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China Regulatory Updates

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■ *QFII*

SAFE Revised Certain Forex Administration Rules for QFIIs

SAFE 修改 QFII 外汇管理的相关规定

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FOREIGN INVESTMENT /外商投资

Investment in Medical Institutions Further Opened up to Service Providers from Hong Kong and Macao

港澳服务提供者在内地设立医疗机构进一步放开

In December 2012, the Ministry of Health and the Ministry of Commerce (the "MOFCOM") jointly promulgated *the Circular on Certain Issues Concerning Establishing Medical Institutions in Mainland China by Service Providers from Hong Kong and Macao* (the "Circular"), which became effective as of January 1, 2013.

2012 年 12 月，卫生部、商务部发布了《关于香港和澳门服务提供者在内地设立医疗机构有关问题的通知》（"《通知》"）。《通知》于 2013 年 1 月 1 日起实施。

Prior to the implementation of the Circular, Service Providers from Hong Kong and Macao may only establish wholly-owned hospitals in the provincial capitals or municipalities directly under the Chinese Central Government in mainland China, or wholly-owned out-patient departments or sanatoriums in Guangdong Province. The aforesaid limitations are now lifted by the Circular and investments in medical institutions by Service Providers from Hong Kong and Macao in mainland China are no longer subject to any restrictions in terms of types of medical institutions or locations.

《通知》实施之前，港澳服务提供者在内地以独资形式只能设立独资门诊部（限广东省）、独资疗养院（限广东省）及独资医院（限省会城市和直辖市）；《通知》实施之后，港澳服务提供者在内地以独资形式设立医疗机构将不再有类型和地域方面的限制。

The Circular provides that the standards and requirements for establishing wholly owned medical institutions (*other than hospitals and sanatoriums*) by Service Providers from Hong Kong and Macao shall follow those applicable to medical institutions to be established by onshore investors, and the establishment applications thereof should be subject to review and approvals by PRC health administration authorities at provincial level and the competent MOFCOM offices, while the market entry requirements and investment approvals for the establishment of wholly owned hospitals and sanatoriums by Service Providers from Hong Kong and Macao remain unchanged. In addition, the Circular has amended the requirements for the establishment of equity or cooperative joint venture medical institutions by Service Providers form Hong Kong and Macao so that such requirements are substantially the same as those applicable to medical institutions to be established by onshore investors. The applications thereof will also be subject to the review and approvals of health administration authorities at provincial level and competent MOFCOM offices.

设置要求和审批程序方面，根据《通知》，港澳服务提供者在内地设立除独资医院、独资疗养院以外的其他独资医疗机构的标准和要求参照内地单位或个人设置医疗机构办理，由省级卫生行政部门审批（独资医院和独资疗养院的设置和审批要求按原有规定办理）。此外，《通知》还将港澳服务提供者在内地设置合资、合作医疗机构的标准和要求也调整为按照内地单位或个人设置医疗机构办理，并由省级卫生行政部门审批。

IMOFCOM Issued New Provisions to Further Regulate Pawn Industry

商务部颁布典当行业监管新规

On December 5, 2012, the MOFCOM promulgated the *Provisions on Supervision and Administration of Pawn Industry* (the "Provisions"). Based on the currently effective *Administration Measures for Pawn Industry*, the Provisions further clarified the limit and key aspects of the administration and supervision powers and authorities of the MOFCOM offices at different levels with respect to the pawn industry. The Provisions also set out more detailed requirements for the establishment, daily operation and management, annual inspection and winding up of

2012 年 12 月 5 日，商务部颁布实施了《典当行业监管规定》("《规定》")，在现有《典当管理办法》的基础上进一步明确和细化了各级商务主管部门对典当企业的监管权限及监管重点，并就典当行业的准入、典当企业的日常经营管理、年度审查及退出等方面提出了更为具体的规定和管理要求。但《规定》仍未就外商投资典当行业作出任何规定，

pawnshops. Since the Provisions are somehow still silent on foreign investment in pawnshops, the pawn industry is still closed to foreign investors.

