



Company and M&A

1. China Publishes Administrative Provisions on the Registration of the Registered Capital of Companies
工商总局发布《公司注册资本登记管理规定》(20/02/2014)

On February 20, 2014, the State Administration for Industry and Commerce published the *Administrative Provisions on the Registration of the Registered Capital of Companies* (the **Provisions**), which became effective March 1, 2014. The Provisions are promulgated in the context of the recent changes to the PRC Company Law in respect to registered capital of companies. The main changes introduced by the Provisions are summarized below.

Minimum Requirements on Registered Capital Abolished

Article 9 of the Provisions provides that the registered capital of a company shall be stipulated in the articles of association, and the minimum requirements on the registered capital of the limited liability company, single-person limited liability company and joint stock limited company—RMB 30,000, RMB 100,000, and RMB 5,000,000, respectively—were eliminated.

Switch from Paid-Up Capital Regime to Subscribed Capital Regime

Article 2 of the Provisions provides that:

- > the registered capital of a limited liability company is the amount of capital contributions *subscribed* to by all the shareholders who have been lawfully registered in a company registration organ;
- > the registered capital of a joint stock limited company established by way of promotion is the total equity *subscribed* to by all the promoters who have been lawfully registered in a company registration organ.

Thus, a company's registered capital will be based on the capital amount subscribed by its shareholders rather than the amount actually paid.

In addition, a company is no longer required to register the amount of paid-up capital with the company registration authority, or subject to a mandatory timetable for capital contribution. The capital contribution schedule is now determined by the shareholders as documented in the articles of association. Moreover, capital verification on the paid-in capital is no longer required.

Equities as a Form of Capital Contribution Permitted

Article 6 of the Provisions specifies that a shareholder or promoter may make a contribution using its equity in another PRC company, so long as such equity has clear title, entails full powers and functions, and are transferrable according to the law.

Conclusion

The Provisions reduce the cost of establishing companies considerably and grant more discretion to the shareholders to decide the amount, timing and form of capital contributions.

- *The Administrative Provisions on the Registration of the Registered Capital of Companies*
- 《公司注册资本登记管理规定》
- Issuing authority: the State Administration for Industry and Commerce
- Date of issuance: February 20, 2014 / Effective date: March 1, 2014

2. China Moving Towards a More Business-Friendly Environment for (Domestic) Mergers, Acquisitions and Reorganizations 国务院出台意见要求进一步优化企业兼并重组市场环境 (07/03/2014)

On March 7, 2014, China's State Council released the *Opinions on Further Optimizing the Market Environment for Mergers, Acquisitions and Reorganizations* (the **Opinions**), which call for the optimization of the policy and market environment for mergers, acquisitions and reorganizations by PRC companies (with a primary focus on mergers, acquisitions and reorganizations by PRC listed companies).

Key Policy Changes

Below are a few directions and key policy changes called for by the Opinions:

- > Acceleration of the Reform of Approval Systems. The Opinions call for a reform of China's approval system for mergers and acquisitions (**M&A**) to narrow the scope of approval items, to simplify approval procedures and to delegate certain approval powers to lower-level regulators.
- > Easing of Restrictions on Private Capital Market Entry. The Opinions call for the reduction of restrictions on market entry by allowing entry of private capital to industries other than those expressly prohibited, opening up the areas of competitive businesses of monopolized industries and supporting participation of private capital in state-owned enterprises through share transfer, capital increase or joint venture.
- > Encouragement for Use of Diverse M&A Transaction Structures. The Opinions encourage the use of various transaction structures to raise capital by qualified enterprises, including the issuance of shares, corporate bonds, debt financial instruments of non-financial enterprises and convertible bonds. The

Opinions also note that qualified enterprise may issue preferred shares or convertible bonds to serve as the consideration for M&A or restructuring activities.

- > Relaxation of Regulation on M&A by Chinese Listed Companies. The Opinions call for the abolishment of (i) the minimum quantity of shares required to be issued by the listed company in connection with mergers; and (ii) the performance commitment requirement in connection with the acquisition by the listed company of a non-affiliated company.
- > Strengthening Policy Support in Multiple Areas. The Opinions also call for the strengthening of support for M&A activities from fiscal, tax, land use and personnel relocation perspectives. One example is the increase in funding to guide the transformation and upgrade of enterprises through M&A and restructurings activities.

- **Conclusion**

The Opinions will impact M&A and restructuring activities and relevant approval regimes. It is important to note, however, that the Opinions include mostly broad policy principles with specific instructions in certain limited aspects. Further guidance and detailed implementing rules still remain to be drafted and issued by the relevant ministries and commissions under the State Council, such as Ministry of Commerce, National Development and Reform Commission and China Securities Regulatory Commission.

