



China Regulatory Updates

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■ **OUTBOUND & FOREIGN INVESTMENTS / 境外投资和外商投资**

SAFE Revised ESOP Administration Rules for Foreign Listed Companies

国家外汇管理局修改境内个人参与境外上市公司股权激励计划管理规则

■ **DISPUTE RESOLUTION / 争议解决**

CIETAC to Adopt New Arbitration Rules

CIETAC 修改仲裁规则

■ **PRIVATE EQUITY INVESTMENT / 股权投资**

Filing Requirement Extended to Existing PEs in Tianjin

天津出台 PE 管理补充规定，存量企业亦须备案

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SAFE Revised ESOP Administration Rules for Foreign Listed Companies

国家外汇管理局修改境内个人参与境外上市公司股权激励计划管理规则

On February 20, 2012, SAFE issued the *Circular on Foreign Exchange Administration of Domestic Individuals Participating in Foreign Listed Companies' Share Incentive Plan* (Hui Fa [2012] No. 7, "Circular 7") to replace its predecessors Hui Zong Fa [2007] No.78 ("Circular 78") and Hui Zong Fa [2008] No. 2 (a supplementary rule of Circular 78). Circular 7 has become effective upon circulation.

Under Circular 7, several key terms are defined and the scope of application is broadened, which generally be deemed a positive development for foreign multinationals to implement ESOP plans in mainland China. In addition, the relevant forex administration procedures have been simplified to some extent while the post-registration compliance requirements are further strengthened. We have summarized the following major changes made by Circular 7 for your general reference:

- (a) **A Few Key Terms Specified:** (i) Circular 7 has expressly defined that *Domestic Individuals* refer to directors, supervisors, senior management personnel and other employees or labor service providers of domestic entities. Not only PRC citizens, but also residents of Hong Kong SAR, Macau SAR and Taiwan, and foreign individuals who have resided in mainland China for one consecutive year or longer should be included (*compared to Circular 78 which was silent on this definition; in practice, only PRC citizens used to be covered in most cases*); (ii) *Domestic Entities* that connect *Domestic Individuals* with the foreign listed company are now made more specified and extensive, according to which the foreign listed company registered in mainland China and all domestic entities (including partnerships and representative offices, among others) that have direct or indirect controlling relationship with the foreign listed company are now covered; and (iii) Circular 7 also stipulates that stock incentive plans shall include employee ownership plans, stock option plans, stock appreciation rights plans, phantom stock plans and all other share-based incentive plans, which are much more extensive compared with those under Circular 78.
- (b) **Forex Administration Procedures More Streamlined:** Circular 7 requires the local SAFE office, after it exams the relevant share incentive plans as applied, to issue forex registration certificates to the onshore agencies engaged by *Domestic Entities* to handle ESOP registrations on their behalf so that they can through the various forex settlement procedures with local banks such as forex account opening, capital remittance, among others. No further registration with SAFE office is required under Circular 7 as compared

2012年2月20日,国家外汇管理局下发了《关于境内个人参与境外上市公司股权激励计划外汇管理有关问题的通知》(汇发[2012]7号,“7号文”),该通知已自发布之日起实施。此前规范境内个人参与境外上市公司股权激励计划的相关规定(即汇综发[2007]78号(“78号文”)及其补充规定汇综发[2008]2号)同时废止。

7号文明确了一些重要概念、扩大了适用范围并简化了外汇监管程序,被认为应更便于跨国公司在华实行其全球员工持股计划。下文对7号文的主要内容进行了简要总结,供参考:

- (a) **明确了一些重要概念:** (i) 7号文首次明确了“境内个人”是指境内公司董事、监事、高管及其他员工,并强调不仅包括中国公民,还包括港澳台个人及在中国境内连续居住满1年的外国个人;而78号文并未对此进行定义,且实践中通常只涉及中国公民(当然,各地主管外管局此前可能对此有不同的解释); (ii) 7号文下“境内公司”的外延更加明确和广泛,包括境内注册的境外上市公司本身及所有与该境外上市公司有控股或实际控制关系的境内各级机构,包括合伙企业、境内代表处等; (iii) 7号文同时明确了如员工持股计划、股票期权计划、股票增值权、虚拟股票等凡是符合境外上市公司“以公司股票为标的,对境内个人进行权益激励”的计划都应按要求申请外汇登记,比原78号文涵盖的范围更广。
- (b) **简化了外汇监管程序:** 7号文要求外管局在审核通过相关股权激励计划后出具外汇登记证明,境内代理机构可凭此证明直接向境内银行办理外汇账户开立、资金划转等手续,而毋需另行向外管局备案。另外,7号文也简化了申请外汇登记所需提交的材料。

with Circular 78. In addition, application documents have also been significantly simplified and standardized under Circular 7.

