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**Notice of the State Administration of Foreign Exchange
on Further Improving and Adjusting the Foreign
Exchange Administration Policies on Direct Investments**
国家外汇管理局关于进一步改进和调整直接投资外汇管理政策
的通知

Issued by】 State Administration of Foreign Exchange

【Subject】 FDI

【Promulgated on】 November 19, 2012

【Effective from】 December 17, 2012

【Source】 www.safe.gov.cn

On November 19 2012, the State Administration of Foreign Exchange (“SAFE”) has promulgated Notice on Further Improving and Adjusting the Foreign Exchange Administration Policies on Direct Investments (“the Notice”) to be effective on December 17, 2012. The Notice, purporting to facilitate foreign direct investments in China, provides for administration policy changes in three major aspects, namely (i) the abolishment of numerous approval procedures for direct investment, (ii) the simplification of existing administration procedures and (iii) the relieved restrictions on the free flow of direct investment. These policy shifts are further reflected in the detailed implementing measures as prescribed in the Notice as follows:

- I. For foreign direct investments, the open up of and payment to a foreign exchange account is no longer subject to approval by SAFE.

This means that firstly, opening of accounts including initial cost account, foreign exchange capital account, asset liquidation account and security deposit account are not subject to approval by SAFE anymore. Instead the respective banks shall open the above mentioned accounts according to the relevant information of the applicants registered with SAFE. Secondly, payments to accounts including asset liquidation account and outbound loan special account are not subject to approval by SAFE. Instead respective bank shall enter such payments according to the relevant information of the account holder registered with SAFE. Thirdly, the restrictions on the opening up of foreign exchange capital account and asset liquidation account in a different location are removed. There are no longer limitations on the number of foreign exchange capital accounts and on the capital inflow into an individual foreign exchange capital account, as long as capital inflow does not exceed the limitation of capital inflow set to each foreign invested enterprise in whole.

- II. For legitimate income of foreign investors in China, the reinvestment of such income is no longer subject to approval by SAFE.

Legitimate income referred to in the previous paragraph include capital surplus, earned surplus, undistributed profits and registered external credits (including interests) held by the foreign invested enterprise, the proportion of which belong to the foreign investor.

Legitimate income shall also include profits obtained in China, income obtained via share transfer, via capital reduction, via liquidation and via advance repayment of investment by the foreign investor.

Reinvestment of the aforesaid does not need to be approved by SAFE; the respective accounting firms shall handle the capital verification and confirmation procedure according to the relevant information of the foreign invested enterprise registered with SAFE.

- III. The foreign exchange administration for foreign funded investment companies is simplified; such simplification are reflected in 5 measures:

1. Foreign exchange registration procedure is no longer required for PRC enterprises invested by foreign funded investment companies. Such registration, however, is still required for enterprises co-invested by foreign funded investment company and foreign investor.
2. Domestic transfer of investment funds by foreign funded investment companies and domestic transfer of foreign exchange profits, dividends or bonuses among foreign funded investment companies do not need to be approved by SAFE. The respective banks shall verify the authenticity of the documents submitted by the company, make the domestic transfer accordingly and register such transfer with SAFE.
3. Domestic investment by foreign funded investment companies does not need to be verified and confirmed by SAFE anymore. Such verification and confirmation, however, is still necessary when the investment is made by foreign funded investment company and foreign investor.
4. Where a domestic enterprise receives foreign exchange investment from foreign funded investment company or other domestic entities, the receiving enterprise shall register the receiving of such domestic foreign exchange investment with SAFE, the respective banks shall open up a domestic reinvestment special account for the receiving enterprise

accordingly, the management of this special account shall be the same as foreign exchange capital account.