目前典当行业仍未向外资开放。

PRIVATE EQUITY INVESTMENT /私募股权投资

The Supreme Court Rendered Final Judgment on First VAM Case

最高院审结首例 PE 对赌协议纠纷

As a matter of PRC law, court judgments do not serve as precedents in China as those in common law jurisdictions, but judgments and opinions of the Supreme Court are usually observed and followed by local courts and legal practitioners in similar cases and practices. Recently, the PRC Supreme People's Court (the "Supreme Court") has rendered its final judgment on the first lawsuit involving disputes over agreement on valuation adjustment mechanism ("VAM") in private equity investments, in which case the investor, *Fuhai Venture Investment Co., Ltd.* sued the investee company, *Gansu Shiheng Non-Ferrous Resource Reutilization Co., Ltd.,* a Sino-foreign joint venture, for indemnifications based on their VAM arrangement. In its final judgment, the Supreme Court concluded that the VAM arrangement between the investor and the investee company was invalid since the arrangement will enable the investor to obtain relatively fixed returns regardless of the performance of the investee company which jeopardizes the interests of the investee company and its creditors. The VAM arrangement between the investor and other shareholders of the investee company was however held by the Supreme Court as valid and legally binding on the ground that such arrangement did not violate any mandatory PRC law and regulations. As VAM arrangements are commonly adopted by the investors with the investee companies and/or other shareholders in private equity investments, but applicable PRC laws, regulations and judicial interpretations keep silent on the validity and legality of such VAM arrangements, the aforesaid final judgment which for the first time indicated the Supreme Court's positions with respect to VAM arrangements, is deemed to be a benchmark for private equity investment practices in China.

日前，中国最高人民院（"最高院"）审结了中国首例"对赌协议案"，即海富投资有限公司诉中外合资企业甘肃世恒有色资源再利用有限公司不履行对赌协议补偿投资案。最高院在终审判决中否认了股东与公司之间对赌安排的效力，认为该等安排使得股东可以获得脱离公司经营业绩的相对固定的收益，从而损害了公司及公司债权人的利益，但认可了股东与股东之间的对赌约定在不违反其他强制性法律法规的前提下的合法性。尽管中国不是判例法国家，但最高院的判决对于后续类似案件的审理及相关法律实践往往也具有很强的指导意义。鉴于目前中国相关法律法规并未对私募股权投资中常见的投资人、被投资公司及其他股东之间的对赌安排的合法性和有效性作出明确规定，而前述判决第一次明确了最高院对于对赌安排的态度，因此，该判决也被认为对日后中国私募股权投资的实践具有标杆性意义。

SECURITIES / 证券市场

China Amended *Securities Investment Fund Law*

对人大常委会修订《证券投资基金法》

On December 28, 2012, the Standing Committee of the PRC National People's Congress promulgated the revised Securities Investment Fund Law (the "New SIFL"), which will become effective from June 1, 2013. The New SIFL is deemed to be a breakthrough by introducing the concept of non-publicly-raised securities investment funds (the "Private SIFs"), providing quite detailed regulation provisions related thereto, further amending

2012年12月28日，全国人大常委会颁布了新修订的《证券投资基金法》。新法将于2013年6月1日起实施。新《证券投资基金法》在引入对非公开募集基金（"私募基金"）的监管、调整公开募集基金（"公募基金"）的监管、加强基金投资者保护和基金从业者投资限制等

regulatory rules over publicly-raised securities investment funds (the "Public SIFs"), enhancing protections for SIF investors and tightening up restrictions on investments by fund practitioners. Some highlights in the New SIFL include:

