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China Regulatory Updates

Oct & Nov 2012

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FOREIGN INVESTMENT / 外商投资

MOFCOM Issued New Provisions on FIE Capital Contributions in the Form of Equity

商务部实施有关外商投资企业股权出资的新规

The *Interim Provisions of MOFCOM on Equity Contribution Involving Foreign-Invested Enterprises* (the "Interim Provisions") has taken effect as of October 22, 2012. This new rule has provided in quite some details the requirements and procedures for domestic and foreign investors to establish or change FIEs by making capital contributions in the form of their equity interest in onshore PRC enterprises.

10 月 22 日，《商务部关于涉及外商投资企业股权出资的暂行规定》（"《暂行规定》"）开始实施。该《暂行规定》就境内外投资者以其持有的中国境内企业的股权作为出资设立及变更外商投资企业的要求和程序等作出了具体规定。

According to the Interim Provisions, the equity to be injected to the target company as capital contribution shall be legally transferable with clean ownership title and complete rights thereto, and the underlying enterprises shall be legally incorporated and validly existing. Under one of the following circumstances, for example, the equity shall not be used for capital contribution to FIEs: (i) the registered capital of the underlying enterprise has not been paid up in full; (ii) the equity has been pledged to a third party or attached as a result of any law enforcement action; (iii) the equity is not allowed to be transferred according to the articles of association or shareholders agreement of the underlying enterprise; or (iv) the equity falls within the scope of equity types which are not permitted by the Interim Provisions to be used for capital contributions (e.g., equity in real estate enterprises, foreign-invested investment companies or foreign-invested venture capital enterprises).

根据《暂行规定》，用作出资的股权应当权属清晰、权能完整，依法可以转让；出资股权所属的企业（"股权企业"）应当合法设立并有效存续。如果存在股权企业的注册资本未缴足，拟用于出资的股权已被设立质权或已被依法冻结，股权企业的公司章程或股东协议规定该等股权不得转让，或者根据《暂行规定》属于不得用于出资的股权的种类（比如房地产企业、外商投资性公司、外商投资创业投资企业的股权）等情形的，则不得用于出资。

On equity valuation, the Interim Provisions requires that the equity used for capital contribution shall be evaluated by a legally established PRC domestic appraisal firm. The parties involved may negotiate based on the assessed equity value to determine the equity price and how much of it should be booked as the registered capital of the target company. To avoid fraudulent capital contribution, the booked value of the equity shall not exceed its assessed value. In addition, the Interim Provisions repeated PRC company law requirements by emphasizing that the aggregate amount of the equity and all other in-kind capital contributions to the target FIE company shall not exceed 70% of its registered capital.

在股权作价方面，《暂行规定》要求用作出资的股权须经依法设立的境内评估机构评估。股权出资人与被投资企业的股东及其他投资者可以在股权评估的基础上协商确定股权作价金额（即各方共同认定的用于出资股权的交易作价）及股权出资金额（即计入被投资企业注册资本的部分），其中股权出资金额不得高于股权评估值，以防出资不实。此外，与《公司法》关于现金出资比例的要求相一致，《暂行规定》明确了被投资企业全体股东的股权出资金额和以其他非货币财产作价出资金额之和，不得高于被投资企业注册资本的70%。

Procedurally, the Interim Provisions specified the approval authority and process and application documents required for MOFCOM review in equity contribution cases. A noteworthy point in this connection is that the establishment and capital increase of FIEs involving equity contributions will be reviewed and approved by provincial or central MOFCOM office which is different from the case of an ordinary FIE establishment or capital increase where the MOFCOM approval authority is conferred in accordance with the industry and total investment amount of the underlying FIEs. On the application documents, the Interim

此外，《暂行规定》对于主管审批部门、具体流程、当事人需要提供的文件等也做出了较详细的规定。其中比较值得关注的是，以往外商投资企业新设和增资主要是依据企业所在的行业及其投资总额来确定审批层级，而《暂行规定》将涉及外商投资企业股权出资的企业新设和增资的审批权都交给了省级以上商务主管部门。在需提交的申请材料方面，《暂行规定》要求当事方提交中

Provisions requires submission of a legal opinion to be issued by certified PRC lawyer with respect to the compliance status of the equity, the underlying enterprise and the target company so concerned.

