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Hot Topics in Debt Marketing

Potential New Boom of Offshore Bonds: How Onshore Enterprises' Decision on Issuing Offshore Bonds Will Be Influenced When "Re-approval" Requirement Becomes "Post-registration" Requirement for Cross-border Security

On June 1, 2014, the *Circular on the Administration of Foreign Exchange for Cross-border Security* and its implementation guidance (the **"Circular 29"**) promulgated by State Administration of Foreign Exchange (**"SAFE"**) is formally brought into force. Since 2010, more and more onshore enterprises have been vigorously issuing offshore bonds, making it one of the major channels for onshore enterprises, especially real estate enterprises, large state-owned enterprises and financial institutions, to obtain financing at a relatively low cost. The relaxing control on cross-border security as endowed by Circular 29 is likely to further foster the enthusiasm of onshore enterprises in issuing offshore bonds.

Under Circular 29, in light of the place of business registration of security providers, cross-border security is categorized as (i) a security provided by an onshore security provider for a debt owed by an offshore debtor to an offshore creditor **("Outward Security for Offshore Lending"**), (ii) a security provided by an offshore security provider for a debt owed by an onshore debtor to an onshore creditor (**"Inward Security for Onshore Lending"**) and (iii) other types of cross-border security. This review will mainly focus on the influence of Circular 29 on onshore enterprises in their issuing of offshore bonds. The Circular 29 changed the "pre-approval" requirement into the "post-registration" requirement for the Outward Security for Offshore Lending by non-bank financial institutions, and changed the mode of "beforehand quota control" into "afterwards voluntary filing" for banks in handling business of Outward Security for Offshore Lending. Such changes are highly favorable to onshore enterprises intending to issue offshore bonds by means of Outward Security for Offshore Lending. On the other hand, onshore institutions will possibly find themselves less enthusiastic in providing credit enhancement [1] by means of

[1] Subject to the previous control/approval requirement on the offshore security by domestic institutions, the practical ways of credit enhancement available for domestic institutions include: keepwell deed, undertaking of equity interest purchase, and letter of support, etc.

Outward Security for Offshore Lending in a large scale for their offshore subsidiaries in issuing offshore bonds, because of the blurry requirements in Circular 29 in terms of the shareholding relations between the security provider and the secured party (namely, the debtor or the issuer), the tight restrictions on use of fund raised by offshore bonds, and the inconsistent understanding among local counterparts of SAFE on the requirement of "post-registration".

I. Main Provisions of Circular 29 in Cross-border Security for Offshore Bonds

(I) Registration Procedure

Prior to the implementation of Circular 29, all onshore institutions (including banks, non-bank financial institutions and enterprises) intending to provide security for offshore institutions issuing offshore bonds, were required to obtain SAFE's approval through the local counterpart of SAFE on a case-by-case basis. Circular 29 removes such approval requirement and instead, stipulates that Outward Security for Offshore Lending are to be managed by means of registration in the following specific procedures:

1. Registration for Contract Conclusion

Where the security provider is a bank, the security provider shall report to the SAFE the data relevant to the business of Outward Security for Offshore Lending through data interchange program or by other means.

Where the security provider is a non-bank financial institution or an enterprise (the **"Non-bank Institution"**), the security provider is required to proceed with the registration formalities for Outward Security for Offshore Lending at the **local counterpart of SAFE at the place of its location** within 15 business days upon the conclusion of the security contract. Please refer to **Exhibit I** for the details of registration formalities.

2. Change of Registration

Where there are changes to the major clauses of the security contract (including extension of the term of the loan contract, or any changes in the amount secured, the term of loan, the period of security, and the creditor), the procedures for change of registration of the contract for Outward Security for Offshore Lending shall be handled within 15 days.

3. Cancellation of Registration

Upon the settlement of liabilities under security by the debtors, the expiration of payment liabilities of the security provider, or occurrence of contract performance for security, security providers as Non-bank Institutions shall handle the registration cancellation procedures for Outward Security for Offshore Lending at the SAFE within 15 business days.