- (c) **Post-Registration Compliance Scrutiny Enhanced:** Pursuant to Circular 7, if any of the following circumstances happens, the onshore agency should apply for forex change registration in a timely manner: the underlying share incentive plans are substantially amended or expired, or the issuer of the underlying share incentive plans is merged or acquired by other entity or gets de-listed, among others.
- (c) **加强了事后合规性监管:** 7号文要求境内代理机构在股权激励计划发生重大变更、境外上市公司并购重组、股权激励计划到期、境外上市公司退市等情形下,及时办理相关变更或注销登记手续。

DISPUTE RESOLUTION / 争议解决

CIETAC to Adopt New Arbitration Rules

CIETAC 修改仲裁规则

In recent years, major international arbitration rules such as the UNCITRAL Arbitration Rules and the ICC Arbitration Rules have been significantly amended to reflect the new developments in the commercial arbitration practice. Under this background, CIETAC, China's most popular international arbitration institution, has also adopted some substantial revisions to its arbitration rules (the "New Rules") recently. The New Rules will take effect on May 1, 2012.

Amendments under the New Rules are mainly related to such matters as arbitration procedures, powers and functions of arbitration tribunals as well as rights and liabilities of the parties involved, which have generally mirrored CIETAC's efforts to keep abreast with the most recent commercial arbitration practices and to make itself more international-orientated. Major changes include:

- (a) Rules with respect to consolidation of related arbitrations are newly added to simplify arbitration procedures. In accordance with the New Rules, the arbitration tribunal may consolidate two or more cases under arbitration that are related to each other at the request of one party or at its own discretion upon consents of all relevant parties.
- (a) 新增与合并仲裁相关的规定: 根据《新规则》, 经一方当事人请求并经其他各方当事人同意, 或仲裁委员会认为必要并经各方当事人同意, 仲裁庭可以根据相关案件的关联性决定将该等案件合并审理, 这将简化关联案件的审理程序。
- (b) The arbitration tribunal is for the first time empowered, at a party's request, to grant certain interim measures it deems necessary or proper in accordance with the applicable law to better protect the interest of relevant parties. In return, the arbitration tribunal may require the party applied for interim measures to provide appropriate collaterals. It is noteworthy however that since under PRC laws, interim measures (such as property preservation and evidence protection) shall be decided and enforced by competent courts (rather than arbitration tribunals), this new CITEAC
- (b) 仲裁庭被首次赋予采取临时措施的权力: 根据《新规则》, 经一方当事人请求, 仲裁庭依据所适用的法律可以决定采取其认为必要或适当的临时措施, 并有权要求请求采取临时措施的一方提供适当的担保。值得注意的是, 鉴于中国法下的临时措施(主要是指财产保全和证据保全措施)只能由有管辖权的法院作出(而不能由仲裁庭直接

provision may only work when the arbitration procedure is governed by foreign laws.

- (c) Other major revisions include: Summary procedure is now applicable to arbitrations involving disputed amount not exceeding RMB2 million (*instead of RMB5,000 under previous rules*). With respect to the language of arbitration, the arbitration tribunal may decide to use Chinese or other foreign language in the absence of an agreement by the parties, while under the previous rules, only Chinese language is permitted.

Although quite some improvements are made by the New Rules, there are still a few obvious weaknesses thereunder compared to the current prevailing international arbitration practices. For instance, the New Rules didn't introduce arbitrators' liability exemption mechanism to better help arbitrators deal with cases without disturbances. The parties involved are not entitled to challenge the qualification or capability of the expert designated by the arbitration tribunal, which may affect the fairness of the arbitration as a result of overconcentration of the arbitration tribunal's powers.