国律师就出资股权、股权企业及被投资企业等符合该规定列举的相关要求而出具的法律意见书。

PE INVESTMENT /私募股权投资

The Segregated Account Business of FMCs Permitted to Enter PE Investment

基金管理公司专户业务获准进入 PE 领域

The revised *Trial Measures for Asset Management Business of Fund Management Companies for Specific Clients* (the "Trial Measures") has become effective as of November 1, 2012. It has made quite some improvements to its old version, among which the most noteworthy points include to permit the fund management companies to invest in equity or debt instruments that are not traded in stock exchange or other property rights permitted by CSRC with assets in their segregated account business. As a result, equity investment in unlisted companies traditionally dominated by PE funds will now embrace a new comer.

证监会修订后的《基金管理公司特定客户资产管理业务试点办法》("《办法》")于今年 11 月 1 日开始实施。《办法》从多个方面对原规定进行了完善和修改，其中最引人注目的是允许基金管理公司将其专户业务中的资产用于未通过证券交易所转让的股权、债权等领域的投资。由此，原本由私募股权投资基金主导的未上市公司股权投资领域将有新的血液注入。

The so-called "*segregated account business*" of fund management companies refers to specific asset management services provided by them for a single client or multiple clients. The business is featured with some PE elements, but before the Trial Measures took effect, the assets in such business can only be used to invest in public products in secondary market such as stocks, bonds and securities investment funds. The Trial Measures also specified procedural matters such as limitation on the number of participants, size of assets, sales channels and filing requirements of any single asset management program.

基金管理公司的"专户业务"是指其为单一客户或为特定的多个客户办理的特定资产的管理业务，其本身即带有私募的色彩，但该等专户业务中的资产此前只能用于股票、债券、证券投资基金等二级市场公开产品的投资。在操作层面，《办法》就参与单个资产管理计划的人数上限、资产规模、销售渠道、备案要求等作出了规定。

Compared with typical PE funds, the private placement service of asset management companies has some advantages. It is more flexible on limitation of participant numbers and involves relatively lower risk for investors. But on the other hand, it faces more regulations and restrictions during fundraising and investment process. Since the asset management companies are not that familiar with the practice in private equity and debt investments, it will take some time for them to explore in the PE field, during which the regulatory authorities will also face many challenges. Detailed implementing rules are expected to be further promulgated.

与私募股权投资基金相比，基金管理公司从事的私募业务具有参与人数的上限弹性较大、投资者风险相对较低的优点，但其在募资及投资的程序上将受到较多的监管和限制。由于基金管理公司对于股权、债权等领域的私募投资实践还不够熟悉，其真正进入 PE 领域将有一个逐渐探索的过程，而在这个过程中监管部门也将面临许多挑战，业内人士预计规管相关操作细节的法规将会进一步出台。

SECURITIES /证券

CSRC Released Rules on Unlisted Public Companies to Accelerate Formation of Nationwide OTCBB Market

非上市公众公司监管办法出台　场外交易市场建设提速

In early October, 2012, CRSC promulgated the *Measures for Supervision and Administration of Unlisted Public Companies* (the "Measures") which indicates that unlisted public companies have become subject to statutory regulations. The Measures will take effect on January 1, 2013.

10 月上旬，证监会发布了《非上市公众公司监督管理办法》（"《办法》"），标志着非上市公众公司的监管正式纳入法制轨道。该《办法》将于 2013 年 1 月 1 日起施行。

According to the Measures, a public company is a joint stock company having more than 200 shareholders as a result of private placement or transfer of shares, or a joint stock company with its shares transferred to general public in open ways. Any public company that is not listed in any stock exchange would be an unlisted public company. For example, Huawei and Wahaha would fit into this category among the well-known PRC companies.

根据《办法》的规定，公众公司是指向特定对象发行或转让股票导致股东累计超过 200 人，或以公开方式向社会公众公开转让股票的股份有限公司。如果符合前述条件之一又未在证券交易所上市交易，则为非上市公众公司。在知名企业中，华为和娃哈哈是两家典型的非上市公众公司。

Unlike regulatory requirements on listed companies by CSRC, the Measures did not set out any financial thresholds or profitability requirements for unlisted public companies to issue shares. CRSC will neither establish any department to specifically regulate unlisted public companies nor adopt any sponsor system for them. Unlisted public companies can only issue shares through private placements and no more than 35 investors (*excluding any existing shareholders of the company*) may be targeted in each of their private placement efforts.

