



HAN KUN LAW OFFICES

# Legal Commentary



CHINA PRACTICE • GLOBAL VISION

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## Capital Market Law

### New SAFE Circular Refines Foreign Exchange Procedures of Overseas Listing of a PRC Stock Company

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The China Securities Regulatory Commission (“**CSRC**”) promulgated the *Regulatory Guidance on Application Documents of and Review Procedures for Overseas Offering and Listing of Joint-Stock Companies* on December 20, 2012 to relax the criteria of overseas offering and listing for domestic enterprises. On January 28, 2013, the State Administration of Foreign Exchange (“**SAFE**”) released the *Circular of the State Administration of Foreign Exchange on Issues Concerning Foreign Exchange Administration of Overseas Listings* (Hui Fa [2013] No.5, “**Circular 5**”), which took effect on the same date. The *Circular of the State Administration of Foreign Exchange and the China Securities Regulatory Commission on Issues Concerning Further Improving Foreign Exchange Administration of Overseas Listings* (Hui Fa [2002] No. 77, “**Circular 77**”), the *Circular of the State Administration of Foreign Exchange on Relevant Issues Regarding Improving Foreign Exchange Administration of Overseas Listings* (Hui Fa [2003] No. 108, “**Circular 108**”), the *Circular of the State Administration of Foreign Exchange on Issues Concerning Foreign Exchange Administration of Overseas Listings* (Hui Fa [2005] No.6, “**Circular 6**”), and other relevant circulars<sup>1</sup> previously established by SAFE were all abolished at the same time.

Circular 5 further regulates and simplifies foreign exchange registration as well as the relevant foreign exchange settlement and sales procedures involved in the overseas listing of a domestic joint-stock company (“**Domestic Company**”), the repurchase of its overseas shares by the Domestic Company itself, and the increase or decrease in overseas shareholding by domestic shareholders of the Domestic Company. In addition, Circular 5 relaxes foreign

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<sup>1</sup> The *Circular of the Capital Account Management Department of the State Administration of Foreign Exchange on Issues Related to Doing a Good Job in Foreign Exchange Administration of Overseas Listings* (Hui Zi Han [2002] No.29) and the *Circular of the State Administration of Foreign Exchange on Relevant Issues related to Remitting to the National Social Security Funds the Foreign Exchange Income Gained from Overseas Reductions of Stated-owned Shares* (Hui Fa [2004] No. 64).

exchange regulations on overseas listed Domestic Companies to a certain extent, and makes it more convenient for Domestic Companies, especially small and medium-sized enterprises, in dealing with foreign exchange procedures involved in overseas listing. The main features of Circular 5 are as follows:

### **Foreign Exchange Registration Done after the First Overseas Offering**

Pursuant to Circular 77, a company with foreign capital shares listed abroad (“**Foreign Capital Shares Company**”<sup>2</sup>) shall apply for the foreign exchange registration for overseas listed shares at a relevant SAFE office within 30 days after acquiring CSRC approval on overseas offering and listing. Circular 5 postpones the time for doing such registration. Under the new provisions, the Domestic Company shall, within 15 working days after the first overseas offering, file an application of overseas listing registration with the SAFE office located in its incorporation place. The registration shall consist of the following documents:

- 1) Written application, with *Overseas Listing Registration Form* enclosed;
- 2) Certificate issued by CSRC approving the overseas listing of the Domestic Company;
- 3) Announcement of the conclusion of the overseas offering; and
- 4) Supplemental documents, if the above-listed documents contradict each other or fail to prove the authenticity of the overseas listing.

SAFE will issue an overseas listing registration certificate (“**Overseas Listing Registration Certificate**”) to the Domestic Company after reviewing and verifying the above documents. The Domestic Company shall bring the Overseas Listing Registration Certificate to open a special bank account in the bank of its incorporation place. This account shall be used for the capital remittance as well as the transfer of funds related to its initial offering (or additional issuance of shares) and repurchase of shares.

### **Raised Funds May be Retained Abroad**

Circular 77 and Circular 6 state that the Foreign Capital Shares Company shall repatriate the raised funds within 6 months after they are raised with the related listing costs deducted. Without SAFE approval, the raised funds shall not be retained abroad.

