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Legal Commentary



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Private Equity Law

SAFE Releases Regulation to Improve the Foreign Exchange Administration of FIPES

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On November 19, 2012, the State Administration of Foreign Exchange (the “SAFE”) issued the *Notice on the Issues Concerning the Administration of Foreign Exchange of Foreign-Invested Partnership Enterprises* (Hui Fa No. 58 [2012]) (the “**Notice**”), which will come into force on December 17, 2012.

On March 1, 2010, the *Measures for the Administration of the Establishment of Partnership Enterprises in the Territory of China by Foreign Enterprises or Individuals* (the “**Administrative Measures**”) issued by the State Council, and the *Administrative Regulations for the Registration of Foreign-Invested Partnership Enterprises* (the “**Administrative Regulations**”) issued by the General Administration for Industry and Commerce were implemented, which laid the legal grounds for the establishment of foreign-invested partnership enterprises (the “**FIPE**”). However, no specific stipulation has been set forth in the Administrative Measures or Administrative Regulations with respect to the foreign exchange administration of FIPES. This has created a certain amount of ambiguity regarding FIPES’ foreign exchange matters, particularly in the areas of foreign exchange registration, exchange settlement, etc. As a result, the development and popularity of FIPES has been restricted. In some places, a standard FIPE cannot even be established due to such foreign exchange issues.

The Notice provides more detailed regulations for the foreign exchange administration of FIPES, which further increases the feasibility of foreign exchange issues concerning FIPES.

Application Scope

First, the Notice clarifies that it regulates FIPES, which include foreign partnerships established in China by two or more foreign enterprises or individuals (collectively the “**Foreign Partners**”), as well as the partnerships established in China by Foreign Partners and Chinese natural

persons, legal persons, or other entities.

Foreign Exchange Registration

Pursuant to the requirements of the Notice, FIPEs, like other foreign-invested enterprises, shall apply for foreign exchange registration. The Notice further stipulates that where an FIPE is: 1) newly established 2) a domestic partnership that became an FIPE due to the Foreign Partners joining the partnership, or 3) formed from the Foreign Partners accepting part or all of the shares of the original domestic partners in the partnership, such FIPE shall within 30 days after obtaining its business license, apply to the local SAFE branch for registration¹. Where the registration information of an FIPE is changed, it shall, within 30 days after completing the amendment registration with the relevant registration authorities, apply to the local SAFE branch to change its foreign exchange registration². Where an FIPE is dissolved and liquidated, the liquidator shall, within 30 days after consummating the cancelling registration with the industrial and commercial authorities, go to the local SAFE branch to cancel its foreign exchange registration³.

Account Management

With respect to the management of foreign exchange accounts, the Notice stipulates that an FIPE shall, after completing its foreign exchange registration, open a foreign exchange account at the designated bank for accepting Foreign Partners' capital contributions in foreign exchange. The Notice also states that the account shall be managed in reference to the relevant provisions on the administration of foreign exchange capital accounts of foreign-invested enterprises.

Where Foreign Partners need to wire in foreign exchange contributions before the FIPE

¹ The materials required for foreign exchange registration are as follows: (1) The *Application Form for Foreign Exchange Registration of Foreign-invested Partnerships* signed by all partners, by the managing partner, or the designated representative; (2) A business license and Organization Code Certificate (originals examined and copies retained); (3) A basic information list that contains all the registered items of the partnership and bears the search seal of the registration authority, or a printed list of Internet search results (hereinafter referred to as "**Information Lists**"); Where there is no capital contribution information of the partners in the Information Lists, a confirmation letter of all partners regarding the capital subscribed or actually contributed by each partner shall also be submitted (where capital is contributed in the form of cross-border RMB, the amount of capital contribution in RMB shall be indicated); and (4) Any other materials required by the foreign exchange administration.

² The materials required for the change of foreign exchange registration: (1) The *Application Form for Foreign Exchange Registration of Foreign-invested Partnerships* signed by all partners or by the managing partner or the designated representative; (2) Where a business license has been changed, the changed business license shall be submitted (originals examined and copies retained); (3) Where Information Lists have been changed, the changed Information Lists shall be submitted; Where a partner increases or decreases the amount of his/her/its capital contribution to the FIPE, but there is no information of the capital contribution change in the Information Lists, a letter of confirmation of the capital subscribed or actually contributed by the partner signed by all partners or the personnel designated by the partnership agreement shall also be submitted; and (4) Other materials required by the foreign exchange administration.