- *Opinions of the State Council on Further Optimizing the Market Environment for the Merger and Restructuring of Enterprises*
- 《国务院关于进一步优化企业兼并重组市场环境的意见》
- *Issuing authority: the State Council*
- *Date of issuance: March 7, 2014 / Effective Date: March 7, 2014*

Foreign Direct Investment

3. Ministry of Commerce Improves Foreign Investment Review Administration 商务部改进外资审核管理工作 (17/06/2014)

On June 17, 2014, the Ministry of Commerce released the *Circular of the Ministry of Commerce on Improving Foreign Investment Review Administration* (the **Circular**) that simplifies foreign investment review and relaxes certain restrictions on foreign investment.

Key elements of the Circular include:

- > The cancellation of the limitations or requirements on the (i) amount of first capital contribution, (ii) amount of monetary capital contribution, and (iii) capital contribution timetable for foreign-invested companies (including Taiwan, Hong Kong and Macau invested companies). Instead, the investors may independently agree upon these terms and specify them in the joint venture (cooperation) contract and the articles of associations.
- > The cancellation of the minimum registered capital requirement (other than for certain special industries).
- > The requirement for foreign-invested companies to issue capital contribution certificates to investors in accordance with the Company Law, Implementing Regulations on Sino-foreign Equity Joint Ventures, and the Implementing Rules of the Law of People's Republic of China on Sino-foreign Cooperative Joint Ventures.

- *Circular of the Ministry of Commerce on Improving Foreign Investment Review Administration*

- 《商务部关于改进外资审核管理工作的通知》

- *Issuing Authority: the Ministry of Commerce*

- *Date of Issuance: June 17, 2014/ Effective Date: June 17, 2014*

4. NDRC Promulgates Administrative Measures for Approval and Record-Filing of Foreign Investment Projects 发改委发布《外商投资项目核准和备案管理办法》 (17/05/2014)

On May 17, 2014, the National Development and Reform Commission (**NDRC**) promulgated the *Administrative Measures for Approval and Record-Filing of Foreign Investment Projects* (the **Measures**), which became effective June 17, 2014. The Measures replaced the *Interim Administrative Measures for Examination and Approval of Foreign Investment Projects* (Order of the National Development and Reform Commission No. 22) promulgated October 9, 2004 (the **Interim Measures**).

The foreign investment projects covered by the Measures include Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures, wholly foreign-owned enterprises, foreign-invested partnerships, foreign mergers and acquisitions of domestic enterprises, capital increases and reinvestments of foreign-invested enterprises.

Compared with the Interim Measures, the key change in the Measures is that while all foreign investment projects are subject to approval under the Interim Measures, going forward only certain

foreign investment projects will be subject to approval requirements. All other foreign investment projects will only be subject to a filing requirement.

- *Administrative Measures for Approval and Record-filing of Foreign Investment Projects*
- 《外商投资项目核准和备案管理办法》
- *Issuing Authority: the National Development and Reform Commission*
- *Date of Issuance: May 17, 2014/ Effective Date: June 17, 2014*

Outbound Investment

5. Ministry of Commerce Solicits Public Comments on the Modifications of the Administrative Measures for Outbound Investment (Revised) (Draft for Comments)

商务部就修订《境外投资管理办法》公开征求意见 (16/04/2014)

On April 16, 2014, the Ministry of Commerce (**MOC**) published an announcement to solicit public comments on its proposed modifications of the *Administrative Measures for Outbound Investment (Revised) (Draft for Comments)* (the **Draft Measures**). The Draft Measures propose to introduce several changes to the approval process of the commerce authorities applicable to outbound investments by Chinese enterprises:

- > Significant Reduction of Investments Subject to Approval. The Draft Measures propose that the only category of outbound investment that should be subject to MOC approval is those investments that involve sensitive countries (or regions) or sensitive industries. For all other types of outbound investments, only the filing with the MOC or the provincial commercial authorities is required.

Sensitive countries (or regions) include countries that do not have diplomatic relations with China; countries sanctioned by the United Nations; and countries or regions at war.

Sensitive industries include industries involving products and technologies of which the export is restricted by China; and industries implicating the interests of multiple countries (regions).

- > Significant Acceleration of Filing Timeline. For those outbound investments that only a filing is required, the Draft Measures propose for the MOC and provincial commerce authorities to follow a fast-track procedure, under which the filing certificate will be issued within three working days after the filing form is properly submitted.
- > New Provisions on Social Responsibility. The Draft Measures propose two new provisions relating to social responsibility. The first provides that an enterprise should urge its offshore enterprise to be environmentally responsible in the host country (or region). The second provides that an enterprise should urge its offshore enterprise to respect local customs and culture.

Conclusion

The proposed changes will facilitate outbound investment projects by eliminating approval requirements in most instances and improving the efficiency of the filing procedures.