方面都有所突破：

Started to Officially Regulate Private SIFs. Based on the features of Private SIFs, the New SIFL provides tailor-made administration and supervision rules for Private SIFs, which introduced, among others: (i) the qualified investor system: Private SIFs are only permitted to raise funds from *qualified investors* (*the underlying qualification criteria to be further clarified by China Securities Regulatory Commission or CSRC*), and the aggregate number of the qualified investors in any single fund product shall not exceed 200; (ii) the Private SIF registration and filing system: different from fund managers of Public SIFs, the establishment of which is subject to CSRC's approval, fund managers of Private SIFs are only needed to be filed with the Fund Industry Association. In addition, fund raising activities of Private SIFs are only required to be filed with the Fund Industry Association afterwards (*the Association will report large scale funds to CSRC later on*) without the need to be registered with CSRC in advance; (iii) the unlimited-liability fund unit holders system: the investors of a Private SIF may agree that certain selected fund unit holders of the fund will act as the fund manager responsible for the management and investment activities of the fund and assuming unlimited joint and several liabilities for the debts of the fund; (iv) the restrictions on fund's promotion methods: Private SIFs are not permitted to do promotions towards general public through such public media as newspapers, magazines, radios, TV stations, internet or lectures, seminars or forums; and (v) the provisions governing fund's investment scope: Private SIFs may invest in publicly issued company stocks, bonds, fund units and other securities and derivatives specified by CSRC.

(a) 将私募基金纳入调整范围。作为本次修订的亮点，新《证券投资基金法》给予了私募基金明确的法律地位，并针对私募基金的特点设定了与公募基金不同的行为规范和制度安排：(i)引入合格投资者制度：规定私募基金应向合格投资者（具体标准将由国务院证券监督管理机构规定）募集，合格投资者累计不得超过二百人；(ii)确立登记备案制度：不同于公募基金，担任私募基金管理人仅需向基金行业协会登记（而毋需取得证监会的批准），基金募集完毕后基金管理人亦仅需向基金行业协会备案（规模达到规定标准的由基金行业协会向国务院证券监督管理机构报告）而毋需向证监会注册；(iii)规定无限连带责任基金份额持有人机制：私募基金可以在基金合同中约定由部分基金份额持有人作为基金管理人负责基金的投资管理活动，并在基金财产不足以清偿其债务时对基金财产的债务承担无限连带责任；(iv)限制推介方式：私募基金不得通过报刊、电台、电视台、互联网等公众传播媒体或者讲座、报告会、分析会等方式向不特定对象进行宣传推介；(v)规定投资范围：私募基金可以进行的证券投资包括买卖公开发行的股份有限公司股票、债券、基金份额，以及国务院证券监督管理机构规定的其他证券及其衍生品种。

Amended Regulations on Public SIFs. Modifications to regulations applicable to Public SIFs include, among others: (i) fund raising activities through public offerings will be subject to filling and registration requirements only (*instead of CSRC's prior approvals anymore*). As a result, the required underlying application materials and procedures are much simplified; (ii) Public SIFs are now permitted to invest in derivatives of securities specified by CSRC and any qualified Public SIFs may also invest in securities issued or underwritten by its fund manager, fund custodian and/or their controlling shareholders, ultimate controlling parties or other corporate entities having any other significant relations with its fund manager or fund custodian; (iii) supervisions and administrations on fund managers, senior management team members and other employees are tightened up (e.g., *insider trading is strictly prohibited and investment in securities by themselves, their spouses and other interested parties are restricted*). Provisions with respect to stabilizing shareholding structure of fund managers and enhancing their internal corporate governance are invited and the CSRC's administration authorities and measures against violations are

(b) 修改了公募基金监管的有关规定。新《证券投资基金法》对公募基金的部分规定作出了调整：(i)放宽管制：基金公开募集由核准制改为注册制，简化了申请材料和手续；(ii)扩大投资范围：增加了国务院证券监督管理机构规定的证券衍生品种，在符合相关规定的情况下基金财产可以买卖基金管理人、基金托管人及其控股股东、实际控制人或者与其有其他重大利害关系的公司发行的证券或承销的证券；(iii)进一步规范监管：加强了对基金管理人及其管理层、其他从业人员的管理（包括禁止内幕交易，限制本人及其配偶、利害关系人进行证券投资等），增加了稳定基金管理人股权结构和治理结构的规定，并细化、明确了国务院证券监督管理机构对于相关不合规情况的监管权限及措

further clarified and detailed.

施。

Other Major Amendments: include, among others, (i) tax burdens in relation to fund investments are specified to be borne by the fund unit holders and withheld by the fund manager or other tax withholders; and (ii) *Risk Reserve Fund* system for Public SIFs are further clarified.

