



CHINA LEGAL BRIEFING 98

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1. National

Circular of Supreme People's Court on Freezing and Compulsory Transfer of Securities Transaction Settlement Funds

最高人民法院关于冻结、扣划证券交易结算资金有关问题的通知

【Issued By】 Supreme People's Court

【Subject】 Civil Procedure

【Promulgated on】 November 9th 2004

【Effective From】 November 9th 2004

【Source】 www.court.gov.cn

This Circular, enacted after consultation with China Securities Regulatory Commission ("CSRC"), seeks to maintain the order in the securities market in respect of transactions and clearing. The key points of the Circular may be summarized as follows:

- Distinction shall be between transaction settlement funds for clients and transaction settlement funds for securities companies. When the courts impose freezing and compulsory transfer upon one party of clients and securities companies, the transaction settlement funds for the other party shall not be affected by such measures.
- Distinction shall be made between settlement reserve funds for clients and settlement reserve funds for securities companies, each of which is kept in the accounts maintained by China Securities Clearing and Depository Company ("China Clearing"). Settlement reserve funds for clients shall in no case be subject to freezing and compulsory transfer. As to settlement reserve funds for securities companies, only the balance beyond minimum sum set by the China Clearing in accordance with rules of the CSRC is subject to freezing and compulsory transfer.
- Funds kept in the special fund verification accounts for issuance of new shares are in no event subject to the freezing and compulsory transfer imposed by the courts.
- Distinction shall be made among stages of transactions. Securities and funds that have been settled and delivered are subject to the freezing by the courts. Securities and funds that are still in the process of settlement and delivery, or have been placed with China Clearing for the purpose of implementing settlement and delivery obligations but have not yet been settled, are not subject to freezing and compulsory transfer by the courts.
- When imposing enforcement measures upon negotiable instruments within the accounts of the respondents, the courts shall examine and ensure that such instruments do belong to the respondents.

Circular on Administration of Certain Issues Regarding Internal Operation of Foreign Exchange Funds by Transnational Companies

关于跨国公司外汇资金内部运营管理有关问题的通知

【Issued By】 State Administration of Foreign Exchange

【Subject】 Capital Account

【Promulgated on】 October 18th 2004

【Effective From】 November 1st 2004

【Source】 www.safe.gov.cn

The Circular is enacted in accordance with Regulation of PRC on Administration of Foreign Exchanges ("中华人民共和国外汇管理条例") and other relevant laws and regulations with a view to facilitating and supporting the application and operation of foreign exchanges by transnational companies. It does not, however, apply to transnational financial institutions.

A transnational company for the purpose of this Circular refers to an enterprise group, formed by domestic and overseas member entities, the global or regional (including China) investment management functions of which is exercised by a member entity located in China. The transnational company may either be a Chinese domestic holding enterprise group or be a foreign-invested holding enterprise group.

Internal operation of foreign exchange funds for the purpose of this Circular refers to inter-borrowing of foreign exchange funds between domestic member entities of a transnational company or between domestic member entities and overseas member entities of a transnational company.

Inter-borrowings between member entities of a transnational company may be conducted: (1) by financial companies the establishment of which has been approved by financial regulatory body in accordance with Provisions on Financial Companies of Enterprise Groups ("企业集团财务公司管理办法"); or (2) in the form of sub-loans via banks designated to conduct foreign exchange business in accordance with General Principles on Loans ("贷款通则"); or (3) in the form of direct loans if funds flow from a domestic member entity to an overseas member entity.

The territorial fund operation under which the funds flow from one domestic member entity to another domestic member entity within the group in the form of bank sub-loans, shall not be subject to the approval of the State Administration of Foreign Exchanges and shall be required to open a special foreign exchange loan account.

The extraterritorial fund operation under which the funds flow from a domestic member entity directly to a foreign member entity within the group or in the form of bank sub-loans, shall be subject to the approval of the State Administration of Foreign Exchanges, and shall be required to open a special extraterritorial loan account.

Funds in the form of sub-loans shall not be settled, or used to create pledge for the purpose of obtaining loans in RMB. Moreover, funds obtained through internal operation of foreign exchange funds shall not be used to set off outstanding debts.

Provisional Rules on Administration of Sale and Payment of Foreign Exchanges in the Case of Transferring Personal Assets to Overseas

个人财产对外转移售付汇管理暂行办法

【 Issued By 】 People's Bank of China

【 Subject 】 Foreign Exchange

【 Promulgated on 】 November 8th 2004

【 Effective From 】 December 1st 2004

【 Source 】 www.pbc.gov.cn

This regulation applies to two categories of transfer. The transfer in the first circumstance takes place when a natural person emigrated from the Mainland China to foreign countries, Hong Kong, Macao, or Taiwan ("Emigrant Transfer"). The transfer in the second scenario occurs when a foreign national or a resident of Hong Kong, Macao or Taiwan inherits assets located in the Mainland China ("Inheritance Transfer"). All the other cases fall out of the scope of this regulation.

The assets to be transferred shall be lawfully owned by the transferor free from any challenge for the title there-to made by any third party. The transfer application will be declined by authorities in charge of foreign exchange if: (1) an order restricting the transfer has been issued by legal enforcement departments; (2) the assets to be transferred are related to pending legal proceedings, either criminal or civil; (3) the transferor is an immediate relative to a party to civil or criminal proceedings unless the authority with competent jurisdiction has issued a statement to the effect that the assets in question are not related to such proceedings; (4) the assets to be transferred are prohibited to be transmitted outside China by certain applicable laws; and (5) no evidence of the legal title of the transferred assets can be presented.

Transfer applications shall be made to the authorities in charge of foreign exchange at the last domicile of the emigrant or the inheritee, as the case may be. Applications involving an amount equivalent to more than RMB500, 000 are subject to the approval of State Administration of Foreign Exchanges. All the other cases are dealt with at provincial level.

The Emigrant Transfer shall be made in one application for the whole sum and be transferred in installments. For Emigrant Transfer involving an amount equivalent to or less than RMB200, 000, a one-off transfer can be made. As to Inheritance Transfer, if the assets are inherited from the same inheritee, the transfer application for the whole sum shall be made in one application, it can be transmitted either by one or several installments; if the assets are inherited from different inheritees, the applications shall be made respectively, and transfers shall be also made separately.

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