- *Announcement of the Ministry of Commerce on Seeking Public Comments on the Administrative Measures for Outbound Investment (Revised) (Draft for Comments)*

- 商务部关于《境外投资管理办法（修订）（征求意见稿）》公开征求意见的通知

- *Issuing Authority: the Ministry of Commerce*

- *Date of Issuance: April 6, 2014 / Effective Date: Not Applicable*

6. NDRC Promulgates New Administrative Measures for Approval and Filing of Outbound Investment Projects

发改委出台《境外投资项目核准和备案管理办法》(08/04/2014)

On April 8, 2014, NDRC promulgated the *Administrative Measures for Approval and Filing of Outbound Investment Projects (Order 9)*. Order 9 replaced the *Tentative Measures for the Administration of Examination and Approval of Outbound Investment Projects (Order 21)* with significant changes. Order 9, which became effective May 8, 2014, significantly simplifies the approval process administered by NDRC and their competent local counterparts (the **NDRC Authorities**) for outbound investments by Chinese enterprises.

Filing Becomes the Primary Requirement

The most significant change introduced by Order 9 is the establishment of a filing (as opposed to approval) regime as the primary regulatory process. Under the replaced Order 21, almost all outbound investment projects must be approved by the NDRC Authorities.

Under Order 9, only two types of outbound projects are subject to approval requirements:

- > Projects in which the total investment amount exceeds \$1 billion; and
- > Projects involving sensitive countries and regions or sensitive industries (collectively, **Sensitive Projects**). “Sensitive countries and regions” include those countries and regions that do not have diplomatic relations with China.

All other types of outbound investments are subject to a filing requirement only.

Given the high threshold amount (of \$1 billion) for projects requiring approval—in the first half of 2013, only CNOOC’s acquisition of Nexen exceeded such amount—most Chinese outbound investments will only need to go through the filing process unless the projects constitute Sensitive Projects.

Clear Approval Timeline

Order 9 clearly sets forth the time limits for the approval procedures. For projects subject to approval, (i) applications from local enterprises (as opposed to centrally-administered stated-owned enterprises) should be sent directly to the NDRC’s provincial counterpart, who should then submit the applications to NDRC together with its review opinions; and (ii) applications from centrally-administered stated-owned enterprises should be sent by its group company or holding company directly to NDRC. If any supplementary documents are required, NDRC must notify the applicant within five working days.

Where an external assessment is needed for a project, Order 9 requires the NDRC Authority to engage a qualified external consultation firm within five working days after the acceptance of an application. While Order 9 does not provide any deadline for the completion of the external assessment, it notes that in principle the assessment should be completed within 40 working days.

NDRC is directed to make its decisions on an application for approval within 20 working days, with a possible extension of review time of no more than 10 working days. Order 9 does not provide any time limit for decisions by NDRC’s provincial counterparts, and we expect that such time limit will be clarified in the implementing regulations to be issued by such agencies.

Simple Filing Process

The filing process prescribed under Order 9 is simple and straightforward: projects undertaken by centrally-administered state-owned enterprises or exceeding \$300 million are filed with NDRC in Beijing; all other projects are only required to be filed with NDRC's provincial counterparts. Like the timeline for the approval process, NDRC must notify the applicant within five working days if any supplementary documents are required for the filing. If the outbound investments meet the filing requirements, NDRC is required to issue the filing notice within seven working days after acceptance of the filing application. Order 9 does not provide any time limit for filings by NDRC's provincial counterparts.

Change in Scope of Applicability

Order 9 is applicable to outbound investment projects by all forms of legal persons established in China, including any investment by way of incorporation, merger and acquisition, equity participation, capital increase or capital injection. It also regulates investments in offshore equity investment funds by way of equity participation or new establishment.

Regarding outbound investments by natural persons or other investment entities, Order 9 notes that separate regulations (to be drafted) will apply.

Certain Relaxation on Re-investment by Chinese Offshore Investors

Contrary to popular perceptions, all offshore investments by the offshore entities controlled by Chinese enterprises (**re-investment**) were subject to the Order 21 approval regime.

In comparison, Order 9 limits the approval or filing process only to re-investments involving financing or guarantee support from the Chinese enterprises. Practically, as onshore parent financing or guarantees are common in re-investments, we expect this relaxation in Order 9 approval regime to have limited impact.

Slight Change to the Project Information Reporting Regime

For outbound investments over \$100 million through acquisitions or competitive bidding, Order 21 required Chinese bidders to submit a project information report to NDRC for NDRC's approval (in the form of a confirmation letter) before substantive work on such projects can be commenced. Substantive work means: (i) in the context of acquisitions, the signing of definitive transaction documents, the making of a binding offer on the price, or the application to the host country (or region) for approval for the transaction; and (ii) in the context of competitive bidding, the submission of formal bid.

NDRC is required to issue the confirmation letter within seven working days after acceptance of the project information report, if the project is in compliance with the PRC outbound investment policy.

Order 9 substantially maintains such regime. The only significant change is that the threshold amount triggering the review has been increased to \$300 million.