4. No Need to Register for Realization of Security

When a bank performs its security obligations for Outward Security for Offshore Lending, the bank may make outward payment for the realization of the security on its own.

When a Non-bank Institution performs its security obligations for Outward Security for Offshore Lending, the Non-bank Institution shall directly proceed with the foreign currency purchase and outward payment at a bank by showing its security registration documents with the stamp of SAFT affixed thereon. In case the security is to be performed where no registration on contract conclusion has been proceeded with, the security provider is required to complete the registration.

Counter security provider may directly purchase foreign currency and make outward payment at a bank by showing documents evidencing the realization of counter security.

5. Registration of Offshore Debts

After realization of security, onshore security

providers or counter-security providers becoming creditors to offshore debts shall handle registration formalities for offshore debts.

When the creditor to an offshore debt is a bank, the relevant information regarding the offshore debt is to be reported to the capital project information system.

When the creditor to an offshore debt is a Non-bank Institution, the creditor is required to handle the offshore debt registration at the local counterpart of SAFE at the place of its location within 15 business days, and proceed with the change and cancellation formalities as required for the offshore debt.

6. Circumstances No Need Registration

(1) For Outward Security for Offshore Lending in which security providers are unable to reasonably assess the upper limit of the scope of security obligation, for example, security for project completion obligation issued by onshore enterprises with unspecified amount of security liability, no registration is required, provided that the realization of security shall be approved in advance by the SAFE.

(2) For other forms of cross-border security provided by onshore institutions, the security providers may enter into cross-border security contracts by itself with no need to go through registration or filing procedure, and no need to report data to the capital project information system, unless otherwise specifically provided by the SAFE; provided, however, when creditor's right for offshore debt is formed after the realization of the security, registration for offshore debts shall be handled.

(II) Qualifications for Security providers and Secured Parties (Debtors)

1. Circular 29 removed the various criteria for security providers and secured parties, such as:

(1) Generally, the quota of offshore security for a single bank and non-bank financial institution shall not exceed 50% of its paid-in capital or working capital in both RMB and foreign currency, or exceed its foreign exchange net asset value;

(2) If the security provider is an enterprise, as a general requirement, the proportion of its net assets to its total assets shall not be lower than 15%, and the balance quota of the enterprise or the balance of its external guarantee approved on a case-by-case basis shall not exceed 50% of its net assets;

(3) The net asset value of the debtor shall be positive; and the debtor shall make profits in at least one of the past three years (or in at least one of the past five years for enterprises engaging in resources development), etc.

2. Circular 29 provides that banks and non-bank financial institutions that serve as security providers shall have the corresponding security business qualification in accordance with the provisions of the competent industrial department; security providers acting as branches of onshore institutions shall obtain authority from the headquarter. Circular 29 is silent about the qualification requirement for enterprises as security providers; but Circular 29 stipulates that any onshore institutions may only provide security for an offshore bond issued by an offshore issuer whose shares are directly or indirectly held by such onshore institutions.

3. Circular 29 further provides that, for security providers that are non-financial institutions, where the security is to be realized, and prior to the repayment of debts of offshore debtors to security providers, security providers shall suspend the conclusion of new contracts for Outward Security for Offshore Lending without the approval of the SAFE, unless the debtor is unable to pay off the debt due to bankruptcy, liquidation or similar reasons.

4. Security providers and debtors shall not sign a cross-border security contract when they clearly

know or should have known the contract realization for security definitely occurs. Please see **Exhibit II** for specific standards.

(III) Usages of Fund Raised

Circular 29 reiterates the principles of using the fund raised by offshore bond as previously provided in its predecessor regulation, which are to prevent the fund raised offshore from "flowing back" to the onshore market, to stipulate that the fund raised by offshore bond will be used in offshore investment projects with shareholding relations with the onshore institution, and to make sure that for the relevant offshore institution or project approval, registration, filing or confirmation has been obtained from the offshore investment authority in China according to relevant requirement. Please see **Exhibit III** for the specific requirements.

II. Major Issues Unsettled in Circular 29 Regarding Cross-border Security for Offshore Bonds

1. Are onshore real property enterprises allowed to provide cross-border security for the offshore bond to be issued by its offshore subsidiaries?