(c) 其他重要修订：包括明确了基金财产投资的相关税收由基金份额持有人承担并由基金管理人或者其他扣缴义务人代扣代缴；进一步明确了公募基金风险准备金制度等。

CSRC Planned to Allow Qualified Asset Management Institutions to Manage Publicly-Raised Securities Investment Funds

证监会拟允许特定资产管理机构开展公募基金管理业务

To implement the newly amended *Securities Investment Fund Law*, CSRC promulgated the draft *Interim Provisions on the Management Business of Publicly-Raised Securities Investment Funds Conducted by Asset Management Institutions* for public comments on December 30, 2012 to allow qualified securities companies, insurance asset management companies and private securities fund management institutions to manage publicly-raised securities investment funds. The draft has set out detailed provisions on entry requirements, ratification of qualifications, administration of daily operations and supervision with respect to the aforesaid three types of institutions which intend to manage publicly-raised securities investment funds.

作为落实《证券投资基金法》修订精神的具体行动之一，证监会于2012年12月30日公布了《资产管理机构开展公募证券投资基金管理业务暂行规定（征求意见稿）》，拟允许符合条件的证券公司、保险资产管理公司、私募证券基金管理机构三类机构开展公募基金的管理业务。《征求意见稿》对上述三类机构开展基金管理业务的具体条件、资格核准、经营运作及监督管理等方面进行了规定。

CSRC Loosened Restrictions on Offshore IPOs of Onshore Enterprises

证监会“松绑”企业境外发行上市

On December 20, 2012, CSRC issued the *Regulatory Guidelines on Application Documents and Examination Procedures for Offshore IPOs of Joint Stock Companies* (the “Guidelines”), which took effect on January 1, 2013. The Guidelines repealed the *Circular on Certain Issues Concerning Applications by Enterprises for Overseas Listing* and lifted quite some requirements for onshore enterprises’ offshore IPOs. Some noteworthy points in the Guidelines include:

证监会于 2012 年 12 月 20 日颁布了《关于股份有限公司境外发行股票和上市申报文件及审核程序的监管指引》（“《指引》”）。《指引》废止了证监会《关于企业申请境外上市有关问题的通知》，从申请条件、审核程序等方面对境内企业申请境外上市进行了“松绑”。《指引》于 2013 年 1 月 1 日起实施，其主要内容包括：

(a) Requirements on the size and profitability of the underlying onshore enterprises and the scale of funds to be raised overseas are taken out: According to the Guidelines, CSRC will no longer impose any mandatory requirements on any onshore applicant for offshore IPO in respect of its net assets, after-tax profits or scale of funds to be raised overseas (*understandably the applicant shall meet IPO requirements imposed by the laws or regulatory authorities of the listing venue*).

(a) 取消了企业规模、盈利能力及集资金额门槛：根据《指引》，证监会对境内企业申请境外上市将不再有净资产、税后利润、筹资额等方面的硬性要求（但申请人需符合境外上市地的上市条件和要求）。

(b) Required application documents and approval procedures are simplified and further clarified: CSRC simplified the required application documents and removed the pre-consulting and reviewing procedures. Applicants now may submit their preliminary IPO application to offshore stock exchange or regulatory authority immediately after they receive acceptance notices from CSRC. CSRC will no longer carry out any substantive review and examination before issuing its notice of acceptance.

(b) 简化并明确了申请文件及审核程序：(i)证监会对申请文件进行了明确和简化；(ii)取消了前置征询程序：申请人收到中国证监会的受理通知后，即可向境外证券监管机构或交易所提交发行上市的初步申请，而证监会出具受理通知前将不再进行实质性审核。

(c) Subsequent regulation requirements are specified: The applicant is required to submit a written report to CSRC for filing within 15 working days after it completes offshore IPO (*including switching board within the same stock exchange*).