Payment of Preliminary Transaction Costs

If Chinese investors need to make payments in foreign exchange during the preliminary phase of their outbound transactions—such as payments for performance bond and letter of guarantee—under the Order 21 regime, they may apply to NDRC for a separate approval, but the amount of such preliminary-phase payments that may be approved is capped at 15 percent of the total investment amount. Order 9 has removed the 15 percent cap.

In practice, the impact of this change is yet to be seen. In the past, the local SAFE branches generally take the conservative approach of shying away from permitting the foreign exchange of the total amount approved by NDRC. It is unclear whether SAFE would modify its practice given the relaxation of the approval regime under Order 9.

Conclusion

Under Order 9, filings now become the primary regulatory process for Chinese outbound investments, and regulatory procedures have been significantly simplified. These changes will facilitate outbound investments by reducing the uncertainty to the transactions brought by the regulatory approval process. However, the “project information reporting” regime remains for projects exceeding \$300 million. Moreover, re-investments by offshore entities are still not completely exempted from the NDRC regulatory process.

While the NDRC regulatory procedures have been simplified, arguably the NDRC Authorities still have discretions when it comes to the issuance of approvals and filing notices, and accordingly it remains important for Chinese enterprises to include the NDRC approval or grant of filing notice, as applicable, as a closing condition for their outbound investments.

- *The Administrative Measures for Approval and Filing on Overseas Investment Projects*
- 《境外投资项目核准和备案管理办法》
- *Issuing Authority: the National Development and Reform Commission*
- *Date of Issuance: April 8, 2014 / Effective Date: May 8, 2014*

Merger Control

7. Ministry of Commerce Promulgates Tentative Provisions on Standards Applicable to Simple Cases of Concentration of Business Operators
商务部公布关于经营者集中简易案件的适用标准 (11/02/2014)

On February 11, 2014, the Ministry of Commerce (**MOC**) promulgated the *Tentative Provisions on Standards Applicable to Simple Cases of Concentration of Business Operators* (the **Tentative Provisions**), which became effective February 12, 2014.

Under the PRC Anti-Monopoly Law, the concentration of business operators that meets certain standards shall be subject to a filing and review procedure with the Anti-monopoly Bureau of MOC (the **Bureau**). Under the common review procedure, the Bureau shall conduct Phase I review of the filing within 30 days upon submission of application and will inform the business operator in writing as regards to whether the concentration is subject to further review; and, in the event that the Bureau decides to conduct further review (the **Phase II review**), such review should be completed within 90 days of such decision except that under special circumstances, the Phase II review could be extended to up to another 60 days tolling from delivery of a notice to the business operators. Therefore, under the common filing procedure, the maximum time frame from submitting the filing documents to receiving the decision from the Bureau can be as long as 180 days.

Compared to the common review procedure, the summary review procedure, as applicable to a simple case as clarified under the Tentative Provisions will shorten the time of the review to as short as 30 days or less, and accordingly lower the filing burden for business operators participating in a certain concentration.

Standards for Simple Cases

The Tentative Provisions provide that the following concentration cases qualify as simple cases (subject to the exceptions described in the next section):

- > Horizontal concentration cases in which the aggregate market share of all the business operators participating in the concentration is less than 15 percent;
- > Vertical concentration cases in which the market share of each business operators accounts for less than 25 percent in its respective upstream or downstream market;
- > Cases in which the business operators participating in the concentration do not operate in the same relevant market nor have any vertical relationship, and each operator holds less than 25 percent in its market relevant to the transaction;
- > Cases in which business operators participating in the concentration establish a joint venture outside of China, and the joint venture does not engage in any economic activities within China;
- > Cases in which the business operators participating in the concentration acquire the equities or assets of overseas enterprises, and the overseas enterprises do not engage in any economic activities in China; and
- > Cases in which the joint venture jointly controlled by more than two business operators is controlled through concentration by one or more of such business operators.

Exceptions

Under the Tentative Provisions, even if the above standards for simple cases are met, under certain circumstances, the concentration will not be treated as a simple case. The special circumstances include (but not limited to) (i) the difficulty in defining the relevant market for the concentration, and (ii) the potential adverse effect on market access, consumers, other operators, or the national economic development.

In addition, MOC has the discretion to revoke its decision to treat a concentration as a simple case if evidence indicates untruthful filing materials, the effect of eliminating or restricting competition, or material change in the concentration or the competition in the relevant market.

- *Tentative Provisions on Standards Applicable to Simple Cases of Concentration of Business Operators*
- 《关于经营者集中简易案件适用标准的暂行规定》
- *Issuing Authority: the Ministry of Commerce*
- *Date of Issuance: February 11, 2014 / Effective Date: February 12, 2014*

8. Ministry of Commerce Promulgates Guiding Opinions on the Declaration for Concentration of Operators Subject to Summary Procedure (for Trial Implementation) 商务部公布关于经营者集中简易案件申报的指导意见（试行）(18/04/2014)

On April 18, 2014, the Ministry of Commerce (**MOC**) promulgated the *Guiding Opinions on the Declaration for Concentration of Operators Subject to Summary Procedure (for Trial Implementation)* (the **Guiding Opinions**), which took effect on the same day.