In the *Notice on Relevant Issues Regarding Remaining Quota of External Security for Financing Purposes for Approved Domestic Banks in 2011* (Hui Fa [2011] No. 30), which is now annulled by Circular 29, it was expressly provided that "any application made by onshore real property enterprises for providing offshore security for their offshore subsidiaries in issuing offshore bonds will be rejected for the time being".

Circular 29 only provides that banks and non-bank financial institutions shall have relevant qualification for operating security business, but the security qualification for enterprises are not required. However, such possibility could not be ruled out that SAFE will promulgate implementation rules for qualification requirement for real property enterprises or enterprises in other industries in cross-border security business.

2. Does the cross-border security referred to in Circular 29 only cover security denominated in foreign currency? Does it applicable to RMB security?

According to the *Notice on Share of Administrative Responsibilities on Cross-border RMB Business* (Yin Fa [2012] No. 103) issued by the People's Bank of China and SAFE, the cross-border RMB business will be administered by the Second Monetary Policy Bureau of the People's Bank of China, and such bureau further once indicated in a letter responding to a bank, that no pre-approval or registration is required for banks to handle the business of RMB offshore security for financing purposes, and the banks are required to submit the security letter and performance status to the the Cross-border RMB Receipts and Payments Information Management System.

Circular 29 has not differentiated the cross-border foreign currency security and cross-border RMB security, instead, it provides that when the security provider is a bank, the security provider only needs to submit relevant data to SAFT through data interchange program. In case an enterprise intends to provide offshore security in RMB, it is highly likely to be required to proceed with relevant registration formalities according to the requirement in Circular 29.

3. Can onshore security provider be enforced to perform the cross-border security when no registration procedure is gone through?

It is expressly provided by Circular 29 that "the registration or filing of cross-border security contracts by foreign exchange authorities shall not constitute the essential element of effectiveness of cross-border security contracts."

Circular 29 further stipulates that in case the security is to be performed by non-bank financial institution where no registration on contract conclusion has been proceeded with, the security provider is required to complete the registration. Prior to the registration, the matter shall be firstly referred to the foreign exchange checking authority.

In addition, Circular 29 provides that in case any security provider fails to register the Outward Security for Offshore Lending according to the relevant requirements, SAFE has the authority to impose punishment according to the *Regulations of the People's Republic of China on Foreign Exchange Administration* (the **"Regulations"**) Please see **Exhibit IV** for specifics on punishment.

According to the above provisions, though the contract conclusion registration is not an essential element of effectiveness of cross-border security contracts, but it should be a condition precedent to the realization of the security thereunder. In case contract conclusion registration is not completed or requirements in connection with the registration are not satisfied, security providers will not be able to perform the security, and will potentially be imposed fines. Therefore, the parties to a cross-border security will possibly have to communicate with SAFE regarding the possibility of registration before concluding the security contract, which will largely decrease the efficiency of the implementation of Circular 29.

4. How could security providers conduct due diligence investigation on the offshore debtors and supervise them in their use of raised fund?

Under Circular 29, "where security providers engage in the financing business of Outward Security for Offshore Lending, they shall verify the principal qualifications of debtors, purposes of funds under security and the relevant trading background, conduct due diligence investigation of whether onshore and offshore laws and regulations are complied, and supervise the use of funds under security by debtors pursuant to their declared uses by appropriate means." If security providers fail to do so, SAFE may impose penalties.

Circular 29 is silent about the method and procedure for the due diligence investigation, and registration requirement does not require due diligence report as part of the application package either. But the above provision may become the sword of Damocles placing potential risks on security providers.

5. Does the "shareholding relations" between the onshore institution and the offshore debtor mean controlling relationship?

Circular 29 stipulates that "when the security provider performs repayment obligation under the bond issued by the offshore debtor, the equity of offshore debtor should be directly or indirectly held by the onshore institution."

Circular 29 does not expressly provide that whether the "shareholding" is actually "share controlling". According to relevant previous practices, we believe the "shareholding relations" may not refer to "controlling relationship".

