



China Regulatory Updates

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■ TAX / 税收

New Preferential Tax Policies for Development of Western China Issued

西部大开发税收优惠政策新规出台

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FOREIGN INVESTMENT / 外商投资

Provisions on Security Review of Foreign-Related M&As Officially Promulgated with A Focus on Anti-Circumvention**商务部出台外资并购安全审查正式规定，禁止规避安全审查**

With nearly six months' pilot practice, on August 25, MOFCOM formally promulgated the *Provisions on Implementing the Security Review System for Acquisition of Domestic Enterprises by Foreign Investors* (the "Provisions") which have become effective as of September 1, 2011. The relevant interim provisions issued earlier this year (please refer to our April 2011 issue of *China Regulatory Updates* for details) were replaced in its entirety by the Provisions.

Compared with the interim provisions, the Provisions have added an anti-circumvention provision and the confidentiality obligations of officials in charge of security review, of which the anti-circumvention provision is more noteworthy. Article 9 of the Provisions emphasizes that whether a transaction is subject to M&A security review should be "judged from the essential content and actual impact of such transaction", and further provides that "no foreign investor may circumvent the M&A security review through any means, including without limitation, nominee shareholding, trust, multi-level reinvestment, leasing, lending, contractual control and offshore transaction".

It is the first time for MOFCOM to expressly provide that foreign related M&A deals through "contractual control", "multi-level reinvestment" and other means as mentioned above should be subject to its administration from the national security review perspective. This to some extent may have been prompted by the "Alipay" event and will effectively expand the scope of M&A deals that are subject to the security review by MOFCOM.

No security review case has been publicly reported so far yet since the promulgation of the interim provisions in March this year.

经过将近 6 个月的试行，商务部于 8 月 25 日正式公布《实施外国投资者并购境内企业安全审查制度的规定》（“《规定》”），自 9 月 1 日起实施；今年 3 月份出台的相关暂行规定（详情请参见本所 2011 年 4 月期的《中国法律更新》）已于 8 月 31 日失效。

与《暂行规定》相比，《规定》在外资并购安全审查反规避和加强审批人员的保密义务等方面新增了相关规定，其中前者尤其值得关注。《规定》第九条强调“应从交易的实质内容和实际影响来判断”是否属于并购安全审查的范围，并进一步规定“外国投资者不得以任何方式实质规避并购安全审查，包括但不限于代持、信托、多层次再投资、租赁、贷款、协议控制、境外交易等方式”。

前述规定是商务主管部门首次明文将“协议控制”、“多层次再投资”等实践中常见、出现过或可能出现的外商投资方式纳入其监管体系。这可能在一定程度上受“支付宝”事件的影响，并扩大了商务主管部门对外资并购安全审查案件的范围。

据悉，自今年 3 月份暂行规定出台以来，目前还没有商务部开展外资并购安全审查的公开案例。

MOFCOM Solicits Public Comments on Cross-Border RMB Direct Investment**商务部就跨境人民币直投征求意见**

Following PBOC's circular on pilot RMB settlement for foreign direct investment promulgated in June this year (please refer to our July 2011 issue of *China Legal Updates* for details), MOFCOM recently issued the *Circular on Several Issues Regarding Cross-Border RMB Direct Investments (Draft for Comments)* (the "Circular"), providing a detailed regulatory framework for the approval processes applicable to cross-border RMB direct investment. The release of the Circular is viewed as a further step to promote cross-border RMB trade and investment activities and to enhance the internationalization of RMB as a currency to settle capital account transactions.

为进一步推进跨境人民币贸易和投资工作，提升人民币的国际地位，继央行于今年 6 月份发布通知开展外商以人民币进行直接投资结算业务的试点（详情请参见本所 2011 年 7 月期的《中国法律更新》）后，商务部于近日发布了《关于跨境人民币直接投资有关问题的通知》（征求意见稿）（“《通知》”），拟对跨境人民币直接投资的相关审批事项进行规范和明确。

“Cross-border RMB direct investment” generally refers to direct investment in China by foreign investors with their RMB proceeds legally obtained offshore (including RMB proceeds obtained from cross-border trade and issuance of RMB bonds and/or stocks offshore, RMB dividends distributed by foreign-invested enterprises in China, as well as RMB proceeds obtained from equity transfer, capital reduction, liquidation and recovery of investment amount ahead of investment term). According to the Circular, the review and approval process and the administrative authorities for cross-border RMB direct investment by foreign investors are basically the same as those of the investment with foreign currencies except that a cross-border RMB direct investment involving RMB300 million or above or related to industries of finance, investment or those under national macro-control will be subject to central MOFCOM’s review and approval. Previously, all cross-border RMB direct investment by foreign investors should be submitted for central MOFCOM’s final review and approval through provincial MOFCOM offices.