5. For foreign funded venture capital investment enterprises, foreign funded equity investment enterprises and other foreign funded investment enterprises whose business is mainly investment, the previous 4 provisions are applicable.
- IV. The capital verification and confirmation procedure for foreign invested enterprise has been simplified. Where the capital verification and confirmation is performed, the respective accounting firms do not need to submit paper formed documents anymore, such submission shall be made electronically via SAFE's online system, to which a response from SAFE will also be made electronically. Moreover, capital verification and confirmation procedure is not required for capital reduction by the foreign investors anymore. The respective accounting firms shall confirm such reduction according to the relating information registered with SAFE.
- V. Where there is an acquisition by foreign investors of shares held by PRC parties, the foreign exchange registration procedure is simplified. Such cash remitted from overseas, under which circumstance, the bank enters the consideration directly into asset liquidation account, after which SAFE shall automatically complete the foreign exchange registration procedure via its online system.

For considerations paid in non-monetary forms, the enterprise being transacted shall still go through the registration procedure at the local offices of SAFE where the enterprise is located.

- VI. For direct investment, purchase and external payment of foreign exchange are no longer subject to approval by SAFE.

The purchase and external payment of foreign exchange referred to in the previous paragraph include foreign exchange paid to foreign investors through capital reduction, liquidation and advance repayment of investment; foreign exchange paid as consideration for shares purchased from domestic institutions or persons to foreign investors; foreign exchange paid by domestic institutions as initial cost for its outbound investment; foreign exchange paid to branches, representative offices of foreign institutions and foreign persons due to transfer of domestic commercial residence; foreign exchange paid through outbound loan special account.

For all the business mentioned above, the bank shall proceed with the purchase and payment procedure according to the information of the applicant registered with SAFE. Restrictions regarding purchase and payment at a different location for the business mentioned above are also removed.

- VII. For direct investment, domestic transfer of foreign exchange is no longer subject to approval of SAFE. All domestic foreign exchange transfer resulted from investment, transactions and operations of foreign invested enterprises shall be handled by respective banks after reviewing the relevant documents submitted by the enterprise. The domestic transfer of foreign exchange amongst the following accounts shall be governed by this provision:
- a. Initial cost foreign exchange account
 - b. Foreign exchange capital account
 - c. Domestic asset liquidation account
 - d. Oversea asset liquidation account
 - e. Security deposit special account for oversea fund
 - f. Security deposit special account for domestic fund
 - g. Domestic reinvestment special account

- VIII. The control on oversea lending is relaxed.

Firstly, the source of overseas loan is widened as now foreign exchange loans obtained domestically by PRC enterprises are permitted to be the source of oversea lending; Further, foreign invested enterprises are permitted to offer loans to their overseas shareholder, as long as such loans do not exceed profits receivable as dividends to the borrowing shareholder.

In the end of the Notice, SAFE has also provided various administrative measures and forms for the banks and local SAFE offices to follow in accordance with the Notice, for the purpose of better implementing such policy changes during this transition period. With a more flexible and efficient administration system for foreign exchanges, we are hoping for an infusion of vitality into the domestic market by foreign direct investment.

Supervision and Management Measures for Non-listed Public Company **非上市公众公司监督管理办法**

- 【Issued by】** China Securities Regulatory Commission
- 【Subject】** Security
- 【Promulgated on】** September 28, 2012
- 【Effective Date】** January 01, 2013
- 【Source】** www.csrc.gov.cn

For a joint stock limited company, PRC Company Law and Securities Law have long been the major regulatory guidance. While Company Law has provided for non-listed

joint stock company with less than 200 shareholders; Securities Law, on the other hand, has provided for listed joint stock companies with over 200 shareholders.

Due to the strict standards regarding market admission, sponsorship system and government review etc. set up by Securities Law, many middle-small sized enterprises, especially newly developed ones in high-tech industries, even though with urgent need to offer their shares to the public, have long found their financing channels restricted due to the difficulty to meet Securities Law standards.

Since 2006, such middle-small sized enterprises have found their way to finance in the newly established Share Transfer Agent System in Zhongguancun Beijing as a pilot project, and have successfully had their shares offered and transferred either to the targeted investors or general public. The result is the booming flow of venture capital and private equity into the market outside of stock exchange. The success of the pilot project then called for some regulatory guidance specifically provided for such off-the-market stock exchange (OTC).