实施), 因此该规定可能只有在仲裁程序适用外国法时才有意义。

- (c) 其他修改内容:《新规则》扩大了简易程序的适用,将适用简易程序的争议金额上限从人民币 50 万元提高至人民币 200 万元。在仲裁语言上,根据《新规则》,如果当事人没有约定,仲裁庭可以根据具体情况选择中文或者中文以外的其他语言(此前则只能使用中文)。

值得关注的是,尽管《新规则》作了较大程度的改进,但与目前的国际仲裁实践相比,其不足也还是较为明显。比如,《新规则》未引入仲裁员的责任豁免制度以使仲裁员在最大程度上不受干扰地处理案件,未赋予当事人对仲裁庭指定的专家提出异议的权利以避免仲裁庭权利过于集中而影响仲裁程序的公正性等。

PRIVATE EQUITY INVESTMENT / 股权投资

Filing Requirement Extended to Existing PEs in Tianjin

天津出台 PE 管理补充规定, 存量企业亦须备案

On March 5, Tianjin Municipal Commission of Development and Reform released the *Supplementary Notice on the Measures for Administration of Equity Investment Enterprises and Equity Investment Management Institutions in Tianjin* (the original measures and the supplementary notice, respectively, the "Measures" and the "Supplementary Notice"), requiring equity investment enterprises established prior to September 1, 2011 (the "Existing PEs") and the relevant management institutions to file with the competent government authority based on a less stringent filing requirements under different situations. Under the original Measures, the filing requirement is only applicable to PEs established after September 1, 2011. The Supplementary Notice is expected to be effective from March 5, 2012 to March 5, 2017.

The Existing PEs are classified into three categories with different filing requirements to be applied pursuant to the Supplementary Notice: (i) Existing PEs with paid-in capital no less than RMB20 million before March 5, 2012; (ii) Existing PEs that have already made investments before March 5, 2012; and (iii) other Existing PEs.

For Existing PEs that fall under category (i) and (ii), the minimum capital contribution of each investor (GPs excluded) shall be RMB1 million; whereas for Existing PEs under category (iii), they should be subject to the filing requirements as strict as those provided under the original Measures, which include, among

天津发改委于 3 月 5 日发布并开始执行《天津股权投资企业和股权投资管理机构管理办法补充通知》(“《补充规定》”),有效期至 2017 年 3 月 5 日。根据该规定,在 2011 年 9 月 1 日前注册的股权投资企业(“存量企业”)和管理机构也应至相关部门完成备案,但备案条件可以根据存量企业的具体情况适当放宽(天津原地方规定《天津股权投资企业和股权投资管理机构管理办法》(“《管理办法》”)仅要求 2011 年 9 月 1 日之后注册的股权投资企业完成备案)。

《补充规定》对以下三类存量企业实行分类备案:(i) 在该规定执行之前实收资本不少于 2,000 万元人民币的存量企业;(ii) 在该规定执行之前已发生对外投资的存量企业;及(iii) 除上述两种情况之外的其他存量企业。

对于上述第(i)、(ii)种情况,要求单个出资人的出资金额应不少于 100 万元人民币。对于第(iii)种情况下的存量企业,则需满足《管理办法》下相对严格的备案条件(如 PE 的认缴资本不少于 1 亿元

others: (A) the subscribed capital should be no less than RMB100 million; (B) the initial capital contribution for PEs in forms of corporate or partnership shall be no less than RMB20 million and RMB10 million respectively; (C) the paid-in capital of their management institutions should be no less than RMB2 million; and (D) the minimum capital contribution by each institutional or individual investor shall be RMB10 million and RMB2 million respectively. Time-wise, the Supplementary Notice requires all Existing PEs to rectify any incompliance and to properly file with the competent authority no later than September 1, 2013.

The issuance of the Supplementary Notice is interpreted as part of Tianjin government's efforts in bringing down local illegal fund raising practices through PEs by subjecting more PEs into its filing system. However, the Supplementary Notice is silent on how to implement the latest national PE administration rules (i.e., the *Circular on Promoting Orderly Development of Private Equity Investment Enterprises* (Fa Gai Ban Cai Jin [2011] No. 2864)) issued by NDRC at the end of last year (the "NDRC Rules"). In addition, how the discrepancies between these local Tianjin rules and the NDRC Rules (such as their different filing requirements, for example) should be addressed is also yet to be clarified.

人民币、首期实收资本不少于2,000万元（适用于公司制PE）或1,000万元人民币（适用于合伙制PE）、股权投资管理机构的实收资本不少于200万元人民币、每个机构或自然人出资人最低认缴1,000万元和200万元等）。根据《补充规定》，存量企业应在2013年9月1日之前完成规范整改和备案工作。

天津此次出台《补充规定》被认为主要是系针对利用PE进行非法集资的情况，其并未对如何落实去年年底国家发改委发布的《关于促进股权投资企业规范发展的通知》（发改办财金[2011]2864号文，全国性私募股权投资基金管理规范）作出规定。《管理办法》及《补充规定》中与国家发改委前述通知的不一致之处（如具体备案条件等）应如何处理，也有待天津地方出台进一步规定予以明确。

For further information, please write us at inquiry@hanyilaw.com.

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