In order to curb the inflow of hot money, the Circular provides that cross-border RMB direct investment may not, directly or indirectly, be used for investment in marketable securities or financial derivatives in China or for extending loans or repayment of loans. In addition, although foreign investors could use RMB to make direct investment, such investment should still be deemed as “foreign investment” and therefore is subject to applicable PRC laws and regulations governing foreign investment, such as those related to foreign investment industrial policies and foreign-related M&A security review.

所谓“跨境人民币直接投资”是指外国投资者以境外合法获得的人民币（包括在境外通过跨境贸易、境外发行人民币债券或股票等合法渠道获取的人民币，以及从中国境内所投资的外商投资企业获取并汇出境外的人民币利润以及转股、减资、清算、先行回收投资所得人民币）依法来华开展直接投资活动。根据《通知》，外国投资者开展跨境人民币直接投资，商务部门应按照现行外商投资审批管理规定进行审批，但是，对于出资金额较大（人民币3亿元或以上）或涉及特定行业（金融，投资或国家宏观调控行业）的，依然需要报商务部审核。而商务部此前仅笼统地的规定，外国投资者开展跨境人民币直接投资均须经省级商务部门函报商务部取得复函同意，未明确跨境人民币直投的具体操作规范。

为防范热钱流入，《通知》规定，跨境人民币直接投资在中国境内不得直接或间接用于投资有价证券和金融衍生品，以及用于委托贷款或偿还国内外贷款。另外，尽管外国投资者系利用人民币开展直接投资，但该等投资依然需要符合中国有关外商投资相关的法律法规，比如遵守国家外商投资产业政策、外资并购安全审查的有关规定。

GENERAL CORPORATE / 公司业务

SAIC Solicits Public Comments on Draft Rules Concerning Debt-to-Equity Swap

国家工商总局就公司债转股征求意见

SAIC recently promulgated the *Administrative Measures for the Registration of Debt-to-Equity Swap of Companies (Draft for Comments)* (the “Administrative Measures”), with an aim to regulate the operation of companies’ debt-to-equity swap. Prior to the promulgation of the Administrative Measures, except for a few local policies and SASAC rules applicable to SOEs, there has been no nation-wide regulation that clearly allows debt-to-equity swap.

According to the Administrative Measures, only debts that a creditor has against the target company can be converted by the creditor into equity of the target company. Debts owed by a third party are clearly excluded. Furthermore, the debt to be converted into a company’s equity also needs to meet at least one of the following three conditions: (i) the creditor has fully performed its obligation under the contract between the creditor and the target company and the swap will not violate applicable

日前，国家工商总局发布了《公司债权转股权登记管理办法》（征求意见稿）（“《管理办法》”），拟对以债权作为一种出资形式对公司进行出资的相关内容进行系统规范，包括债权出资的具体范围、认定规则、具体程序等事项。此前，尽管存在一些地方性规定和国资委允许国有企业债转股的一些规定，国家工商总局一直未对债权是否可以作为一种出资形式出台明确规定。

根据《管理办法》，可转为股权的债权仅限于债权人对目标公司所享有的债权，而并未包含其对第三方的债权，且限于如下三种情况：(i) 债权人已经履行的、公司经营中债权人与公司之间产生的合同之债（但不得违反相关法律法规或者公司章程的禁止性规定）；(ii) 法院生效裁判确认的债权；以及(iii) 公司破

laws and regulations or the company's articles of association; (ii) the debt is confirmed by an effective judgment of a people's court; or (iii) the debt is a part of the restructuring plan approved by or is subject to the settlement agreement confirmed by a people's court during the bankruptcy reorganization or settlement process of the target company. Please note that since inter-company borrowings (except for bank-endorsed entrustment loans) are not allowed under current PRC legal framework, it is uncertain whether any debt that a corporate creditor has due to inter-company borrowings is qualified for a debt-to-equity swap.