Circular 29 is also blurry about whether an onshore guarantor (an onshore bank) is allowed to provide security for the offshore bond issued by an offshore issuers with whom it has shareholding relations with an onshore institution while has no shareholding relations with the onshore guarantor. From the literal meaning of the provision, the answer should be no. It is more or less irrational, for example, as a commercial bank, providing credit enhancement for customers is one of its inherent business.

6. How to deal with the inconsistency between Circular 29 and the regulations on cross-border security that are still in force?

Circular 29 annuls a series of regulations on cross-border security promulgated by SAFE. However, due to the limitation of its authority, SAFE has no power to annul regulations published by other government agencies or judicial authorities, such as the *Administrative Measures on Offshore Security by Onshore Institutions* published by the People's Bank of China, and the *Interpretation on Several Matters in Application of the Security Law of the People's Republic of China* issued by the Supreme People's Court. Such regulations still provide that, without approval and registration, contracts for cross-border security are invalid.

The simplification of approval procedure by Circular 29 is a measure responsive to the call of the State Council of to "streamline administration and delegate power to the lower levels", and the above inconsistencies are only of a matter needing reconciliation between the government agencies, and the effectiveness of Circular 29 is unlikely to be affected.

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Exhibit I: Formalities for Contract Conclusion Registration

1. Non-bank Institutions should provide the following materials to the local counterpart of SAFE for proceeding with contract conclusion registration for Outward Security for Offshore Lending:

(1) Written application report regarding the contract conclusion registration for Outward Security for Offshore Lending (containing the basic information of the company, sum of cross-border security already handled but not settled yet, the major specifics about this security business, the source of fund expected to be used as repayment fund, and other matters to be clarified. In case there is a co-provider for security, it should be indicated in the application report);

(2) Security contract and contract of the main debt under the security (in case the contracts are too long, summary of contracts with official stamps affixed would be sufficient. In case the contracts are written in foreign languages, Chinese translation thereto with official stamps affixed should be furnished);

(3) Relevant evidentiary materials deemed by SAFE as necessary to supplement (such the approval documents issued by National Development and Reform Commission and Ministry of Commerce regarding the offshore investment project).

2. SAFE will conduct procedural review from the aspects of truthfulness and compliance on the application for registration submitted by Non-bank Institutions as security providers, and will proceed with the registration formalities. In case any security providers fail to handle the registration formalities within the designated period, they may apply for post-registration.

3. Non-financial institutions may apply with SAFE to report data through the capital project system referring to the procedure applicable to financial institutions.

4. In case there are multiple onshore security providers for a single project of offshore loan under onshore security, the security providers may appoint one of them to proceed with the registration formalities at the local SAFE.

Exhibit II: Standard in Determination of Intention of Security Realization

Security providers and debtors shall not sign a cross-border security contract when they clearly know or should have known the contract performance for security definitely occurs. The following standard shall apply to determine whether a definite intention to perform a security exists under a security contract:

1. When entering into the security contract, whether the debtor has sufficient capability to repay and expected resources of fund to be used as fund for repayment;

2. Whether the financing conditions under the underlying loan contract are largely inconsistent with the purpose of fund indicated by the debtor, in terms of the amount, interest rate, term and other aspects of the loan;

3. Whether the parties to the security indicate any intention to repay the debt under the security in advance by means of realization of security; and

4. Whether the parties to the security have ever maliciously performed the security or committed any loan-related breach, as security provider, counter-security provider or debtor.

Exhibit III: Restrictions on Use of Funds Raised by Outward Security for Offshore Lending

The use of funds of Outward Security for Offshore Lending shall comply with the following provisions:

1. The funds under security shall be used for the payment of debtors within the usual scope of operation, and shall not be used for businesses outside the scope of business engaged by debtors or for arbitrage or other speculative transactions against fictitious trading background;

2. Without approval by SAFE, debtors shall not directly or indirectly transfer funds under security for domestic use by means of offering loans or making investment in equity or securities within the territory.

