



HAN KUN LAW OFFICES

# Legal Commentary



CHINA PRACTICE • GLOBAL VISION

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## Capital Market Law

### Proposed Amendments to the Administrative Measures on Foreign Investors' Strategic Investments in Listed Companies

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On September 27, 2013, the Ministry of Commerce (“MOFCOM”), with the purpose of adapting to the needs of foreign direct investment under the new situation and promoting the healthy development of China’s securities market, declared that it intended to amend the *Administrative Measures on Foreign Investors’ Strategic Investment in Listed Companies* implemented on January 31, 2006 (the “2006 Administrative Measures”), and published the *Draft of Administrative Measures on Foreign Investors’ Strategic Investments in Listed Companies (Amendment)*(the “Draft”), to solicit opinions from the public.

Compared with the 2006 Administrative Measures, the Draft proposes to make amendments to the requirements a foreign investor shall meet to be qualified to make strategic investments in A-Share listed companies (the “Investor(s)”), the approval/filing procedures of strategic investment and the applicability of some relevant rules.

Below is a brief summary of the important amendments in the Draft:

#### Investor Requirements

In accordance with the 2006 Administrative Measures, one of the requirements an Investor shall meet is that the total amount of both the Investor and its parent company’s actual overseas assets is not less than USD100 million or the total amount of both the Investor and its parent company’s managed actual overseas assets is not less than USD500 million. The Draft modifies this requirement by removing the word “overseas” from the above expression.

In addition, the Draft clarifies that where a listed company invests overseas by way of share swap without causing change in its actual control power, and thus makes an overseas entity become an Investor, neither the above requirement of the total amount of assets nor the

requirement that the proportion of the shares obtained after the completion of the initial investment shall not be less than 10% of the shares issued by the listed company shall apply.

### **Strategic Investment Methods and Time Limit**

In accordance with the 2006 Administrative Measures, the methods of obtaining the shares of a listed company include the transfer of shares under an agreement, purchase of new shares issued by a listed company to target subscribers, and any other means specified in the relevant laws and regulations. The Draft adds “tender offer” as a new method to the above methods.

The 2006 Administrative Measures also stipulates that an Investor may make strategic investments through any of its wholly-owned overseas subsidiaries. However, the Draft expands the scope of entities which may conduct strategic investments by saying that an Investor may make strategic investments through any of its wholly-owned overseas subsidiaries and/or its investment companies established within the territory of the PRC.

In accordance with the 2006 Administrative Measures, an Investor shall initiate its strategic investment acts within 15 days of the settlement of exchange of the funds, and shall complete the strategic investment within 180 days following the date on which the in-principle approval is granted. If an Investor fails to complete the strategic investment under the strategic investment plan within the specified time limit, the in-principle approval granted by the relevant examination and approval authority shall automatically become invalid. The Draft provides certain expansion on the time limit of completing strategic investment by stipulating that if an Investor fails to complete the strategic investment within 180 days due to rational reasons, it may submit an application for extension to MOFCOM 30 days ahead of the specified time limit.

### **Application Scope**

The Draft clearly defines its application scope. In accordance with the Draft, besides applying to situations of obtaining shares of any listed company by an Investor through transfer of shares under an agreement, purchase of new shares issued by a listed company to target subscribers, tender offer and other means specified in the relevant laws and regulations, the rules of the Draft are also applicable in the following situations: 1) where an Investor increases its shareholding proportion in a listed company of which the Investor already holds shares through transfer under an agreement, additional directed issue of shares or tender offer; 2) where an Investor obtains actual control of a listed company through merging or acquiring the shareholders of the listed company; and 3) where an Investor obtains shares by participating in the reorganization of a listed company through foreign-invested enterprise(s) the Investor has invested in.

However, the situations not included in the application scope are as follows: 1) obtaining

shares of a listed company through an Initial Public Offering of the company of which the Investor previously holds shares; and2) obtaining the shares of a listed company as a result of bankruptcy, dissolution, mortgage or any other particular reason of foreign investment enterprises who hold the listed company's shares.

### **National Security Investigation, Anti-monopoly and Insider Information Confidentiality**

The Draft sets forth clearer provisions on national security investigation, anti-monopoly and insider information confidentiality issues. The Draft states that if a strategic investment in listed companies falls with the scope of national security investigation, it shall follow the security investigation procedures applicable to mergers and acquisitions by foreign investors of enterprises within the territory of China. Where a strategic investment meets the standards stipulated in the *Provisions of the State Council on the Thresholds for Notifying Concentration of Business Operators*, an antitrust notification shall be submitted to MOFCOM. Transactions are not permitted without a notification or where an antitrust clearance is not obtained. Before legal disclosure, the information of strategic investment in listed companies is insider information stipulated in the *Law of the People's Republic of China on Securities*. Those who are aware of insider information shall perform confidentiality obligations, and shall cooperate with the listed companies and relevant departments during the insider registration process.

### **Miscellaneous**

As to the renewal of the Approval Certificate for a Foreign-Invested Enterprise(the "Approval Certificate") caused by the change of the Investor's shareholding proportion, both the 2006 Administrative Measures and the Draft stipulate that if a reduction in the number of the shares held by an Investor causes the proportion of foreign investment shares of the listed company to be less than 25%, the company shall report to MOFCOM for record-filing and go through the relevant formalities for the renewal of the Approval Certificate. On this basis, the Draft adds that when the accumulated reduction proportion of the shares held by an Investor reaches or exceeds 5% of the total share capital of the listed company, the listed company shall also report to MOFCOM to go through the Approval Certificate renewal procedure.

In addition, the 2006 Administrative Measures stipulate that where the reduction in the number of shares held by an Investor causes the proportion of foreign investment shares of a listed company to be less than 10%, and such Investor is not the single largest shareholder, the listed company shall report to the relevant examination and approval authority for record-filing and go through the relevant formalities for cancellation of the Approval Certificate. The listed company shall also complete certain change or cancellation procedures with the relevant industry and commerce, tax and foreign exchange authorities. However, the Draft stipulates that only until there are no foreign investment shares existing in a listed company, shall the

listed company report to MOFCOM to go through the Approval Certificate cancellation procedure and complete certain change or cancellation procedures with the relevant industry and commerce, tax and foreign exchange authorities.

Furthermore, the Draft provides: 1) if an Investor uses offshore RMB legally obtained as funds for strategic investment, it shall comply with the relevant regulations on trans-border RMB direct investment; 2) if an Investor uses any equity interest of a company established within the territory of China as payment of strategic investment, it shall be in compliance with the relevant regulations on using equity interest as the capital contribution. Moreover, the Draft makes several adjustments, supplements and refinements of foreign exchange and tax procedures relevant to the strategic investment in listed companies by foreign investors.

## **Important Announcement**

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