



**US-China Business Council Comments
on the
Administrative Measures for Bank Card Clearing Institutions
(Revised Draft for Comments)**

January 28, 2020

On behalf of the more than 200 members of the US-China Business Council (USCBC), we appreciate the opportunity to engage with the People's Bank of China (PBOC) and China Banking and Insurance Regulatory Commission (CBIRC) with regards to the draft revision of the Administrative Measures for Bank Card Clearing Institutions ("draft measures"). USCBC member companies are important stakeholders in China's financial services and technology industries, and have a strong interest in supporting the continued advancement of China's financial reform and opening. We believe that further liberalization of China's financial services industry to foreign competition would advance economic reforms, contribute to upgrading China's financial markets, and reduce systemic risk.

While China has made steady efforts in the past year in opening its financial technology sector to foreign companies, the draft measures include provisions—some new and others retained from existing measures—that could negatively impact market access and business continuity for foreign electronic payment service (EPS) suppliers.

We also encourage China to incorporate the commitments it made under the WTO decision on EPS suppliers from 2012 into the final measures and would be pleased to work together constructively with PBOC and CBIRC to advance our shared objective of improving China's financial technology ecosystem for the benefit of Chinese consumers, Chinese businesses, as well as the foreign business community in China.

Please find our high-level feedback including specific concerns and recommendations below.

- **Industry's previous concerns still remain unaddressed in the draft measures.** USCBC and its member companies are concerned that several areas in the draft measures could create an unlevel playing field for foreign EPS suppliers. For example, the draft still contains vaguely defined requirements for BCCI national security reviews, as well as restrictive provisions on data localization and cybersecurity standards. Additionally, concerns about the mandatory adoption of domestic bank card clearing

institutions' bank identification number (BIN) for dual branded cards were also carried over to these draft measures. These provisions could reduce new and existing market opportunities for foreign EPS suppliers, contribute to an unlevel playing field for foreign and domestic companies, and cause uncertainty for their existing crossborder business.

- **New provisions add to industry's existing concerns and could impose additional burdens on foreign EPS suppliers.** The new changes incorporated into the draft measures could potentially favor national security at the expense of market access for foreign EPS suppliers by codifying a model requiring foreign companies to outsource infrastructure to a third party. Additionally, the proposed increase in penalties for foreign EPS suppliers found to be engaging in RMB bank card clearance without regulatory approval could create unfair burdens to foreign EPS suppliers. It could also fold into PBOC's regulatory remit overseas entities that have typically been outside PBOC's jurisdiction.

Broad application of provisions on national security

- **The adoption of the outsourcing model could restrict market access for foreign EPS (Articles 4, 15).** The draft measures' removal of the clause from Article 4 of the original 2016 measures that "the core business system shall not be outsourced" appears to be aimed at limiting the scope of business activities of foreign EPS suppliers to only non-infrastructure activities while reserving the core functions for domestic EPS. Article 15 further stipulates the requirements that domestic players to whom core functions have been outsourced must meet. While USCBC understands that these changes have grown out of China's national security concerns, we hope that national security concerns can be mitigated to ensure that they do not limit market access to foreign EPS.
- **Scope of requirements for the national security review are unclear (Articles 4, 12).** While the draft measures make slightly adjust the language regarding national security review to ensure compliance with *Foreign Investment Law* provisions (Article 35), they essentially retain the same requirements on the national security review for bank card clearing applicants. According to Articles 4 and 12 of the draft measures, applicants must "abide by the relevant laws and regulations on national security," and the "relevant state regulations" will apply where a national security review is required. Given the draft measures' open-ended provisions on national security review, USCBC is concerned that they could be effectively used to keep foreign suppliers out of the China market and to delay or deny approval of a licensing application. To this end, we hope that the final measures will clarify the circumstances under which such security reviews will be required as well as the regulatory entities responsible for conducting such reviews and the basis on which the reviews will be conducted.

Disproportionate punishments

- **New penalties for overseas institutions fall outside the scope of PBOC's jurisdiction (Article 39).** The draft measures stipulate new and higher punishments for overseas institutions and domestic financial, clearing, and non-bank payment institutions who assist overseas institutions in engaging (including in disguise) in RMB bank card

clearing business. These new penalties could pose an unnecessary and unfair burden on overseas institutions to whom these legal liabilities have not previously applied.