The Administrative Measures apply to foreign invested enterprises as well as domestic funded enterprises. However, if a creditor intends to convert its debt against a foreign invested enterprise into such enterprise's equity, it will need to obtain a prior approval of the competent MOFCOM office and such debt-to-equity swap will be subject to the laws and regulations governing foreign investment. In addition, as debt is categorized as a type of "non-monetary assets" under the Administrative Measures, the amount of capital contribution made in the form of debt as well as other non-monetary assets may not exceed 70% of a company's registered capital. Moreover, the Administrative Measures expressly require that the debt to be converted into a target company's equity should be properly appraised and the conversion price of such debt should not exceed its appraised value.

产重整或者和解期间，列入经法院批准的重整计划或者裁定认可的和解协议的债权。值得注意的是，鉴于目前企业间不允许借贷，在债权人是企业的情况下，其对目标公司的直接债权（除非通过委托贷款）可能无法转换为股权。

债权转股权不仅适用于内资企业，也适用于外商投资企业，但境内外债权人拟将其对外商投资企业的债权转为股权的，应当符合外商投资的相关法律法规，并经审批部门批准。另外，《管理办法》将债权列为一种“非货币财产”，因此其作价出资金额与其他非货币财产作价出资金额之和，不得高于公司注册资本的百分之七十。为合理认定债权价值，《管理办法》明确要求对转为股权的债权进行评估，要求其作价出资金额不得高于该债权的评估值。

TAX / 税收

New Preferential Tax Policies for Development of Western China Issued

西部大开发税收优惠政策新规出台

SAT, together with several other departments under the State Council, recently issued the *Circular on Relevant Tax Policies for Further Implementing the Strategy to Develop Western China* (the "New Policies"), putting forward a series of new preferential tax policies for development of western China. The New Policies took effect retrospectively as of January 1, 2011 and will cease to apply by December 31, 2020. After the New Policies became effective, all previous tax preferential policies applicable to development of western China have been abolished.

The western regions of China eligible for tax preferences under the previous policies remain unchanged under the New Policies, and the following points are noteworthy:

1. The New Policies continue to provide preferential enterprise income tax treatment (i.e., a 15% EIT rate is applied instead of the unified 25% rate) for enterprises in the encouraged industries. However, with respect to the determination of whether an enterprise falls under the encouraged category, the New Policies provide that the *Catalogue for Encouraged Industries in Western China* (which will be issued at a later time) will apply, regardless of whether an enterprise is a foreign invested or domestic funded one.

近日，国家税务总局等部门发布了《关于深入实施西部大开发战略有关税收政策问题的通知》（“《新规定》”），提出了一系列新的西部开发税收优惠政策。

《新规定》追溯至 2011 年 1 月 1 日起生效，并将于 2020 年 12 月 31 日终止。

《新规定》生效后，原有的与西部大开发相关的税收优惠政策将同时被废止。

与原有政策相比，《新规定》并未改变适用相关税收优惠政策的西部地区的范围，但值得注意的是：

1. 《新规定》保留了鼓励类产业企业的所得税优惠政策（即按 15% 的税率征收企业所得税），但就如何认定鼓励类企业，《新规定》不再区分内资企业和外商投资企业，而统一按照《西部地区鼓励类产业目录》来认定（该目录将另行发布）；

2. The customs duty applicable to self-use equipment imported for projects in the domestic funded encouraged industries or foreign invested encouraged/advantageous industries continues to be exempted under the New Policies, while the exemption of the import value added tax of such equipment is cancelled.
3. Certain tax preferences under the previous policies will no longer apply. For instance, with respect to enterprise income tax, the “two-year exemption and three-year reduction by half” policy will no longer be available to the transportation, electric power, water conservancy, postal service, radio and television broadcast and certain other industries, and the provincial government will no longer have the authority to approve any preferential tax treatment thereof.
2. 《新规定》保留了原有政策中对“西部地区内资鼓励类产业、外商投资鼓励类产业及优势产业的项目在投资总额内进口的自用设备”在政策范围内免征关税的税收优惠，但不再免除进口环节增值税；以及
3. 原有政策下的部分税收优惠政策不再适用。比如交通、电力、水利、邮政、广播电视等行业的企业不再适用“二免三减半”的税收优惠政策，不再允许通过省级政府审批来减免企业所得税。

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

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