

August 2014



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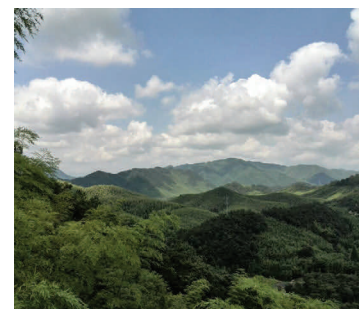
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CROSS-BORDER INVESTMENT / 跨境投资

SAFE Issued Circular #37 to Replace Circular #75

外管局发布境外投融资新规替代75号文

In an effort to consolidate and streamline its various notices, circulars and other compliance requirements applicable to foreign exchange (or forex) administration involving PRC Residents' cross-border investment and financing activities, the State Administration of Foreign Exchange/国家外汇管理局 (the "SAFE") has recently issued a new Circular #37 (*Notice of the State Administration of Foreign Exchange on Relevant Issues concerning Foreign Exchange Administration for Domestic Residents to Engage in Overseas Investment and Financing, and in Round-Trip Investment via Special Purpose Companies, Hui Fa [2014] #37*) which has become effective since July 4, 2014 to fully replace the famous Circular #75 (*Notice of the State Administration of Foreign Exchange on Relevant Issues concerning Foreign Exchange Administration for Domestic Residents to Engage in Financing and in Round-Trip Investment via Overseas Special Purpose Companies, Hui Fa [2005] #75*). While there are still quite a few areas to be clarified or further explained by SAFE which will hopefully soon become available after this new circular is implemented, here is a summary of some of the noteworthy points that Han Yi has observed:

- (a) In addition to the offshore SPVs (special purpose vehicles) established or controlled by PRC Residents (the scope of which is substantially the same as that under the Circular #75) for round-trip investment purpose, which are subject to SAFE registrations, the new Circular #37 for the first time has set out a SAFE registration procedure applicable to offshore SPVs established or controlled by PRC Residents for direct outbound investment purposes including their overseas investment and operating activities. This seems to provide a new forex compliance route specifically for PRC individuals interested in outbound investments.
- (b) SAFE registration of outbound and round-trip investments in offshore SPVs by PRC Residents will be limited to tier-1 SPVs directly established or controlled by PRC Residents, and under some circumstances, registration

regarding the establishment and subsequent financing (or change of such financing) of such SPVs is no longer required. Both the initial registration when the PRC Residents contribute their onshore or offshore assets or equities into the SPVs and the subsequently change registrations have been greatly simplified and will be more transparent for the PRC Residents concerned with significantly reducing compliance burdens. The 30-day deadline to complete any change registration under Circular #75 has also been replaced with a softer and more reasonable requirement of "timely" filing.

- (c) Circular #37 has allowed PRC Residents to buy forex for the purpose of the establishment and subsequent operations of the SPVs (such as redemption or privatization). It further revoked the 180-day timing requirement under Circular #75 for PRC Residents to wire back all forex funds realized by PRC Residents offshore in the form of profits, dividends and capital gains. Instead, the new circular permits all offshore funds to be kept offshore for future use.
- (d) Unlike Circular #75 which relates noncompliance with the registration requirements thereunder to prohibition of subsequent dividend repatriations of the onshore operating companies, etc., penalty provisions under Circular 37 seem to be mainly a certain amount of administrative fines that may be applied by SAFE offices to the violating PRC Residents and their onshore FIEs.
- (e) Finally, all ESOPs granted by a non-listed offshore SPV to PRC Residents can now also be registered pursuant to this new Circular #37 and its detailed implementing guidelines.

2014年7月4日, 国家外汇管理局发布了《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》及其配套的《返程投资外汇管理所涉业务操作指引》(统称为“37号文”), 用于监管与红筹重组返程投资等相关的外汇登记事宜, 同时宣布废止自2005年起开始实施的著名的《关于境内居民通过境外特殊目的公司融资及返程投资外汇管理有关问题的通知》

(“75号文”)及其相关配套规定中与37号文不一致的内容。37号文已于发布之日起生效。

尽管37号文的一些具体条文还需相关外汇监管部门在实践中予以进一步澄清和解释, 但总体而言, 37号文优化了相关外汇监管流程, 并在多方面简化和改进了相关业务流程, 主要包括:

- (a) 扩大了特殊目的公司的范畴。具体而言, 37号文将“特殊目的公司”的定义从境内居民以股权融资为目的的以境内资产或权益在境外直接设立或间接控制的企业, 扩大到了以投资和融资为目的, 以境内资产或权益, 或者境外资产或权益, 在境外设立或间接控制的企业。这将可能对此前长期处于不确定状态的境内个人境外投资(非以融资为目的)打开了一条合规通道。
- (b) 调整境外特殊目的公司的登记范围, 只对境内居民直接设立或控制的(第一层)境外特殊目的公司进行登记, 取消境外特殊目的公司在一些情况下的设立登记、融资登记和融资变更登记等手续, 同时简化变更登记内容。此前在75号文下需要30天内完成相关变更登记的要求被比较软性的“及时”办理相关变更登记所替代。
- (c) 拓宽资金流出渠道, 即允许境内居民购付汇用于境外特殊目的公司设立及境外营运资金等, 同时取消境内企业对特殊目的公司境外放款的限制。此外, 不再要求境内居民将其从特殊目的公司获得的利润、红利及资本变动外汇收入于获得之日起180日内调回境内, 允许其将该笔资金继续在境外使用, 放宽了境外融资资金的使用限制。
- (d) 原75号文下“境内居民按规定办理境外投资外汇登记及变更手续后, 可向特殊目的公司支付利润、红利、清算、转股、减资等款项”的规定被取消, 因此境内居民若未及时办理相关外汇登记或变更手续等合规性瑕疵可能不会导致境内运营公司的利润、红利、清算或转股所得无法汇出境外给境外特殊目的公司, 而是需要按照《外汇管理条例》等规定承担以罚款为主的行政等责任。
- (e) 首次明确将境内居民参与非上市特殊目的公司的股权激励计划纳入登记范围, 填补了此前该操作在实践中无法可依的状况, 使尚未上市的境外红筹公司在上市之前实施股权激励计划有据可循。

SAFE Significantly Relaxed Capital Account Forex Settlement Restrictions in Experimental Areas 外管局在试点区域放款外汇资本金结汇规管，或对人民币基金融资和红筹结构产生较大影响

SAFE recently issued the *Notice of the State Administration of Foreign Exchange on the Pilot Reform of the Administrative Approach Regarding the Settlement of the Foreign Exchange Capitals of Foreign-Invested Enterprises in Certain Areas* (Hui Fa [2014] #36, "Circular #36"), effective on August 4, deciding to launch the pilot reform of the administrative approaches with respect to the settlement of forex in the capital accounts of foreign-invested enterprises in 16 areas such as Suzhou Industrial Park, Hengqin New Area, Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone, and among others. Such pilot approaches have already been implemented in Shanghai Free Trade Zone since February, 2014.

Circular #36 will adopt a new trail implementation of forex capital account settlement on a discretionary basis in pilot areas in order to facilitate FIEs' business and capital operation, namely, to allow FIEs registered within pilot areas to settle 100% (*subject to adjustment by SAFE from time to time*) of the forex in their capital accounts on a discretionary basis, while maintaining the choice to use such forex according to the existing system of payment-based forex settlement.

Meanwhile, Circular #36 relaxes the restriction on the use of RMB fund obtained from settlement of forex in the capital accounts to make equity investment under Circular #142 since August, 2008 by allowing FIEs (including foreign-invested investment companies, foreign-invested venture

capital enterprises, foreign-invested equity investment enterprises and other ordinary FIEs) to settle forex in its capital accounts and transfer the RMB settled to the account of an invested enterprise or to transfer the forex in their capital account directly to the invested enterprise. Such relaxed administrative approaches would possibly mean that the QFLP system implemented in many areas could make less sense and the capital inflow (*including but not limited to capital inflow from offshore companies to domestic operating entities under red-chip structure and VIE structure*) for reinvestment of the general FIEs would be more convenient with forex channel thereof opened.

While in general Circular #36 moves towards a more relaxed administrative approach regarding forex capital account settlement, it is worthy to note that such provisions of this circular remain ambiguous as to whether the domestic enterprise reinvested by FIEs are subject to restrictions in terms of registration place and so on. In addition, Circular #36 requires the RMB fund obtained from forex capital account settlement on a discretionary basis to be managed as pending payment amount and use of such amount is still subject to administration and supervision of local forex bureaus or their delegated banks. In this sense, the actual effect of the administrative approaches under Circular #36 remains to be seen.

国家外汇管理局于近日发布《关于在部分地区开展外商投资企业外汇资本金结汇管理方式改革试点有关问题的通知》

(汇发[2014]36号, "36号文"), 决定在苏州工业园区、横琴新区、深圳前海深港现代服务业合作区等16个地区开展外商投资企业资本金结汇管理方式改革试点, 并于2014年8月4日起实施。该等试点已于今年2月开始在上海自贸区展开。

36号文将在试点区域内试行意愿结汇制, 以满足和便利外商投资企业的经营与资金运作, 即允许试点区域内注册成立的外商投资企业的外汇资本金在支付结汇制之外, 可根据企业的实际经营需要在银行办理100% (国家外汇管理局可视国际收支形式对该比例进行适时调整) 的意愿结汇。