On September 28, 2012, China Securities Regulatory Commission promulgated the Supervision and Management Measures for Non-listed Public Company (“the Measures”). The Measures are targeted to fill in the regulatory gap between Company Law and Securities Law and has provided for the public offering, private placement as well as transfer of shares for non-listed companies mainly in their corporate governance, information disclosure, share transfer and private offering.

Highlights of the Measures are summarized as follows:

I. Corporate Governance

Firstly, the Measures have provided for the general principles for the governance and formation of the Articles of Associations (“AoA”) of the company; in a separate regulatory code promulgated pursuant to the Measures, the mandatory content of the AoA is further provided. Secondly, the Measures stress on the equal protection of the shareholder’s rights, a challenge system for voting is recommended to be established in order to protect the rights of minority shareholders. Thirdly, self-governance is encouraged as it is required that shareholders agree upon dispute resolution mechanism in the AoA.

II. Information Disclosure

Information disclosure has always been the key responsibility of a public company as well as a key for relating government supervision. Thus information disclosure has constituted the most important part of the Measures.

Given the usually smaller size of the non-listed public companies and its targeted investors, information disclosure requirements for these companies are not as broad and complete as those for the listed companies. In comparison, there are two major differences:

- a. In order to lower the disclosure cost for companies, the disclosed information focuses on core competitive edge and risk elements; only semi-annual reports and annual reports are required to be disclosed, quarterly reports are not; all information may be disclosed through

the online platform set up by CSRC, disclosure through press media is not required.

- b. For different types of non-listed public companies, different standards apply to information disclosure. For public offerings and private placement, the company is required to disclose prospectus for the offering or placement, semi-annual report and annual report; for companies, due to share transfer to targeted investors, having over than 200 shareholders, only prospectus and annual report is required to be disclosed.

III. Share Transfer

The administration of share transfer for non-listed public companies is flexible and tailored according different types of transfer taking place.

For shares offered and transferred to the general public, there is no specific requirement on profits made; the focus is on sound governance and information disclosure. The company is required to submit to CSRC a recommendation report issued by securities firms, legal opinion issued by law firms, audit report issued by accounting firms that are qualified to practice securities and features related matters and opinions issued by stock exchange for the latter's approval.

For shares transferred privately, if the shareholders, due to such share transfer, have exceeded 200 in number, the company has to submit to CSRC the documents mentioned in the previous paragraph for its approval. Such approval, however, is exempted if the number of shareholders fall back under 200 within 3 months since the transfer takes place.

IV. Private Placement

Private placement referred to in the Measures includes two kinds of circumstances: one being offerings made to targeted investors by a public company with more than 200 shareholders; the other being offerings made to targeted investors that have resulted in the company having more than 200 shareholders.

For a private placement, several matters have to be noted:

- a. The targeted investors include shareholders of the company, directors, supervisors, senior managers and core staff of the company as well as eligible investors as prescribed in the Interim Provisions on the Eligibility Management of Investors promulgated by CSRC.
- b. Such placement may only be completed via a subscription agreement.
- c. The company bears the responsibility for confirming the identity and eligibility of the targeted investors; a risk disclosure clause has to be included in the subscription agreement.
- d. Where the investment is made in several terms, the company may only apply for CSRC's approval once and complete the first

term of the offering within 3 months upon approval, the last term shall be completed within 12 months without any additional application.

- e. If after the offering to targeted investors, the shareholders of the company do not exceed 200 in number or capital financed by such offering during 12 months is lower than 20% of the company's net asset, application for approval of CSRC is exempted. Only a registration with CSRC within 5 days is required.

Interpretation of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Criminal Cases Involving Refusal to Pay Labor Remunerations

最高人民法院关于审理拒不支付劳动报酬刑事案件适用法律若干问题的解释

【Issued by】	The Supreme People's Court
【Subject】	Labor Law, Criminal Law
【Promulgated on】	January 16, 2013
【Effective Date】	January 23, 2013
【Source】	www.court.gov.cn

With Amendment 8 to the PRC Criminal Law Promulgated in 2011, refusal to pay labor remuneration has for the first time been recognized as a criminal offense which could possibly lead to 3 to 7 year imprisonment, rather than just a breach of contract or tort. The specific article being discussed hereinafter reads as follows:

“Whoever evades payment of a relatively large amount of labor remunerations by transferring property or escaping and hiding or refuses to pay a relatively large amount of labor remunerations though capable, and still refuses to pay even after being ordered by the relevant government department to pay, shall be sentenced to imprisonment of not more than 3 years or criminal detention and/or a fine; and if there are serious consequences, shall be sentenced to imprisonment of not less than 3 years but not more than 7 years and a fine.