《办法》在非上市公众公司发行股票的准入标准上不设财务门槛，也没有盈利指标的要求。证监会不为非上市公众公司设置类似发审委的机构进行专门监管，也不实行保荐制。非上市公众公司只能定向发行，不得公开发行，并且每次定向发行的投资者人数，除公司原股东外，合计不超过 35 人。这些都与证监会对上市公司的监管有较大区别。

In addition, the Measures has made some further amendments to the *Draft Measures for Supervision and Administration of Unlisted Public Companies* released by CSRC for comments in June, 2012 (*see our China Regulatory Updates for July 2012 for a brief introduction thereof*) in the hope to facilitate technology and innovation oriented companies to maintain their key employees through incentive plans and to enable companies with large-scale assets to realize small-scale financings through private placements.

此外，与证监会之前公布的《非上市公众公司监督管理办法（征求意见稿）》（*我所 2012 年 7 月刊《中国立法更新》对该征求意见稿有过介绍*）相比，正式出台的《办法》根据科技型、创新型企业和大型企业的特殊情况作出了一些调整，以便科技型、创新型企业通过激励和约束机制维持核心员工，以及资产规模较大的公司进行小额定向融资。

The promulgation of the Measures is deemed to be an important signal that the formation of a nationwide OTCBB market has been put into the fast track. CSRC further indicates that it will release more supporting rules for the Measures with respect to public transfers, private placements, transfers to selected investors, and detailed thresholds for accredited investors, among others.

《办法》的正式发布被认为是全国性场外交易市场建设提速的重要信号。证监会表示，其将在公开转让、定向发行、定向转让、投资者准入门槛等方面推出相关配套规则。

CSRC Formed Specific Department to Supervise ChiNext-Listed Companies

证监会设立上市公司监管二部　专门负责创业板监管

After the establishment of the ChiNext Offering Administration Department in late 2009, CSRC further adjusted its organs by establishing Supervision Department No. 2 for Listed Companies to focus on supervision of ChiNext-listed companies. The existing Supervision Department for Listed Companies was changed to Supervision Department No. 1 for Listed Companies to oversee companies listed in main board as well as small and medium-sized enterprise board.

继 2009 年年底设置创业板发行监管部之后，今年 10 月，证监会对其内设机构作出进一步调整，设立上市公司监管二部，专门负责创业板上市公司的监管工作。同时，原上市公司监管部更名为上市公司监管一部，负责主板、中小板上市公司的管理。

The Principal duties of Supervision Department No. 2 for Listed Companies include, among others, formulation of administrative regulations and implementing rules regarding ChiNext-listed companies, assistance with relevant government authorities to supervise the issuance of stocks and bonds by ChiNext-listed companies, and coordination with relevant government agencies on delisting of ChiNext-listed companies.

监管二部的主要职责包括：拟订监管创业板上市公司的规则、实施细则，协助有关部门监管创业板上市公司发行股票、债券，协调有关机构处理创业板上市公司退市等。

INSURANCE / 保险

CIRC Started to Monitor Significant Equity Investments by Insurance Companies

保监会对保险公司重大股权投资实行报审制

In late September, 2012, CIRC promulgated *the Explanations on the Report/Application Items Concerning Equity Investments and Real Property Investments by Insurance Companies,* pursuant to which the insurance companies are now required to apply for CIRC's prior approval on any significant equity investment and to report to CIRC of other equity investments or real estate investments that have reached certain criteria after such investments are made. Pursuant to several CIRC notices promulgated before, the term *significant equity investment* refers to investment by insurance companies in non-insurance financial institutions or other enterprises engaged in insurance-related business for a controlling position.

9 月下旬，保监会公布《关于保险公司投资股权和不动产报告（申请）事项的说明》，要求保险公司开展重大股权投资活动之前应当报保监会核准，而开展其他股权投资或规模达到有关标准的不动产投资之后，向保监会报告。根据保监会之前颁布的相关通知，所谓“重大股权投资”，是指对非保险类金融企业或者与保险业务相关的其他企业实施控制的投资行为。

In addition, CIRC clarified the scope of report/application documents and key terms that should be included therein so as to keep the investment by insurance companies in PE funds, direct equity interest and real property generally in good order.