According to Circular 5, funds raised in the overseas listing of the Domestic Company may be repatriated to the corresponding domestic special bank account or retained in the overseas special bank account. The usage of such funds shall be consistent with publicly disclosed documents such as prospectuses, shareholders’ circulars, and shareholders’ resolutions.

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<sup>2</sup> This refers to companies registered in China and listed overseas.

## **Overseas Funds can be used to Repurchase Overseas Shares**

Under Circular 77, prior to the repurchase of overseas listed outstanding shares, the Foreign Capital Shares Company shall obtain CSRC approval and complete the foreign exchange registration for the changes of overseas listed shares. The Foreign Capital Shares Company shall also obtain SAFE approval for opening overseas accounts and remitting out the domestic funds.

Circular 5 simplifies the procedure and exempts CSRC and SAFE approval. When repurchasing its overseas shares, the Domestic Company may use overseas funds in accordance with the relevant provisions or remit out the domestic funds. With the Overseas Listing Registration Certificate specifying the relevant repurchase information, the Domestic Company may transfer funds to its domestic special bank account for repurchase and remit out such funds.

## **Regulates the Foreign Exchange Procedures regarding the Increase or Decrease in Overseas Shareholding by Domestic Shareholders**

Circular 7, Circular 108, and Circular 6 do not mention the increase or decrease in overseas shareholding by domestic shareholders of the Foreign Capital Shares Company, while Circular 5 contains explicit provisions regarding such increase or decrease in shareholding. When a domestic shareholder of the Domestic Company proposes to increase or decrease the overseas shareholding after the Domestic Company is listed overseas, it shall file an overseas shareholding registration application with the SAFE office located in its domicile and provide the following documents:

- 1) Written application, with *Overseas Shareholding Registration Form* enclosed;
- 2) Board resolution or shareholders' resolution regarding the increase or decrease in shareholding (if needed);
- 3) Approvals from the relevant authorities, when approvals of the state asset management authority are required; and
- 4) Supplemental documents, if the above-listed documents contradict each other or fail to prove the authenticity of overseas listing.

SAFE will issue an overseas shareholding registration certificate ("**Overseas Shareholding Registration Certificate**") to domestic shareholders, which is used for increasing or decreasing shareholding in the Domestic Company.

To increase overseas shareholding in the Domestic Company, a domestic shareholder may use overseas funds in accordance with the relevant provisions or remit out the domestic funds to purchase the overseas shares. With the Overseas Shareholding Registration Certificate, a

domestic shareholder may transfer funds to its domestic special bank account to increase shareholding and remit out such funds.

Capital gains under the capital account due to the decrease in shareholding in the Domestic Company, the transfer of the overseas shares of the Domestic Company, or the delisting of the Domestic Company shall be repatriated to the domestic special bank account for decreasing shareholding within 2 years after the acquisition of such gains. With the Overseas Shareholding Registration Certificate, the repatriation of such gains can be conducted in the bank directly without SAFE approval.

### **Relaxes Overseas Special Bank Account Regulation**

Pursuant to the provisions of Circular 77, Circular 108, and Circular 6, to temporary keep the funds raised by the Foreign Capital Shares Company or the capital gained by decreasing shareholding or selling the assets or interests of listed company overseas, an application shall be filed with SAFE for opening an overseas special foreign exchange account. However, there are certain limitations and/or requirements in such an account: 1) the validity of an overseas special foreign exchange account is only 2 years; 2) Chinese banks in the place of listing shall be chosen preferentially to open the overseas bank account; and 3) Chinese banks chosen shall also issue a written commitment<sup>3</sup> to SAFE.

Circular 5 relaxes overseas special bank account regulations by providing the Domestic Company and its domestic shareholders need only make a filing with SAFE for the opening, changing, or closing of the overseas special bank account within 10 working days.

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<sup>3</sup> The written commitment shall consist of the followings: using the foreign exchange account in accordance the account scope of revenues and expenses and duration approved by SAFE; reporting the account opening certificate, account utilization and account cancellation certificate to SAFE within 10 working days after opening and closing the overseas account.

## **Important Announcement**

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