

# China Regulatory Updates

January 2009

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**Shanghai Office**  
Suite 4103, II Grand Gateway  
3 Hongqiao Road  
Shanghai 200030, China  
Tel: (86-21) 6448-5600  
Fax: (86-21) 6448-5611

**Beijing Office**  
Suite 311, Tower E1  
Oriental Plaza  
Beijing 100738, China  
Tel: (86-10) 8518-5580  
Fax: (86-10) 8515-3818

## **1. Catalogue of Priority Foreign Investment Industries in China's Central and Western Regions Revised**

On December 23, 2008, the PRC National Development and Reform Commission and the PRC Ministry of Commerce jointly issued the *2008 Catalogue of Priority Foreign Investment Industries in the Central and Western Regions* (the "Priority Catalogue"), which came into force on January 1, 2009.

According to applicable regulations, foreign invested projects listed in the Priority Catalogue are entitled to the preferential policies enjoyed by the encouraged foreign invested projects as set out in the *2007 Catalogue for the Guidance of Foreign Investment Industries*. Foreign invested projects currently under construction may also enjoy the preferential policies as applicable, so long as they satisfy the requirements in the Priority Catalogue.

## **2. Tax Certificate Requirement Related to Payment to Overseas Accounts Clarified**

On November 25, 2008, the PRC State Administration of Foreign Exchange and the PRC State Administration of Taxation jointly promulgated the *Notice on Certain Issues Related to Submission of Tax Certificates for Payment to Overseas Accounts under Service Trade and Other Items* (the "Notice"), aiming to improve the supervision on tax collection as well as authenticity check on payment to overseas accounts under the items of service trade, proceeds and other items.

According to the Notice, if any domestic institution or individual intends to pay to any overseas account an amount more than equivalent of US\$30,000 under the items of service trade, proceeds, transfer under current account or under certain items within capital account, such institution or individual should first apply to the competent tax authority for a tax certificate to evidence all PRC taxes applicable to such amount have been paid up (the "Tax Certificate"). With the foregoing provisions, the Notice has (i) unified the form of the tax certificates or evidences for the amount to be paid abroad by domestic institutions or individuals; (ii) set out the circumstances where a Tax Certificate is mandatorily required; and (iii) specified the amount threshold (i.e., US\$30,000) for the submission of Tax Certificates.

### 3. Two New Guidelines Released by CBRC

During the month of December 2008, the China Banking Regulatory Commission (“CBRC”) has successively issued the *Guidelines for Risk Management of the M&A Loans by Commercial Banks* (the “Loan Guidelines”) and the *Guidelines for Business Cooperation between Banks and Trust Companies* (the “Cooperation Guidelines”).

Pursuant to the Loan Guidelines, qualified commercial banks are permitted to engage in M&A loans business. M&A loans may be extended to M&A transactions in which a PRC enterprise or its onshore SPV intends to merge or gain actual control over an existing target company operating on a continual basis by means of, among others, acquisition of existing equity interest or assets, subscription for additional equity or debt assumption. According to relevant CBRC officers, M&A loans can also be adopted in strategic takeovers of listed companies on A-share market, but should keep away from any financial investment. According to the Loan Guidelines, M&A loans should not exceed 50% of the total funds the underlying M&A transaction needs and the loan term should be no longer than 5 years.

The Cooperation Guidelines primarily regulate the business cooperation between banks and trust companies. Pursuant to the Cooperation Guidelines, (i) banks should not provide guarantees in any form for the trust products or the properties/projects operated thereunder that are related to their cooperation with trust companies in respect of wealth management; (ii) when trust companies purchase assets (e.g., mortgaged loans and commercial papers) from banks, no repurchase-by-bank arrangement is permitted; (iii) when developing their business cooperation, banks and trust companies should comply with regulations on related-party transactions and disclose relevant information as required; and (iv) the risks of asset management plans under the cooperative wealth management arrangement by banks and trust companies should be fully disclosed to the potential customers. Moreover, the Cooperation Guidelines explicitly provide that trust companies can purchase equity interest in financial institutions with assets entrusted to them.

#### **4. Judicial Procedures for Non-Performing Loan Disposition Cases Resumed**

On December 3, 2008, the PRC Supreme People's Court circulated the *Several Opinions on Providing Judicial Protection and Legal Services to the National Finance Safety and the Full, Coordinative and Sustainable Development of Economy* (the "Opinions"), which indicates that relevant judicial procedures for lawsuits in connection with the disposition of non-performing loans ("NPL") will be resumed after almost 4 years of suspension.