Data localization requirements that could limit market access opportunities

- **Requirements that would trigger onshore processing of cross-border transactions (Article 3).** The draft measures maintain the requirement that an overseas institution only engaged in cross-border transactions establish a legal presence in Mainland China and obtain a BCCI license should it have a “significant influence on the sound operation of the domestic bank card clearing system or the payment confidence of the public.” This provision could be interpreted in two different ways. One interpretation is that an overseas institution would only need to establish a legal presence onshore but be allowed to keep its processing of cross-border transactions offshore. However, if that is not the actual intent, Article 3 could alternatively be interpreted as requiring overseas institutions who are seeking to obtain BCCI licenses to move all the processing operations of their cross-border transactions onshore. This would pose an undue burden on overseas institutions. To reduce uncertainty, USCBC recommends that the final measures explicitly specify the thresholds for such requirements and clarify whether these requirements would entail transfer of processing of cross-border transactions onshore.
- **Requirements for foreign EPS processing both domestic and cross-border transactions (Article 20, Item 11).** It appears under Article 20, Item 11, that a foreign EPS supplier applying for a license to process RMB-denominated transactions onshore would need to migrate its existing processing operations of cross-border transactions in foreign currencies onshore. Such a requirement, if implemented, would pose an unnecessary burden on the existing cross-border processing that the foreign EPS supplier hopes to continue to provide while applying to process RMB-denominated transactions. USCBC suggests removal of this clause.

Burdensome cybersecurity requirements

- **Cybersecurity provisions appear to be aimed at encouraging adoption of domestic technology (Article 4).** To ensure compliance with China’s laws and regulations on national cybersecurity, Article 4 states that applicants must meet requirements on graded protection of national information security, use only encryption devices approved by the state, and comply with the relevant industry financial standards. This provision may prohibit the use of imported encryption devices and only allow the use of devices sanctioned by the State Encryption Management Bureau. Furthermore, the requirement on compliance with the relevant industry financial standards might lead foreign EPS suppliers to adopt standards that are inconsistent and incompatible with best practices on global standards, such as the China Financial Integrated Circuit Card Specifications released by PBOC in 2018. USCBC recommends that the final measures fully align with international standards and allow flexibility in sourcing best-in-class technology even if it is imported from outside China.

Potentially harmful requirements on use of domestic BINs

- **Only allowing the use of domestic BINs may inhibit foreign EPS suppliers from issuing dual-branded cards and processing overseas transactions (Article 26).**

The requirement under Article 26 of the draft measures that the issuer bank identification number (BIN) of the domestic bank card clearing institution must be used in any cooperation between an overseas institution and domestic bank card clearing institution in issuance of bank cards appears to apply to dual-branded bank cards. Typically, for the use of dual-branded cards overseas, the BIN of the foreign EPS is adopted, and the terms and rules for how such cards are used are set by the foreign EPS provider. Mandating the use of the domestic bank card clearing institution's BIN would give the priority—on setting the rules and terms of the overseas transactions for which the card is used—to the domestic player. Implementation of this provision would reduce the role of foreign EPS in overseas transactions as well as the commercial value of dual-branded cards for foreign EPS. It would also benefit domestic bank card clearing institutions at the expense of foreign EPS providers by promoting the international acceptance of domestic cards and helping to phase out dual-branded cards.

Suspension of BCCI license based on financially burdensome and vague standards

- **The draft measures have introduced a new provision that gives PBOC the authority to suspend a BCCI's business if (1) such BCCI has an accumulated loss of more than 50 percent of its registered capital; or (2) there exists any circumstance that has "relatively significant impact" on the "stable operation of payment clearance market" (Article 33).** Item (1) of this provision would place significant financial burdens on a BCCI and its shareholders, forcing them to increase the BCCI's registered capital when its cumulative loss is close to or over 50 percent of its registered capital, even when it still has at least 50 percent of such capital (at least RMB 500 million, given the minimum registered capital requirement of RMB1 billion under Article 13) for its continued business operation. This could have a prohibitive effect for BCCIs to make necessary business, human resource and technology investments in China. It also contradicts the general principle in China's *Company Law* that shareholders of a company are liable to the company only within the scope of their registered capital contribution. We suggest either deleting this item (1) or, at a minimum, clarify in this provision that the "registered capital" used therein includes authorized but unpaid registered capital. Further, we suggest removing item (2) of Article 33, because the terms used are extremely vague and would create unnecessary confusion and uncertainty for BCCIs in their respective business operations.

Additional procedure could make the approval processes inefficient and burdensome

- **The draft measures have introduced a new provision requiring an applicant to withdraw its application and resubmit the full application package, if it intends to make any change to such application (Article 24).** In practice, after an application is submitted, the applicant would only change its application materials at the request of PBOC and/or CBIRC in their respective review and commenting process. If a change is made after official acceptance of the application, the newly created procedure under Article 24 would void such acceptance, causing unnecessary inefficiency in the licensing

process. We suggest making such withdrawal-resubmission procedure only applicable to applications that have not yet been accepted by PBOC. After PBOC's official acceptance, an applicant should be able to amend and supplement such application instead of having to withdraw it, unless it wishes to abandon the application.