同时，保监会还明确了保险公司投资股权投资基金、直接投资股权和不动产所需提交的报告或申请文件及其应包含的要点，以便相关工作的规范。

CIRC Introduced New Rules to Speed up Reforms of Investments with Insurance Funds

保监会出台多部新规　深化保险资产投资运用改革

At the end of October, 2012, CIRC promulgated some six new rules ("the New Rules") to further regulate the management and outbound investments with insurance funds as well as investments with insurance funds in financial products. This is the second batch of CIRC new rules in respect of the management and application of insurance funds since mid-July this year. It is reported that some additional administrative rules are yet to be released.

10 月底，保监会连续发布了 6 项新政策，在保险资产的管理、境外投资和对金融产品的投资等方面作出了比较全面的规定。这是自今年 7 月中旬以来，保监会出台的第二批有关保险资产管理和运用的新政策。根据相关报道，还有部分新政策也将陆续颁布。

In terms of the management of insurance funds, the New Rules broadened the source of funds to be managed by insurance fund management companies. They would allow pension funds, enterprise annuity funds, housing funds and other funds of qualified investors who are capable of recognizing and taking risks to become source of insurance funds.

在资产管理方面，本轮新规拓宽了保险资产管理公司受托管理的资产的来源，养老金、企业年金、住房公积金等资金和能够识别并承担相应风险的合格投资者的资金均被纳入其中。

In respect of outbound investments by insurance companies, the New Rules set out qualification requirements for insurance companies, onshore or offshore investment agents and targeted PE funds, among others. The New Rules also expanded the destinations for insurance fund investments from Hong Kong and Macao to some additional 25 developed countries and 20 emerging markets.

在境外投资方面，本轮新规规定了保险公司进行境外投资时作为委托人的资质条件，境内外受托人、托管人及拟作为投资对象的股权投资基金的资质条件等，并将保险资产境外投资的地域范围由原先的港澳地区扩展到 25 个发达国家和 20 个新兴市场国家。

On investments by insurance funds in financial products, the New Rules broadened the scope of business of insurance fund management companies and specified the scope of financial products that may be purchased by insurance funds. Meanwhile, the New Rules also provided quite detailed requirements on qualifications of insurance funds, trading professionals, operating procedures and etc. for investments in financial derivatives, stock index futures and infrastructure bonds.

在投资金融产品方面，本轮新规总体上拓宽了保险资产管理公司的业务范围，也明确了保险资产可以投资的金融产品的范围。同时，新政策分别对保险资产投资金融衍生品、股指期货和基础设施类债券的资质条件、人员要求、操作流程等方面作出了具体规定。

DISPUTE RESOLUTIONE / 争议解决

China Issued Second Amendments to Its Civil Procedural Law

人大常委会对《民诉法》进行第二次修订

The Standing Committee of the PRC National People's Congress promulgated the further revised PRC Civil Procedural Law (the "CPL") in September, 2012, which is the second round of amendments since its first amendments in 2007. The revised CPL is scheduled to take effect on January 1, 2013. In general, this round of amendments is focused on optimizing the civil litigation system and has introduced such new concepts as injunctive orders, *pro bono* litigation, and etc. Some highlights of this round of amendments include:

2012 年 9 月，全国人大常委会发布了新修订的《中华人民共和国民事诉讼法》（"新《民诉法》"）。新《民诉法》将于 2013 年 1 月 1 日起实施。这是继 2007 年首次修订后，全国人大常委会进行的第二次修改。与现行民诉法相比，该次修订主要是进一步完善了诉讼机制，同时也新增了公益诉讼、行为保全等机制，具体如下：

- Optimizing litigation system: To improve the civil litigation system, the revised CPL has (i) provided more flexibility for parties to decide how they would resolve their disputes on contracts or property rights, (ii) specified that disputes arising from company establishment, recognition of shareholder ownership, profit distribution and company dissolution should be governed by courts in the jurisdiction where the company is located, (iii) adopted electronic data as source of evidences, (iv) unified criteria for determining date of delivery through electronic means, (v) introduced expert testimony system in court proceedings, (vi) improved court judgment filing and announcement system, and (vii) enhanced enforcement of court judgments, among others.