(c) 明确了后续监管要求：根据《指引》，申请人应在完成境外发行股票和上市（包括在同一境外交易所转板上市）后的 15 个工作日内，就境外发行上市的有关情况向证监会提交书面备案报告。

LABOR LAW / 劳动法

China Amended *Labor Contract Law* to Further Regulate Labor Dispatch Arrangements

人大常委会颁布修订后的《劳动合同法》，严管劳务派遣

On December 28, 2012, the NPC Standing Committee circulated *the Decisions to Amend the PRC Labor Contract Law*. The amended Labor Contract Law will come into force from July 1, 2013. Being general consistent with the draft amendments issued by the NPC Standing Committed for public comments last year (*see August 2012 issue of our China Regulatory Updates for a brief instruction thereof*), the revised Labor Contract Law are focused on further regulating labor dispatch or secondment activities, which include, among others: (a) requiring any entity engaged in labor secondement business to obtain an administrative permit thereof first and raising thresholds of minimum registered capital amount for such an entity; (b) specifying that labor secondment arrangement can only be used as a supplement to directly hired employees and the ratio of seconded employees to all employees in any employer should not exceed the permitted percentage to be specified by the labor bureau of the State Council; (c) emphasizing that the seconded employees should be equally paid; and (d) enhancing administrative penalties on violations.

2012 年 12 月 28 日，全国人大常委会发布了《关于修改<中华人民共和国劳动合同法>的决定》（“《决定》”）。修订后的《劳动合同法》将于 2013 年 7 月 1 日起实施，加强和完善有关劳务派遣的监管及违规处罚系本次修订的焦点，其内容与人大常委会此前公布的草案基本一致（*本所 2012 年 8 月刊《中国立法更新》对该草案进行过介绍*），包括：(a)明确了经营劳务派遣业务需以获得相应的行政许可为前提，并提高了最低注册资本的门槛；(b)明确了劳务派遣用工的性质，即只能作为劳动合同用工的补充，并要求用人单位将劳务派遣用工的数量控制在规定的比例范围内（具体比例有待国务院劳动行政部门予以明确）；(c)强调了同工同酬的要求；及(d)加重了违规行为的行政处罚力度。

QFII

SAFE Revised Certain Forex Administration Rules for QFIIs

SAFE 修改 QFII 外汇管理的相关规定

On December 7, 2012, the State Administration of Foreign Exchange (“SAFE”) released the revised *Provisions on Foreign Exchange Administration of Domestic Securities Investment by*

2012年12月7日，国家外汇管理局发布了对《合格境外机构投资者境内证券投资外汇管理规定》（“《规定》”）进行修

Qualified Foreign Institutional Investors, which took effect on the same day. Some major points in those revised provisions include:

(a) Lifted investment cap for certain types of QFIIs: As a principle, the aggregate investment quota for any single QFII shall not exceed USD1 billion, but certain institutional investors such as sovereign wealth funds, central banks and monetary authorities may be treated as exceptions.

(b) Amended QFII forex remittance administration rules: (i) the aggregate amount of funds (*including investment principal and proceeds*) channeled by any QFII out of China per month shall not exceed 20% of its total onshore assets as of the end of the preceding year; (ii) formalities for capital inflow or outflow of any open-ended Chinese fund will be carried out on weekly basis rather than monthly basis and no forex filing or approval is ever needed for any net subscription or redemption. But the aggregated net amount of capital outflow per month shall not exceed 20% of the fund's total onshore assets at the end of the preceding year; and (iii) remittance of any cumulated investment proceeds by QFIIs (*other than open-ended Chinese funds*) out of China will no long be subject to SAFE approvals. Instead, the custodian banks may settle the relevant forex formalities on behalf of the QFIIs directly.

订的公告，修订内容自公告之日起实施。修订后的《规定》对QFII的投资额度、资金汇兑及账户管理等方面作出了调整，主要包括：

(a) 放宽了部分QFII投资额度的上限：原则上，单个QFII申请的投资额度累计不得超过等值 10 亿美元，但主权基金、央行及货币当局等作为机构投资者时可作例外处理。

(b) 调整了QFII汇兑管理规定：(i)QFII每月汇出资金（包括本金和收益）总额不得超过其上年底境内总资产的 20%；(ii)开放式中国基金资金的汇入、汇出手续由按月办理调整为按周办理，且发生净申购或净赎回时毋需再进行外汇备案或核准，但每月累计净汇出资金不得超过上年底基金境内总资产的 20%；(iii)除开放式中国基金外的其他QFII如需汇出已实现的累计收益，可由托管人直接办理，毋需再由托管人所在地外管局审核。

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