同时, 36号文放开了自2008年8月开始生效的142号文之下的外商投资企业结汇所得人民币资金不得用于境内股权投资的限制, 允许外商投资企业 (包括外商投资性公司、外商投资创业投资企业和外商投资股权投资企业) 及一般外商投资企业通过原币划转或将外汇资本金直接结汇后将相关外汇资本金划入被投资企业的账户。前述对外商投资股权投资企业资本金结汇的放开意味着目前在多地试行的QFLP制度将可能失去其实践意义, 对一般性外商投资企业再投资的外汇渠道的打通也将便利一般性外商投资资金的流入 (包括可能会对红筹结构的境内重组、VIE结构下的境外资金汇入用于境内实际运营实体等带来便利)。

值得注意的是, 尽管36号文显示了放宽外汇资本金结汇限制的整体信号, 但其部分具体条款还有很多不清晰的地方 (包括但不限于并未明确相关企业是否受到注册地等条件的限制)。此外, 试点下的意愿结汇后所得人民币资金需纳入结汇待支付账户进行监管, 而不得随便对外进行支付。因此, 36号文下相关试点的实际作用还尚需观察。

CAPITAL MARKET / 资本市场

NEEQ Issued New Rules Regarding Stock Transfer and Personal Income Tax 新三板新规陆续出台

On July 3, 2014, the Chinese National Equities Exchange and Quotations Co., Ltd. (the "NEEQ") released the *Guidelines for the Determination and Change of the Methods for the Transfer of Shares via the National Equities Exchange and Quotations* (for Trial Implementation) (the "Guidelines"). The Guidelines state that a company applying for a quotation shall determine the method for the transfer of its shares, namely by agreement, market makers or price competing (*note that in practice transfer by price competing is not yet available as the rules are yet to be clarified*). The company whose shares

are quoted on NEEQ may change the method for the transfer of its shares with a prior application and NEEQ's approval. Furthermore, the Guidelines specify relevant issues concerning market makers' entrance and retreat, in an effort to regulate the transfer by market makers systematically.

Meanwhile, *Circular on Certain Issues Concerning the Implementation of the Policy for Differentiating Personal Income Tax Treatments for Dividend and Bonus Incomes from Companies Quoted on the National Equities Exchange and Quotations* (the "Notice"), effective on July 1, clarifies that the stock dividend of companies

quoted on NEEQ obtained by individuals shall be subject to 3 classes of discounts pursuant to the shareholding period. The Notice aims to encourage long-term investment and restrict short-term speculation, which is in line with currently effective policies and rules on companies listed on *Main Board, SMEs Board* and *ChiNext*.

2014年7月3日, 全国中小企业股份转让有限公司发布《全国中小企业股份转让系统股票转让方式确定及变更指引 (试行)》(“《指引》”)。《指引》明确了公司在申请在新三板挂牌的同时, 须申请股票拟采取的转让方式, 即协议转让、做市转让和竞价转让 (不

过由于竞价转让方式的相关规定尚未明确，目前挂牌公司股票实际上可以选择的只限于做市转让和协议转让)。经挂牌公司申请并经全国股份转让系统公司同意，转让方式可以变更。此外，《指引》还对做市商加入、退出等相关事宜

做出了明确规定，以对做市转让这一转让方式进行系统性地规范。

此外，7月1日开始执行的《全国中小企业股份转让系统挂牌公司股息红利差别化个人所得税政策有关问题的通知》明确了个人取得新三板挂牌公司股票

股息红利按持股期限分三档适用不同的折扣率。这与现行适用于主板、中小板或创业板上市公司的有关政策基本一致，目的均为鼓励长期投资并抑制短期炒作。

SHANGHAI FTZ UPDATES / 上海自贸区要闻

Regulations on China (Shanghai) Pilot Free Trade Zone Promulgated 自贸区条例通过

On July 25, the Standing Committee of the Shanghai People's Congress officially passed the *Regulations on China (Shanghai) Pilot Free Trade Zone* (the "Regulations"), effective on August 1. The Regulations integrates the *General Plan for China (Shanghai) Pilot Free Trade Zone* and other supporting rules issued by financial authorities, SAFE, MOFCOM, SAIC and other competent authorities; it also provides comprehensive regulations with respect to the development and construction of Shanghai Free Trade Zone, regarded as the *Basic Law* of

Shanghai Free Trade Zone, and devises a framework for the general regimes in respect to the negative list management system, investment and opening up, trade facilitation, financial services, etc. The promulgation of the Regulations incorporates such articles into local law, providing a stronger legal regulatory foundation for the development of Shanghai Free Trade Zone and implementation of relevant policies.

7月25日，上海市人大常委会表决通过《中国(上海)自由贸易试验区条例》

(“《条例》”)，并于8月1日起实施。《条例》的内容整合了此前国务院发布的《中国(上海)自由贸易试验区总体方案》及金融、外汇、商务、工商等各主管部门就自贸区所出台的相应具体政策中的相关规定，对自贸区的发展建设进行了全面的规范，包括负面清单管理模式、企业注册便利化、国际贸易、金融创新等，被称为是自贸区的“基本法”。《条例》的出台使该等规定的效力提升为地方性法规，对自贸区的发展和相关政策实施提供了更有力的法规保障。

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