³ The materials required for cancelling foreign exchange registration: (1) A written application signed by all partners or by the managing partner or the designated representative and foreign exchange registration certificate; (2) The liquidation reports signed by all partners; and (3) Any other materials required by the foreign exchange administration.

completes its foreign exchange registration, the Notice allows the FIPE to apply to the relevant SAFE authorities for opening a foreign investor's upfront expense account.

Registration of Capital Contributions in Foreign Exchange

In order to strengthen the supervision of Foreign Partners' capital contributions, the Notice further requires that when the Foreign Partners contribute capital to an FIPE, the partnership shall apply to the local SAFE branch for the confirmation of capital contributions in foreign exchange⁴. The Notice also clarifies that before an FIPE completes its foreign exchange capital contribution registration, the capital contributed in such FIPE by the Foreign Partners shall not be transferred or settled for use in China. In addition, the income of the Foreign Partners from the liquidation, capital decrease, transfer of partnership property shares, and profit distribution of such FIPE shall not be used for the offshore payment in foreign exchange or domestic re-investment.

Profit Remittance and Reinvestment

The Notice provides clear guidelines for issues concerning profit remittance and reinvestment in FIPES. When an FIPE intends to remit profits to its Foreign Partners, it shall apply to the bank with the relevant materials⁵ and record the relevant information of the remittance through the SAFE system.

Where Foreign Partners intend to invest (including capital increase or reinvestment) in China with the profits⁶, they shall apply for registration with the local SAFE branch and bring the relevant materials⁷.

Payment of Consideration of Shares Transfer

The Notice stipulates that, where the domestic partners of an FIPE remit the consideration of the accepted property shares of the Foreign Partners, they shall, after the FIPE applies for changing its foreign exchange registration with the local SAFE branch, purchase foreign exchange, and make the payment to the bank where the domestic partners are located. The

⁴ The required registration materials shall be provided in reference with the requirements for the capital contribution and verification confirmation of foreign investors in foreign-invested enterprises.

⁵ Materials required to remit an FIPE's profits to its Foreign Partners are as follows: (1) A written application signed by all partners or by the managing partner or the designated representative; (2) A profit distribution resolution made by all partners in the form prescribed by the *Partnership Law* and the way of profit distribution agreed in the partnership agreement; (3) The tax certificates for profits attributable to Foreign Partners; and (4) Any other materials required by the bank.

⁶ "Profits" here refers to the capital from withdrawal or liquidation of an FIPE and capital from the transfer of partnership property shares of such FIPE

⁷ Materials required for Foreign Partners' re-investment are as follows: (1) A written application signed by all partners, by the managing partner, or the designated representative; (2) The certificates for sources of the above-mentioned income and corresponding tax certificates; (3) The business license and articles of association (or partnership agreement) of the reinvestment project; (4) If the reinvestment project is a foreign-invested enterprise, the enterprise's approval documents, approval certificate, and foreign exchange registration certificate shall also be provided; and (5) Any other materials required by the Foreign Exchange Administration.

bank shall check the corresponding tax certificates and foreign exchange registration information when dealing with such foreign exchange purchase and payment procedures.

The Notice also provides that where the Foreign Partners accept the partnership share of the domestic partners, the FIPE shall apply for changing its foreign exchange registration with the local SAFE branch. The original domestic partners shall, in accordance with the foreign exchange registration information, directly open special foreign exchange accounts for domestic asset liquidation at local banks to receive the consideration paid by the Foreign Partners. The foreign exchange capital in these accounts shall be settled in accordance with the existing provisions on foreign exchange administration, pursuant to the Notice.

FIPE for Investment

Lastly, the Notice provides that other issues concerning the foreign exchange administration of FIPes mainly engaged in investment business shall be stipulated separately by the relevant departments.

The Notice has set unified regulations on the national level for the foreign exchange administration of FIPes, which enhances the feasibility of FIPes in respect to foreign exchange. We will keep a close eye on the trends of relevant regulations regarding FIPes, and inform you of any future developments.

Important Announcement

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