- 完善诉讼机制：扩大了合同及其他财产纠纷案件的协议管辖范围，明确因公司设立、确认股东资格、分配利润、解散等纠纷提起的诉讼由公司住所地人民法院管辖，新增电子数据作为证据种类，统一电子送达日期的判断标准，增加专家出庭，完善裁判文书公开制度及加强强制执行等。

- Introducing injunctive orders and *pro bono* litigations: The revised CPL allows competent institutions or organizations to bring actions against environmental pollutions, tortuous acts against consumers or other public interests. To facilitate court judgment enforcement and mitigate potential damages to the parties concerned, the revised CPL introduced the Chinese version of *injunctive orders* which would allow a court, at its own discretion or upon request of a party, to order the

- 增加公益诉讼及行为保全：对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，新《民诉法》允许法律规定的有关机关和组织向法院提起诉讼。而为避免判决难以执行或给当事人造成其他损害，新《民诉法》引入了行为保全制度，允许法院根据一方当事人的

other party to take or not to take certain actions. In addition, the validity term of property preservation or injunctive orders prior to litigation or arbitration has been extended from 15 days to 30 days.

请求或经其自行判断，责令另一方当事人作出一定行为或禁止其作出一定行为。与此同时，诉前和仲裁前保全的有效期从 15 日延长至 30 日。

It is also noteworthy that the revised CPL allows court to impose fines or detention on parties who infringed other parties' legitimate rights or interests or attempted to escape from obligations by taking advantage of legal proceedings. For any *Affected Third Parties* who failed to participate in court proceedings due to reasons that are not attributable to them, if there is evidence to prove that the binding judgment is incorrect and may affect their civil rights or interests, such *Affected Third Parties* will be entitled to bringing an action to rescind the judgment within 6 months after they have learned or should have learned such infringement.

此外，值得注意的是，就当事人或被执行人利用法律程序侵害他人合法权益或逃避义务履行等违法行为，新《民诉法》明确规定法院可以依情节轻重判处罚款、拘留等制裁措施。对于因不能归责于其本人的事由而未参加诉讼的第三人，如果有证据证明生效判决、裁定或调解书有错误而导致其民事权益受到损害的，该第三人有权自知道或应当知道该等损害之日起的 6 个月内，提起撤销之诉。

CIETAC Established A Hong Kong Chapter

CIETAC 成立香港仲裁中心

It seems that the pending dispute between CIETAC and its Shanghai and Shenzhen chapters (*which dispute was briefly introduced in our China Regulatory Updates for September 2012*) did not affect its expansion. In late September, 2012, CIETAC announced that it has launched a new arbitration center in Hong Kong which will be its first arbitration center established outside of mainland China. It will also be an addition to the existing two arbitration institutions already operating in Hong Kong, i.e., the HKIAC and ICC's Asia presence.

CIETAC 与其上海分会和华南分会之间悬而未决的纷争似并未影响其发展扩张（*我所 2012 年 9 月刊《中国立法动态》对该纷争有过简要介绍*）。今年 9 月下旬，CITEAC 宣布在香港设立了仲裁中心，这是其在中国大陆以外设立的首个仲裁中心，也使得香港在已有的香港国际仲裁中心、国际商会国际仲裁院秘书局亚洲事务办公室的基础上，又多了一个仲裁机构。

It is reported that CIETAC's Hong Kong arbitration center is formed to meet high-end clients' demands for dispute resolution by utilizing Hong Kong's mature arbitration legal system, which in turn may help Hong Kong provide more choices of arbitration services to various market participants. Detailed rules concerning this arbitration center's case acceptance, administration and etc. are yet to be released by CIETAC.

据报道，CITEAC 香港仲裁中心的设立，是为了依托香港健全的仲裁法制，就近管理案件，满足当事人对高端仲裁服务的需求，客观上也有助于香港为当事人提供更多的仲裁选择。有关该仲裁中心的受案范围、仲裁及管理规则等，尚待 CIETAC 公布细则。

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