The Guiding Opinions set forth various points for reference by business operators participating in a proposed concentration that intend to declare to the Anti-Monopoly Bureau of MOC (the **Bureau**) that the concentration qualifies as a simple case and accordingly may be reviewed pursuant to a summary procedure. The key points are summarized below:

- > **Optional Pre-Declaration Discussion.** At its discretion, an operator may apply to the Bureau for a discussion on whether the transaction to be declared meets the standards of simple cases prior to a formal declaration. The application for discussion is required to be made in written form and submitted by fax, postal or personal service.
- > **Public Notice Period.** After an operator submits its application to the Bureau to declare its proposed concentration as a simple case, and the application is officially placed on file, the Bureau is required to disclose the applicant's Disclosure Form on the Bureau's website (<http://fldj.mofcom.gov.cn>) for a period of 10 days (the **Public Notice Period**); and
- > **Public Comments.** During the Public Notice Period, any third party may submit written comments to the Bureau on whether the transaction should qualify to be reviewed under the summary procedure.

- *Guiding Opinions on the Declaration for Concentration of Operators Subject to Summary Procedure (for Trial Implementation)*
- 《关于经营者集中简易案件申报的指导意见（试行）》
- *Issuing Authority: the Ministry of Commerce*
- *Date of Issuance: April 18, 2014 / Effective Date: April 18, 2014*

9. Ministry of Commerce Revises the Guiding Opinions on the Declaration of Concentration by Business Operators

商务部修订《关于经营者集中申报的指导意见》(06/06/2014)

On June 6, 2014, the Ministry of Commerce published a revised version of the Guiding Opinions on the Declaration of Concentration by Business Operators (the 2014 Guiding Opinions), which took effect on the same day. The 2014 Guiding Opinions made certain significant changes to the 2009 version, adding greater clarity to the merger-control filing requirements. Such changes are summarized below:

- > **Control.** Under the PRC Anti-Monopoly Law, the procurement of direct or indirect control by an operator (the **acquiring operator**) over another operator (the **target operator**) is a form of business concentration. The 2014 Guiding Opinions clarify that control includes sole control and joint control. Further, the determination of whether there is control is a case-by-case determination requiring consideration of various factors including (but not limited to):
 - The purpose of the transactions and future plan;
 - The capital structure of the target operator prior to and subsequent to the transactions and changes thereto;
 - The shareholder voting mechanisms of the target operator;
 - The composition and the voting mechanism of the board of directors of the target operator;
 - The appointment and dismissal of the senior executives of the target operator;
 - Any voting agreements or arrangements among the shareholders or directors of the target operator; in the relationship between the shareholders and directors of another business operator; and
 - Whether the acquiring operator and the target operator have any significant business dealings or alliance arrangements.
- > **Joint Control.** A business concentration is deemed to have occurred when two business operators establish and have joint control over a joint venture. If only one business operator has control over the new joint venture, no concentration is deemed to have occurred.
- > **Series of Transactions Deemed to be a Single Transaction.** If the same business operators enter into several separate concentration transactions, none of which individually satisfies the conditions requiring the operators to make a merger-control filing, and the transactions occur within two years of each other, the transactions would be deemed to be one single concentration transaction for the purposes of determining whether a merger-control filing is required.

- *Guiding Opinions on the Declaration of Concentration by Business Operators (Revised in 2014)*

- 《关于经营者集中申报的指导意见(2014年修订)》

- *Issuing Authority: the Ministry of Commerce*

- *Date of Issuance: June 6, 2014 / Effective Date: June 6, 2014*

Foreign Exchange

10. SAFE Circular Relating to Foreign Exchange Administration of Offshore Investment, Financing and Return Investment by Domestic Residents Utilizing Special Purpose Vehicles (Hui Fa [2014] No. 37) 国家外汇管理局关于境内居民通过特殊目的公司境外投融资及返程投资外汇管理有关问题的通知（汇发[2014]37号文） (04/07/2014)

On July 4, 2014, the State Administration of Foreign Exchange (**SAFE**) promulgated the *Circular Relating to Foreign Exchange Administration of Offshore Investment, Financing and Return Investment by Domestic Residents Utilizing Special Purpose Vehicles (Circular 37)*, which became effective July 14, 2014.

Replacing an earlier circular published by SAFE in 2005 (**Circular 75**), Circular 37 further simplifies the registration process for Chinese residents seeking the round-trip investment transactions where Chinese companies (**Domestic Entities**) are re-organized to create an offshore holding company (the **SPV**) that will control the Domestic Entities and seek offshore financing. Also, for the first time overseas investments by Chinese individuals are formally legalized under Circular 37.