3. The funds under the security may not be used by the offshore institutions to make equity investment or debt investment, directly or indirectly into onshore institutions or individuals, and conducts including without limitation the following are prohibited:

(1) the debtor uses the funds under the security to make equity investment or debt investment, directly or indirectly, into the institutions registered within the PRC.

(2) the funds under the security are used directly or indirectly to acquire the equity in an offshore target company, more than 50% assets of which is within the PRC.

(3) the funds the security are used to repay the debt of the debtor or debts of other offshore companies, and the funds originally raised have been transferred for domestic use by means of investment in equity or debt within the territory.

(4) the debtor is using the funds under the security to repay the price for goods or services to the onshore institutions, and (a) the repayment is made at a time 1 year ahead of the time of supply of the goods or provision of services, and (b) the amount of repayment exceeds both USD 1 million and 30% of the aggregate contract price (in case of exportation of complete sets of heavy equipments or contracted services, the completion of work load will be deemed as delivery of goods).

4. Where the security obligation for the Outward Security for Offshore Lending is the obligation to repay for the bonds issued by offshore debtors, the gains of offshore bond issuance shall be used in offshore investment projects/institutions with shareholding relations with the onshore institution, and the relevant offshore institutions/projects should have been approved, registered, filed or confirmed by the foreign investment authority of the PRC.

5. When the funds raised under the contract for Outward Security for Offshore Lending are used to acquire, directly or indirectly, the equity or debt of other offshore institutions (including investment in newly-established offshore enterprises, acquisition of the equity interest in offshore enterprises, or increase of capital contribution of offshore enterprises), such investment activities shall be deemed as in

consistent with the relevant regulations on outbound investment set by relevant PRC authorities.

6. When the obligation under the contract for Outward Security for Offshore Lending is the obligation to pay for the derivative transaction of offshore institutions, when dealing derivative transactions debtors shall abide by the principle of stop-loss and inflation-proof, act within the scope of its main business, and has been duly authorized by shareholders.

Exhibit IV: Punishment on Violations in Connection with Outward Security for Offshore Lending

Violations	Punishment
Violating item (ii) of Article 11, Circular 29, Debtors directly or indirectly transfer funds under security for domestic use by means of offering loans and making investments in equity or securities within the territory.	According to Article 41 of *Regulations*, where any foreign exchange is remitted into the territory of the People's Republic of China in violation of any legal provision, the foreign exchange administrative organ shall order its correction, and impose a fine of not more than 30% of the amount of violation; or if the circumstances are serious, impose a fine of not more than the amount but not less than 30% of the amount of violation. Where any illegal settlement of foreign exchange is committed, the foreign exchange administrative organ shall order conversion of the illegal settlement funds back into the original currency, and impose a fine of not more than 30% of the amount of violation.
Violating Article 8, Circular 29, security providers engage in the business of Outward Security for Offshore Lending in violation of state laws and regulations, the provisions of the competent industrial department and administrative provisions on foreign exchange.	According to Article 43 of *Regulations*, where any violation of foreign debt administration is committed, such as unapproved international borrowing, offshore bond issuance or provision of international guaranty, the foreign exchange administrative organ shall impose a warning and a fine of not more than 30% of the amount of violation.
Violating Article 10, Circular 29, security providers engage in the business of Outward Security for Offshore Lending exceeding the authorized scope of business approved by the competent industrial department.	
Violating Article 12, Circular 29, security providers fail to verify the principal qualifications of debtors, purposes of funds under security and the relevant trading background, fail to conduct due diligence investigation of whether onshore and offshore laws and regulations are complied, or fail to supervise the use of funds under security by debtors pursuant to their declared uses by appropriate means.	