Where an entity commits the crime as provided for in the preceding paragraph, a fine shall be imposed on it, and its directly responsible person and other directly liable persons shall be punished according to the provision of the preceding paragraph.

Whoever commits an act as mentioned in the preceding two paragraphs without serious consequences but pays labor remunerations before a public prosecution is instituted and assumes the corresponding compensatory liability according to law may be given a mitigated penalty or exempted from penalty.”

And on January 16, 2013, the Supreme People's Court issued Interpretations on Certain Issues concerning the Application of Law in the Trial of Criminal Cases

Involving Refusal to Pay Labor Remunerations (“Interpretations”) for the better understanding and implementation by the lower courts of this rather unconventional criminal offense. The Interpretations have set out clearer definitions for the terms underlined in the above mentioned criminal code in order to clarify potential issues that may come out as vague or problematic during a trial.

Labor remunerations: according to Labor Law and Labor Contract Law, Labor remunerations shall include wages, bonuses, allowances, subsidies, overtime wages and wages payable under special circumstances etc.

Transferring property or escaping and hiding: conducts that fall under the following categories for the purpose of avoiding payment of labor remunerations shall be regarded as “transferring property or escaping and hiding”:

- a. To transfer or dispose of property by means of property concealment, bad faith debt repayment, debt fabrication, fraudulent bankruptcy, fraudulent close down etc.
- b. To run or to hide
- c. To conceal, destroy or falsify account books, employee registers, pay roll records, attendance records or other materials related to labor remunerations.
- d. To avoid payment of labor remuneration by other means.

Relatively large amount: any of the following shall be regarded as “relatively large amount”:

- a. Where one employee is denied labor remunerations for over 3 months and the amount payable is over RMB 5000 to over RMB 20,000 (depending on specific regions).
- b. Where over 10 employees are denied labor remunerations and the cumulative amount payable is over RMB 30,000 to RMB 100,000 (depending on specific regions).

Still refuses to pay even after being ordered by the relevant government department to pay: whoever is lawfully ordered to pay labor remunerations with a written instruction for correction within a specified period by human resource and social security department or with a written decision of administrative review by other relevant government departments, and who still fails to pay labor remunerations shall be deemed as “still refuses to pay even after being order by the relevant government department to pay”. Except when there is evidence to prove that the party concerned is justifiably not aware of the payment order or has justifications for failure to make timely payment.

Where the payment order cannot be served due to the running and hiding of the party concerned, upon posting the payment order at the domicile, place of business operations of the party concerned and taking pictures and video records thereof, it shall be deemed as the party concerned is “being ordered by the relevant government department to pay”.

Serious consequences: where the labor remunerations payable is a “ relatively large amount” and the results fit into any of the following, it shall be deemed as causing “serious consequences”:

- a. The basic living standards of the employee or his dependents are severely affected or any major disease of the employee or his dependents cannot receive timely medical treatment or the employee or his dependents have dropped out of school.
- b. Where the party concerned uses violence or threats to use violence against the employee demanding labor remunerations.
- c. Where any other serious consequences are caused.

Where a legal entity is found liable for refusal to pay labor remunerations, the legal entity will be subject to fines mainly, the person directly in charge or other personnel that are directly liable or even the actual controller of the legal entity will be found liable and serve a term of imprisonment.

It is rather obvious that such a criminal code and the interpretations are set out to protect the grass root groups in China, mainly the rural immigrant workers who have long be deprived of social wealth and security. The purpose of this criminal code is not to punish those who refuses to pay them, but rather urge them to make the payment that such unprivileged groups deserve and need. From this viewpoint, it becomes understandable why a breach of labor contract would become a criminal offense.

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