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"A basic element of any successful life is to find people you like and to do things you like together. / 成功人生的一个要素是：找到你喜欢的人，并在一起做喜欢做的事。" - Richard Xu

PRIVATE EQUITY / 私募股权投资

PE Funds Encouraged to Invest in PRC Insurance Companies 保监会发文鼓励PE投资中资保险公司

On April 24, 2013, the China Insurance Regulatory Commission ("CIRC") promulgated the *Circular on Issues Concerning Regulation of Investment and Shareholding of Equity Investment Enterprises in the Form of Limited Partnership in Insurance Companies* (the "Circular") and the scripts of a Q&A session in a related press conference, allowing both domestic and foreign invested PRC equity investment enterprises established in the form of limited partnership ("PE funds") to invest in insurance institutions with less than 25% foreign shares (the "Chinese Insurance Companies") such as insurance group or holding companies, property insurance companies and life insurance companies.

According to the Circular, the prerequisites for a PE fund to invest in any Chinese Insurance Company include, among others, (i) the PE fund is legally established pursuant to the *PRC Partnership Law* and has duly filed with the National Development Regulation Commission or its provincial counterparts as the case may be; (ii) for the purpose of investment in the Chinese Insurance Companies the PE fund should fully disclose its source of funds and background information of all its LPs; and (iii) the target Chinese Insurance Company already has a controlling shareholder or an ultimate controlling party and has established balanced shareholding structure as well as good and stable corporate governance.

Based on the principle of "gradual opening-up with controllable risks", the Circular stipulates that in a Chinese Insurance Company, the equity ratio of any single PE fund shall not exceed 5% and all PE funds shall not exceed 15%, while no PE fund should become the largest shareholder, controlling shareholder or ultimate controlling party thereof. Since CIRC believes that PE funds, as financial investors, usually are unable and unwilling to provide technical and managerial support to insurance companies, and also in order to prevent certain shareholders of insurance companies from employing PE fund as a cover to circumvent CIRC's regulations and consequently affecting the effectiveness of corporate governance, the Circular articulates that the PE funds shall not participate in the management of insurance companies.

The Circular is deemed to generally encourage PE funds to invest in Chinese Insurance Companies. But the requirements (such as that the PE fund shall fully disclose its source of funds and background of LPs and shall not involve in the management of portfolio Chinese Insurance Companies) may however affect their enthusiasms.

2013年4月24日, 保监会公布了《关于规范有限合伙式股权投资企业投资入股保险公司有关问题的通知》(“《通知》”)

和相关答记者问, 允许内外资有限合伙制股权投资企业(PE)投资入股中资保险公司(即, 外资股东出资或持股比例低于25%的保险机构, 包括保险集团(控股)公司、财险及寿险公司)。

根据《通知》, PE入股中资保险公司的条件包括: 该PE系依照中国《合伙企业法》设立、并已在国家发改委或省级有关部门完成备案手续, 为投资中资保险公司之目的须如实、完全披露其资金来源和合伙人的背景情况; 被投资的中资保险公司存在控股股东或者实际控制人, 且股权结构合理、公司治理良好、稳定等。

按照“风险可控, 逐步放开”的原则, 《通知》规定, 在任一中资保险公司中, 单个PE的出资或者持股比例不得超过5%, 多个PE合计不得超过15%, 且不得成为第一大股东、控股股东或者实际控制人。鉴于保监会认为PE作为财务投资人一般难以以为保险公司提供技术和管理支持, 其主观上也缺乏参与经营管理的动力, 同时为防止个别股东借PE的形式规避保监会有关股权管理的监管规定、进而影响公司治理的有效性, 《通知》还明文规定PE不得参与保险公司的经营管理。

尽管《通知》总体上是鼓励PE投资保险公司, 但要求PE对LP和资金来源作完全披露, 并且不允许PE介入经营管理, 可能会挫伤部分PE的投资热情。

ANTI-MONOPOLY / 反垄断

MOFCOM Seeks Comments on Proposed Criteria for Simple Cases in Concentration of Business Operators

商务部就经营者集中申报简易案件标准公开征求意见

The PRC Ministry of Commerce ("MOFCOM") recently published the draft *Interim Regulations on Standards for Simple Cases in Concentration of Business Operators* (the "Draft") for public comments. The Draft formulated certain criteria pursuant to which a case of concentration may be classified as simple case and thus is expected to be subject to simplified and shortened anti-monopoly review process. Such criteria include, among others, where a horizontal concentration applies, the aggregate market share of the parties concerned in all horizontal markets is less than 15%, or there a vertical concentration appears, the aggregate market share of the parties concerned in all vertically related markets is less than 25%.