Pursuant to the Opinions, people's courts at all levels should continue to hear NPL lawsuits in accordance with the *Provisions on Several Issues Related to the Application of Laws in the Trial of Cases Arising from Financial Asset Management Companies' Purchasing, Managing and Disposing of the Non-Performing Loans of State-Owned Banks* and other applicable judicial interpretations and policies, and render judicial protection to state-owned financial institutions for their debt collection. According to the Opinions, when hearing the cases with respect to NPL transfer, people's courts at all levels should fully protect the state-owned financial property rights, prevent any possible losses of state-owned assets, and punish the illegal behaviors with the purpose of evading the repayment of bank loans.

#### **5. Share Incentive Plans of Listed SOEs Further Regulated**

On December 11, 2008, the PRC State-Owned Assets Supervision and Administration Commission and the PRC Ministry of Finance jointly issued the *Notice on Issues Related to Regulation of the Implementation of Share Incentive Rules of Listed State-Controlled Enterprises* (the "Notice") to further regulate the implementation of share incentive plans by listed state-owned enterprises (the "Listed SOEs").

The Notice provides that, share incentive plans should generally focus on senior managers and key technical staff that have direct influence on the Listed SOEs' business performance and future development. The application scope of share incentive plans should not be arbitrarily expanded.

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Listed SOEs are required to work out complete and standard performance appraisal mechanism and appraisal method, and set reasonable limits to the senior managers' income from share incentive plans. In principle, for onshore Listed SOEs and H-share Listed SOEs, the senior managers' income from share incentive plan should not exceed 40% of their total remunerations, and for red chip Listed SOEs, should not exceed 50%.

#### **6. Draft Rules on Registration of Capital Contribution with Equity Interest Published for Public Comments**

On December 17, 2008, the State Administration for Industry and Commerce ("SAIC") made public request for comments on the Draft *Measures on Administration of Registration of Capital Contribution with Equity Interest* (the "Draft Measures"). The Draft Measures intend to regulate the registration of investors' capital contributions to one PRC limited liability company or joint stock company (the "Investee Company") with the equity interests they own in another PRC limited liability company or joint stock company (the "Investor Company").

In accordance with the Draft Measures, the equity interest to be contributed should be complete, transferable and free of any dispute and encumbrance, provided that, however, the equity interest could not be used for capital contribution if (i) the registered capital of the Investor Company has not been fully paid; (ii) any pledge has been created on such equity interest; (iii) such equity interest has been legally frozen; (iv) the articles of association of the Investor Company prohibit the transfer of such equity interest; (v) the requisite approval as provided in applicable laws, administrative regulations or the decisions of the PRC State Council for the transfer of such equity interest has not been obtained; or (vi) the transfer of such equity interest is against any applicable laws, administrative regulations or the decisions of the PRC State Council.

The Draft Measures further specify that: (i) the aggregate amount of the contribution with equity interest plus all other non-cash contributions paid to an Investee Company by all of its shareholders should not exceed 70% of its registered capital; (ii) the equity interest to be contributed should be first appraised by qualified asset appraisal firms; and (iii) if the investor intends to incorporate a new company by contribution with equity interest, it should complete all relevant transfer procedures within 1 year from the Investee Company's establishment; if the investor intends to subscribe for additional registered capital of an existing company by contribution with equity interest, it should complete all relevant transfer procedures before the Investee Company applies for the change of registration with respect to its capital increase with competent SAIC office.

#### **7. New Implementing Rules on Three Major Turnover Taxes Issued**

On December 18, 2008, the PRC Ministry of Finance and the PRC State Administration of Taxation jointly issued three revised implementing rules for the newly revised interim regulations on value added tax ("VAT"), consumption tax and business tax (*please refer to the December 2008 issue of Han Yi China Regulatory Updates for more details*). The three implementing rules (the "Implementing Rules") became effective on January 1, 2009.

According to the Implementing Rules, the sales amount standards for industrial and commercial small-scale VAT payers are respectively lowered to RMB500,000 and RMB800,000. The individual small-scale VAT payers will continue to keep their status as small-scale taxpayers. However, non-enterprise institutions with their sales amounts exceeding the aforesaid standards and enterprises that occasionally engage in taxable activities with their sales amounts exceeding the aforesaid standards are allowed to decide, at their own discretions, whether to pay VAT in the capacity of small-scale VAT payers or not from January 1, 2009.



The Implementing Rules also further clarify the treatment of the sales revenue derived from mixed sales and concurrent business. The Implementing Rules have reserved the principle that whether any VAT or business tax should be levied on any mixed sales activity should be dependent on the nature of the taxpayer's core line of business. However, in the case of the mixed sales activities involving both sales of self-produced goods and provision of construction services, both the VAT and the business tax payable should be calculated and paid.

*For further information, please write us at [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com).*

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