Circular 37 features the following significant changes from Circular 75:

- > **Contribution of Offshore Assets.** Contrary to Circular 75 under which Chinese residents were only permitted to use their domestic assets to establish the SPV, Circular 37 allows Chinese investors to contribute their legally-held offshore assets into the SPV.
- > **Initial Registration.** Under Circular 75, Chinese residents must register the SPV with SAFE before the SPV undertakes any substantial capital change (e.g. equity financing, equity transfer or round-trip investment). However, under Circular 37, SAFE registration is only required prior to the Chinese residents' contribution of assets into the SPV—implying that the SPV are permitted to solicit offshore financing prior to the SAFE registration.
- > **Scope of Amendment Registration.** Circular 37 narrows the scope of events that requires an amendment SAFE registration. Under Circular 37, in the event of a change to any basic information of the SPV (e.g. identity or name of the Chinese investor and the term of operation) or a change in the Chinese investor's shareholding in the SPV, an amendment SAFE registration is required. The requirements under Circular 75 for an amendment SAFE registration for any equity financing, establishment of subsidiaries and material change in the capital structure by the SPV have been eliminated.
- > **Employee Stock Options Plan.** Under Circular 37, the employees of the Domestic Entities are now permitted to file with SAFE any stock or option incentives received from the SPV. Prior to Circular 37, Chinese employees were not able to pay for stocks of the SPV unless the SPV was already listed on an offshore stock exchange.

- > **Makeup Registration.** Circular 37 clarifies that if the Chinese residents have contributed into the SPV without registration, they are required to file for a makeup registration with SAFE. Notably, Circular 37 removes the language in Circular 75 requiring the Chinese residents to submit evidence that there was no violation of SAFE regulations and a special audit report listing capital flows between the SPV and the Domestic Entities for such makeup registration. These stringent requirements have been cited to discourage makeup registrations.

- *Circular on Several Issues Regarding the Foreign Exchange Administration over Overseas Investment and Financing and Round Trip Investment by Chinese Residents through Special Purchase Vehicles*

- *国家外汇管理局关于境内居民通过特殊目的公司境外投融资及返程投资外汇管理有关问题的通知*

- *Issuing Authority: State Administration of Foreign Exchange*

- *Date of Issuance: July 4, 2014 / Effective Date: July 14, 2014*

11. Circular Regarding the Provisions on the Foreign Exchange Administration for Cross-Border Guarantee

国家外汇管理局关于发布《跨境担保外汇管理规定》的通知 (12/05/2014)

On May 12, 2014, the State Administration of Foreign Exchange (**SAFE**) released the Provisions on the *Foreign Exchange Administration for Cross-Border Guarantee (Hui Fa [2014] No. 29)* (the “**Provisions**”), which became effective June 1, 2014. The Provisions replace 12 existing SAFE rules that regulate cross-border guarantees.

The Provisions streamline SAFE’s administration of cross-border guarantees by eliminating the registration procedure completely or narrowing the scope of registration for certain types of cross-border guarantees. More specifically, the Provisions include the following changes:

The Provisions define the cross-border guarantees to include three types: (i) where a Chinese guarantor provides guarantee to an offshore creditor for the benefit of an offshore debtor (Domestic Guarantee of Foreign Loans, or **DGFL**), (ii) where an offshore guarantor provides guarantee to a Chinese creditor for the benefit of a Chinese debtor (Foreign Guarantee of Domestic Loans, or **FGDL**), and (iii) any other types of cross-border guarantees (e.g., a Chinese entity providing guarantee to an offshore creditor for its own offshore debt).

- > With respect to DGFL, the Provisions repeal the quota management for financing DGFL and expressly permit PRC individuals to act as the guarantor.
- > With respect to FGDL, the Provisions repeal the quota management for pure domestic debtor and increase the loan amount limit to 100 percent of the net assets of the debtor.
- > With respect to other types of cross-border guarantees, no registration or filing is required.
- > The Provisions repeal the SAFE approval, registration and filing requirements for cross-border security agreements.
- > The Provisions eliminate the regulatory distinction of finance purpose guarantee and non-finance purpose guarantee.
- > The promulgation of the Provisions represents a significant step by SAFE towards streamlining administration and deregulating government control of capital in the area of cross-border guarantees. The changes in the Provisions will facilitate cross-border trade and bringing increased certainty and

accessibility to the use of cross-border guarantees – which are welcome news to the market participants.

- *Circular Regarding the Provisions on the Foreign Exchange Administration for Cross-border Guarantee*
- *国家外汇管理局关于发布《跨境担保外汇管理规定》的通知*
- *Issuing Authority: State Administration of Foreign Exchange*
- *Date of Issuance: May 12, 2014 / Effective Date: June 1, 2014.*

Intellectual Property

12. China Promulgates New Implementing Regulations of the Trademark Law 中国修订发布《商标法实施条例》(29/04/2014)

On April 29, 2014, the State Council promulgates the revised *Implementing Regulations of the Trademark Law of the People's Republic of China (Revised in 2014)* (the **Regulation**), which became effective May 1, 2014. Compared to the prior version, the Regulation introduces several major changes as summarized below.