Currently under the applicable PRC anti-monopoly rules qualified concentrations of business operations are all subject to ordinary anti-monopoly review process by MOFCOM which consists of a preliminary review and a further examination (including a potential extension) with up to 180 days might be consumed after the underlying filing materials are formally accepted by MOFCOM. The Draft is therefore viewed as one of MOFCOM's efforts to save administrative resources and reduce applicants' filing costs. However, the Draft has only set out the standards for identifying simple cases of concentrations and MOFCOM is still expected to promulgate rules for the simplified review procedure itself in terms of application materials required,

the shortened time limits for anti-monopoly filing and review, among others. It is also noteworthy that the Draft empowered MOFCOM with some discretions to re-classify a concentration case into ordinary case which was previously labeled as simple case under certain circumstances (e.g., where any third party claims that the concentration has or may have the effect of eliminating or restricting competition and provides relevant evidences, or MOFCOM perceives material change in the proposed concentration transaction or the competition status in the relevant market).

商务部近期就《关于经营者集中简易案件适用标准的暂行规定(征求意见稿)》公开征求意见。根据该《征求意见稿》, 符合一定标准的经营者集中案

件（比如在同一相关市场，所有参与集中的经营者所占的市场份额之和小于15%，或者存在上下游关系的参与集中的经营者，在上下游市场所占的份额均小于25%等），有望缩短反垄断申报和审查的时间。

目前中国反垄断法下的经营者集中审查只有普通程序，分为初步审查和进一步

审查两个大的阶段，审查期限自商务部正式受理后，最长可达180天。《征求意见稿》被视为是商务部为节约行政资源、降低企业申报成本所作的努力之一，不过该稿只规定了可以适用简易程序的案件的的标准，商务部也未就简易程序本身（比如审查期限等）作出任何规定。此外，根据《征求意见稿》，商

务部在一定情形下（比如第三方主张经营者集中具有或可能具有排除、限制竞争效果并提供相关证据，或商务部发现集中交易情况或有关市场竞争状况发生重大变化等），有权撤销对简易案件的认定，有较大的自由裁量权。

SECURITIES / 证券

PBOC Promulgated Additional Guidelines for Onshore Securities Investment by RQFIs 央行就RQFII境内证券投资发布进一步通知

On May 2, 2013, the People's Bank of China ("PBOC") promulgated the *Circular on Issues Concerning the Implementation of Pilot Measures for Onshore Securities Investment by RQFIs* (i.e., *RMB Qualified Foreign Institutional Investors*) (the "Circular") which became effective upon its issuance. The Circular provided guidelines for RQFIs in terms of bank account opening, portfolio disposition, application for entering into inter-bank bond market and etc.

So far the three central PRC ministries which had formulated the *Pilot Measures for Onshore Securities Investment by RQFIs* have all issued

their respective implementing rules for the pilot program (*a brief introduction of the CSRC rules could be found in our April 2013 issue of China Regulatory Updates*). Some insiders believe that after a spokesperson of CSRC mentioned in the end of April that the RQFII quota of some RMB200 billion would be released in the near future, the publication of this PBOC Circular signaled quite strongly that the approval process for the RQFII quota will be resumed soon after a two-month suspension.

中国人民银行（“央行”）于2013年5月2日发布了《关于实施<人民币合格境外机构投资者境内证券投资试点办法>

有关事项的通知》（“《通知》”），《通知》自发布之日起实施。《通知》对有关人民币合格境外机构投资者（“RQFII”）银行账户开立、总体投资比例和品种、进入银行间债券市场申请程序等事项作出了进一步规定。

至此，制定《人民币合格境外机构投资者境内证券投资试点办法》的三部门证监会、央行及外汇局已分别就实施该试点办法作出了具体规定（其中证监会的相关规定可以参见本所2013年4月刊《中国法律更新》）。有业内人士认为，继证监会发言人4月底表示2,000亿元人民币RQFII审批工作近期将启动后，本次央行发布《通知》是RQFII审批重启的标志性信号，暂停两个多月的RQFII额度审批即将重新开始。

TAXATION / 税务

New Trends in Taxation on Non-Resident Entities' Indirect Transfer of Onshore Chinese Investments at Offshore Level

