



HAN KUN LAW OFFICES

# Legal Commentary



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## Foreign Direct Investment Law

### New SAFE Rules Further Simplify FDI Foreign Exchange Administration

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On May 10, 2013, the State Administration of Foreign Exchange (together with its branches, “SAFE”) released the *Foreign Exchange Administrative Rules on Foreign Direct Investment by Foreign Investors* (the “**Administrative Rules**”), the *List of Abolished Laws and Regulations of Foreign Exchange Administration on Foreign Direct Investment* (the “**List of Abolished Laws and Regulations**”) and the *Operational Guidelines for Foreign Direct Investment Businesses* (the “**Operational Guidelines**”). Based on the *Circular on the Further Improvement and Amendment of Foreign Exchange Administrative Policies on Direct Investment* (Hui Fa [2012] No.59, “**Circular 59**”) which adjusted the foreign exchange administrative policies on foreign direct investment by foreign investors<sup>1</sup> (“**FDI**”), the Administrative Rules further simplify and integrate the operational steps and regulations on FDI foreign exchange administration, including foreign exchange registration, account opening and use, receipt and payment of funds, and settlement and sales of foreign exchange, etc. The rules and regulations under the List of Abolished Laws and Regulations were repealed on May 10, 2013, and the Administrative Rules and the Operational Guidelines took effect on May 13, 2013.

Compared with the previous FDI foreign exchange administration system, the following points of the Administrative Rules, List of Abolished Laws and Regulations and Operational Guidelines are worthy of attention.

#### Further Clarify the Foreign Exchange Registration Matters

The Administrative Rules establish that the principal administrative model for FDI is foreign exchange registration. The Administrative Rules clarify the matters under FDI that need to be registered with SAFE, which include the following:

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<sup>1</sup> FDI shall refer to foreign investors setting up foreign-invested enterprises or projects through a new establishment or acquisition, and obtaining ownership, control, management rights and other rights and interests.

- Remittance of up-front fees and related funds by foreign investors;
- Newly-established foreign-invested enterprises;
- Capital contribution by foreign investors to foreign-invested enterprises, or payment of the purchase price by foreign investors for the acquisition of the shares of domestic companies;
- Capital increase, capital decrease, transfer of shares, other capital changes, and deregistration of foreign-invested enterprises;
- Transfer of shares, domestic reinvestment and related businesses involved in domestic direct investment by domestic and foreign institutions and individuals.

In order to implement the abovementioned registration matters, the Operational Guidelines stipulate in detail the operating requirements for nine types of businesses, which include the following: “registration of the basic information of up-front fees”, “registration of the basic information of newly-established foreign-invested enterprises”, “registration of the basic information of foreign-invested enterprises established through the acquisition of a domestic company by foreign investors”, “changing registered matters or deregistration of foreign-invested enterprises”, etc.

### **Further Clarify Foreign Exchange Matters Conducted by Banks**

In 2012, Circular 59 repealed the approval for foreign exchange account opening, account entry, purchase and payment of foreign exchange under FDI, and the prior filing procedures for the special settlement of foreign exchange capital funds of foreign-invested enterprises. Currently, the Administrative Rules reemphasize that banks will be responsible for the opening of up-front fees account, capital accounts and assets realization accounts and other FDI accounts, as well as the settlement of capital funds of foreign-invested enterprises.

In addition, where foreign-invested enterprises need to remit money abroad due to capital decrease, liquidation, withdrawal of investment, distribution of profits, etc., they may purchase foreign exchange and make outbound payments in banks after completing the relevant registration with SAFE. Where outbound remittance is needed due to the acquisition of the shares of foreign investors, the domestic transferee may purchase foreign exchange and make outbound payments in banks after the foreign-invested enterprise has completed the relevant registration with SAFE.

### **Further Simplify the Administrative Procedures for FDI Foreign Exchange Formalities**

The Operational Guidelines stipulate the requirements for nine foreign exchange registration matters, including “registration of the basic information of up-front fees”, as well as the requirements for fourteen businesses conducted by banks directly, which include the “opening of up-front fees account, account entry and use”. The Operational Guidelines further integrate

and simplify the procedural rules for FDI foreign exchange businesses under Appendix I of Circular 59, the Operation Rules for Direct Investment Foreign Exchange Business under Capital Account (SAFE Version), and Appendix II of Circular 59, the Instructions on Direct Investment Foreign Exchange Business under Capital Account (Bank Version).

### **Strengthen Statistical Supervision on Fund Flows under FDI**

Pursuant to the Administrative Rules, banks shall conduct relevant businesses according to the registered information of SAFE, open accounts for entities, and submit information of account opening, account change, receipt and payment of funds, and settlement and sales of foreign exchange to SAFE in accordance with the relevant rules and regulations. SAFE shall conduct statistical supervision on cross-border fund payments, settlements and sales of foreign exchange, changes in rights and interests of foreign investors under FDI through registration, bank reports, annual inspections on foreign-invested enterprises, sample surveys, etc. in accordance with the relevant rules and regulations.

### **Repeal Several Normative Documents Related to FDI Foreign Exchange Administration**

The List of Abolished Laws and Regulations repeals 24 normative documents of FDI foreign exchange administration, including the *Circular of the State Administration of Foreign Exchange on Distributing the Interim Measures for Foreign Exchange Registration of Foreign invested enterprises ([96] Hui Zi Han Zi No. 187)*, the *Circular of the State Administration of Foreign Exchange on Reforming the Administrative Mode of the Foreign Exchange Settlement of Capital Funds of Foreign-invested Enterprises (Hui Fa [2002] No.59)*, the *Circular of the State Administration of Foreign Exchange on Issues Concerning Improving the Foreign Exchange Annual Inspection of Foreign-invested Enterprises (Hui Fa [2004] No.7)*, the *Circular of the State Administration of Foreign Exchange on Printing and Distributing on the Operating Rules for Foreign Exchange Administration with Respect to the Financing and Round-tripping Investment of Domestic Residents via Overseas Special Purpose Companies (Hui Fa [2011] No.19, “Circular 19”)*.

It is worth noting that Circular 19 was the main operational guideline for the foreign exchange registration (including without limitation to the foreign exchange registration of overseas special purpose companies of domestic residents) under the *Circular of the State Administration of Foreign Exchange on Issues Concerning the Regulation of Foreign Exchange in Equity Finance and Return Investments by Domestic Residents through Offshore Special Purpose Vehicles (Hui Fa [2005] No. 75, “Circular 75”)*. Since Circular 75 is still in effect, we understand that the nullification of Circular 19 would not influence foreign exchange registration under Circular 75. After Circular 19’s repeal, the foreign exchange registration under Circular 75 is currently being conducted in accordance with the guidelines under Items 2.10, 2.11, 2.13 and 2.14 in Appendix 1 of Circular 59 “Operation Rules for Direct Investment Foreign Exchange

Business under Capital Account (SAFE version)". These items include the following: "Foreign Exchange Registration for Overseas Special Purpose Companies of Domestic Residents", "Foreign Exchange Amendment Registration of Overseas Special Purpose Companies of Domestic Residents", "Foreign Exchange Deregistration of Overseas Special Purpose Companies of Domestic Residents" and "Foreign Exchange Supplementary Registration for Overseas Special Purpose Companies of Domestic Residents Overseas" respectively.

## **Important Announcement**

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