Clarification on the Calculation of Trademark Examination or Hearing Period

The *PRC Trademark Law* specifies the limited periods within which the Trademark Office is required to complete the examination of the trademark application and the Trademark Adjudication Board is required to complete the hearing of trademark administrative disputes (the **Trademark Examination or Hearing Period**).

The Regulation specifies several time periods that are excluded from the calculation of the Trademark Examination or Hearing Period, including:

- > the period when the documents and announcement of the Trademark Office or the Trademark Adjudication Board are being delivered;
- > the period when the applicant is preparing any additional evidence or supplementary documents;
- > the time spent on the submission of evidence, negotiation, and draw;
- > the time spent on waiting for a determination of priority; and
- > the time spent on the hearing of prior cases related to the rights of the trademark in the current application if the applicant applies to wait for the result of such hearing.

Same-Day Applications for Similar Trademarks

The Regulation provides that if two parties apply for the same or similar trademarks for the same or similar products on the same day, the applicants are required to (i) submit prior use evidence within 30 days of receipt of a notice from the Trademark Office or (ii) attempt to resolve the matter through negotiation if their use of the marks started on the same day or if there have not been any prior use of the marks.

Partial Acceptance

Previously if a trademark application was rejected, the applicant would either have to abandon the entire application or appeal to the Trademark Adjudication Board. However, the Regulation introduces the principle that an application may be split if the application was rejected with respect to certain products but accepted with respect to others. In such case, the applicant may split the application within 15 days after receipt of the partial acceptance notification from the Trademark Office, and the accepted portion of the application can proceed to the next step in the registration process separately.

International Registration of Trademark

The Regulation contains a chapter on the international registration of trademarks based on the Madrid System. The chapter provides rules regarding (among other things) (i) the applications of international registration with China as the country of origin, and (ii) the applications designating China for territorial extension.

- *Implementing Regulations of the Trademark Law of the People's Republic of China (Revised 2014)*
- 《中华人民共和国商标法实施条例（2014年修订）》
- *Issuing Authority: the State Council*
- *Date of Issuance: April 29, 2014 / Effective Date: May 1, 2014*

13. China Solicits Public Comments on Copyright Law (Draft Revision for Review) 法制办就《著作权法（修订草案送审稿）》征求意见 (06/06/2014)

On June 6, 2014, the Legislative Affairs Office of the State Council circulated the *Copyright Law of the People's Republic of China (Draft Revision for Review)* (the **Draft Revision**) for public comments. Compared to the prior version of the *Copyright Law*, the Draft Revision introduces several major changes as summarized below.

- > Private Agreement on Copyright Ownership. The modifications in the Draft Revision reflect that in certain cases, parties involved may privately agree on the copyright ownership of the work created. For example, copyright ownership in the work created by an employee in the course of his/her employment may be decided by the employer and employee.
- > Collective Administration of Copyright. The current Copyright Law only contains one general article (i.e., Article 8) which provides that (i) copyright owners and owners of related rights may authorize a copyright collective administration organization (the **Administration Organization**) to exercise their copyright or related rights; and (ii) the Administration Organization may, upon authorization, claim the rights for the copyright owner or owners of related rights in its own name, and act as a party in litigations or arbitrations involving the copyright or related rights. The Draft Revision includes a separate chapter to set forth in detail (among other things) the nature, rights and duties of the Administration Organization, as well as the competent authority regulating the activities of the Administration Organization.
- > Calculation of Damages Resulting from Infringement. The current Copyright Law provides that the infringer of a copyright should pay damages based on the actual loss of the right holder. The Draft Revision proposes to introduce the flexibility for the copyright owner to claim damages based on different measures at his/her option. Possible measures include actual losses, the illegal income gained by the infringer, or a specific amount below RMB 1 million.

- *Circular of the Legislative Affairs Office of the State Council on Promulgating the Copyright Law of the People's Republic of China (Draft Revision for Review) for Public Comments*
- 国务院法制办公室关于公布《中华人民共和国著作权法（修订草案送审稿）》公开征求意见的通知
- *Issuing Authority: Legislative Affairs Office of the State Council*
- *Date of Issuance: June 6, 2014 / Effective Date: N/A*

Food and Drugs

14. State Council Revises Regulations on the Supervision and Administration over Medical Devices 国务院修订《医疗器械监督管理条例》(07/03/2014)

On March 7, 2014, State Council promulgated the revised *Regulations on the Supervision and Administration over Medical Devices* (the **Regulations**), which became effective June 1, 2014. Compared to its prior version, the Regulations introduce several major changes as summarized below.