非居民企业境外间接转让中国境内公司股权征税新动向

The local Jiangsu tax bureau has recently publicized the *Notice Regarding the Collection of Enterprise Income Tax from Acquisition by Wal-Mart of the Non-Resident Enterprise Trust-Mart* and two attachments thereof (i.e., the *Reply of the State Administration of Taxation ("SAT") to Certain Issues Concerning Wal-Mart's Acquisition of Trust-Mart's Shares* and the *Plan of Collecting Enterprise Income Tax from Wal-Mart's Acquisition of the Non-Resident Enterprise Trust-Mart*; collectively the "Taxation Documents"). The release of these Taxation Documents to our knowledge is the first publication of official documents by PRC tax authorities with respect to the application of the *Circular of SAT on Strengthening the Administration of Enterprise Income Tax on Gains Derived from Transfer of Equity of Non-Resident Enterprises* ("Circular 698") on the indirect transfer of onshore Chinese investments by non-resident entities at offshore level (while previously only a few similar cases were briefly introduced).

According to the Taxation Documents, SAT believes that the share transfer of Bounteous Company Limited, a BVI company, from Bounteous Holding Company Limited to a BVI subsidiary of Wal-Mart is virtually a transfer of some 65 onshore Chinese Trust-Mart entities that conduct supermarket business, therefore, pursuant to the *PRC Enterprise Income Tax Law* and the Circular 698, the seller is subject to PRC tax obligations and should complete tax filings for the concerned transaction with each of the local tax bureaus having jurisdiction over the 65 Trust-Mart entities respectively. However, the Taxation Documents only simply stated SAT's judgment and decision but did not explain how such concepts as "abusing organizational form" and "reasonable business purpose" that were not clarified under Circular 698 have been interpreted by SAT in this Wal-Mart case or how the underlying offshore transaction has been looked through based on its "economic substance".

It is noteworthy that according to the Taxation Documents, prior to the closing of the relevant Wal-Mart transaction, the National Tax Bureau of Shenzhen Futian District has issued a *Notice of Taxation* to Wal-Mart under SAT's direction, pursuant to which Wal-Mart has retained certain amount of the proposed purchase price in an offshore escrow account for the purpose of withholding income tax. In view of this development, PRC local tax authorities may become more aggressive in monitoring potential indirect offshore sales transactions involving onshore entities and withhold (presumably by requiring the purchasers to do so) the gain tax thereof going forward (according to the reports before this Wal-Mart case, it was primarily the seller itself who would be obliged to file and pay the tax to the local tax bureau after the transaction is closed rather than the purchaser to withhold any tax before closing).

江苏省地方税务局近日公布了《关于对沃尔玛收购好又多非居民企业所得税征税的通知》及两个附件（包括《国家税

务总局关于沃尔玛收购好又多股权事项的批复》和《沃尔玛收购好又多非居民企业所得税征税方案》；统称“征税文件”）。该等征税文件应该是中国税务主管部门就非居民企业境外间接转让中国境内公司股权适用“698号文”（即《国家税务总局关于加强非居民企业股权转让所得企业所得税管理的通知》）首次对外公布官方文件（以往只是在公布过一些案例介绍）。

根据征税文件，国税总局认为，BOUNTEOUS HOLDING COMPANY LIMITED在境外向沃尔玛转让BVI公司BOUNTEOUS COMPANY LIMITED股

权的实质是转让中国境内65家经营超市业务的“好又多”公司的股权，因此，根据中国《企业所得税法》及698号文的规定，其应就相关交易分别到境内各家好又多公司所在地的主管税务局申报和缴纳所得税。不过征税文件只简单记载了认定结果和依据，并未就“滥用组织形式”、“合理的商业目的”等698号文未予明确的概念在本案中如何解释适用作出说明，也没有介绍国税总局是如何按照经济实质重新对有关交易定性的。

值得注意的是，根据征税文件，深圳市福田区国税局在有关交易交割前就已经

根据国税总局的要求，向受让方沃尔玛出具了《税务事项告知书》，沃尔玛也配合扣留了部分交易款项作为备付税款存放于境外的监管账户。由此看来，如果税务主管部门提前监测到拟进行的境外间接转股交易，则受让方（尽管也是非居民企业）有可能被要求履行代扣代缴义务（沃尔玛之前公开的案例基本上都是转让方事后纳税而不是受让方先行代扣代缴），而地方税务部门也可能基于本税案，对涉及其辖区内企业的境外间接转股交易加强监控，并提前介入。

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