Reclassification of Medical Devices by Risk Levels

The Regulations re-classify the medical devices based on their risk levels to include the following three classes:

- > Class I medical devices, which refer to those devices with low risks whose safety and effectiveness can be ensured through routine administration;
- > Class II medical devices, which refer to those devices with moderate risks whose safety and effectiveness needs to be ensured by strict control and administration; and
- > Class III medical devices, which refer to those devices with relatively high risks whose safety and effectiveness needs to be ensured by taking special measures to exert strict control and administration.

Changes for Registration and Filing Procedures

- > Compared to previous practice that all the medical devices are subject to registration procedures, according to the Regulations, Class I medical devices are subject to filing procedures only, while Class II and Class III medical devices will continue to be subject to registration procedures.
- > The medical device registration certificate is valid for five years, one year longer than the previous standard.

Stricter Supervision System over Medical Devices

- > The Regulations provide that the country shall set up a monitoring system over the medical devices to timely collect, analyze, evaluate and control the adverse events of the medical devices.
- > The manufacturer of medical devices is required to set up a quality management system that is compatible to the standards of medical devices produced, and carry out self-inspection over the quality management system on a regular basis and report the self-inspection results to the competent provincial or local food and drug supervision and administration authority.

Manufacturer's Obligations to Recall Defective Medical Devices

- > If the manufacturer of medical devices finds that the medical devices produced by it do not meet the statutory standards, the products' technical requirements or have other defects (the **Defective Medical Devices**), it is required to (a) immediately stop the production of the Defective Medical Devices, (b) inform the distributors, users and consumers to stop its business and use of the Defective Medical Devices, (c) recall the Defective Medical Devices that have entered into the market, and (d) take remedial measures or destroy the Defective Medical Devices. Such manufacturer is also required

to report the results of its recall and handling efforts to the food and drug supervision and administration authority and the competent health and family planning authority.

- *Regulations on the Supervision and Administration over Medical Devices (Revised in 2014)*
- 《医疗器械监督管理条例（2014年修订）》
- *Issuing Authority: the State Council*
- *Date of Issuance: March 7, 2014 / Effective Date: June 1, 2014*

15. China Solicits Public Comments on Proposed Revisions to Food Safety Law 《中华人民共和国食品安全法（修订草案）》全文公布 (14/05/2014)

On May 14, 2014, the *Food Safety Law of the People's Republic of China (Draft Revision)* (the **Draft Revision**) was published to seek public comments. The Draft Revision proposes to enhance the supervision of food safety issues and includes the following key proposed change:

- > **Prevention-Focused Risk Control System.** The Draft Revision focuses on the use of prevention as a means to control food safety risks. For example, it specifies the various circumstances under which food safety risk assessments should be implemented by the Health Administration Authority of the State Council. The Draft Revision also introduces a system of self-inspection and reporting to the relevant authorities by food manufacturers, including penalties for the failure to make such reporting.
- > **Supervision of Overall Process.** In respect of the overall industry chain of food production, the Draft Revision proposes to provide a comprehensive system of supervision on each step of the production, *i.e.*, food manufacturers shall be responsible to establish and carry out food safety control systems regarding (a) raw material inspection (to ensure the quality and freshness); (b) safety administration of production process (to ensure that the food will not be exposed to harmful substances during the production); (c) equipment management (to ensure the equipment meets the sanitary standards); and (d) management of non-conforming products (to prevent them flowing into the marketplace). Meanwhile, the Draft Revision also provides that the retail enterprises shall establish the sales records system in which the related records and certifications of the sold food shall be kept no less than six months following the expiration date of food.
- > **Increased Supervision on Infant Formula.** Under the Draft Revision, manufacturers of infant formula are required to implement quality control from the point of receipt of raw materials to the delivery of finished products. Infant formula products also required to be inspected lot by lot by the manufacturers before they are sent to the market. Moreover, infant formula food may not be produced by ways of subcontract production, OEM or sub-packaging, and one formula may not be used to produce infant formula under different brands.
- > **Obligations of Third-Party Online Shopping Platforms.** The Draft Revision provides specific rules to regulate the online food transactions and imposes obligations on third-party online shopping platforms to register online food operators in their real names and examine their food production and operation licenses (if any).
- > **Increased Penalty.** The Draft Revision provides increased penalties on illegal manufacturers and operators, inspection agency personnel and related governmental officers. For instance, the penalty on food manufacturers and operators who add chemicals or other harmful substances other than food additives into food products can be as high as 30 times of the total value of all products. Also,

inspection agency personnel who are found to be criminally liable for a violation of food safety laws may be given a life-long prohibition from engaging in employment related to food inspection.

- *The Food Safety Law of People's Republic of China (Draft Revision)*
- 《中华人民共和国食品安全法（修订草案）》
- *Issuing Authority: the State Council*
- *Date of Issuance: May 14, 2014 / Effective Date: N/A*

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