Violating Article 14, Circular 29, security providers conclude new contracts for Outward Security for Offshore Lending without the approval of the SAFE prior to the collection of repayment funds from debtors.	
Violating Article 27, Circular 29, security providers and debtors sign a cross-border security contract when they clearly know or should have known the contract performance for security definitely occurs	
Violating Article 28, Circular 29, onshore banks fail to conduct due diligence investigation as to the background of cross-border security transactions to ensure such security contract is in compliance with Chinese laws and regulations and the provisions of Circular 29.	According to Article 47 of *Regulations*, a foreign exchange administrative organ shall order the financial institution to make correction within a prescribed time limit, confiscate the illegal proceeds, and impose a fine of not less than 200,000 yuan but not more than 1 million yuan; or if the circumstances are serious or no correction is made within the prescribed time limit, it may order the financial institution to suspend the relevant business.
Violating Article 9, Circular 29, security providers fail to handle the registration formalities for Outward Security for Offshore Lending in accordance with relevant provisions.	According to Article 48 of *Regulations*, a foreign exchange administrative organ shall order correction and impose a warning, and may impose a fine of not more than 300,000 yuan in the case of an institution or 50,000 yuan in the case of an individual.
Violating Article 13, Circular 29, security providers fail to handle the registration cancellation formalities for Outward Security for Offshore Lending in accordance with relevant provisions.	
Violating Article 15, Circular 29, security providers or counter-security providers fail to handle the formalities for registration of offshore creditors' rights in accordance with relevant provisions.	

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资本市场法律热点问题

海外发债可能迎来新高潮

——简评跨境担保由“事前审批”变为“事后登记”对境内企业海外发债的影响

2014 年 6 月 1 日，国家外汇管理局（以下简称**“外汇局”**）发布的《跨境担保外汇管理规定》及其操作指引（以下简称**“29 号文”**）正式实施。自 2010 年起，境内企业海外发债风起云涌，海外发债已成为境内企业（特别是房地产企业、大型国有企业和金融机构）获得较低成本融资的一个重要渠道，29 号文放松跨境担保审批可能进一步激发境内企业海外发债的热情。

29 号文按照担保当事各方的注册地，将跨境担保划分为内保外贷、外保内贷和其他形式跨境担保。本简讯主要讨论 29 号文对境内企业海外发债的影响：29 号文将非银行机构办理内保外贷业务由原来的“事前审批”变为“事后登记”，将银行办理内保外贷业务由此前的“事前额度管理”改为“事后自行申报”；该等变化对拟以内保外贷方式发债的境内企业是一大利好，但 29 号文对担保人和被担保人（即债务人或发行人）之间股权关系的要求、对海外发债募集资金使用的严格限制以及各地外汇局对事后登记程序的理解不一，可能抑制境内机构大规模地通过内保外贷方式为其境外子公司海外发债提供增信[1]。

一、 29 号文关于海外发债跨境担保的主要规定

（一） 关于登记程序

29 号文实施以前，境内机构（包括银行、非银行金融机构、企业）为境外机构在境外发债提供担保的，境内担保人应经所在地外汇局报国家外汇局逐笔核准。29 号文取消了该等核准，规定内保外贷实施登记管理，具体登记程序如下：

1、签约登记

担保人为银行的，由担保人通过数据接口程序或其他方式向外汇局报送内保外贷数据。

担保人为非银行金融机构或企业（以下简称**“非银行机构”**）的，应在签订担保合同后 15 个工作日内到**所在地外汇局**办理内保外贷签约登记手续。具体的登记手续请见附件一。

[1] 受限于此前境内机构对外担保的审批控制，实践中由境内机构提供的增信措施主要包括：维好协议、权益购买承诺、支持函等。

2、变更登记

担保合同或担保项下债务合同主要条款发生变更的（包括债务合同展期以及债务或担保金额、债务或担保期限、债权人等发生变更），应当在 15 个工作日内办理内保外贷变更登记手续。

3、注销登记

债务人还清担保项下债务、担保人债款责任到期或发生担保履约后，非银行机构担保人应在 15 个工作日内到外汇局办理内保外贷注销登记手续。

4、担保履约无需登记

银行发生内保外贷担保履约的，可自行办理担保履约项下对外支付。

非银行机构发生担保履约的，可凭加盖外汇局印章的担保登记文件直接到银行办理担保履约项下购汇及对外支付。未办理签约登记而需要办理担保履约的，担保人需办理补登记。

反担保人可凭担保履约证明文件直接办理购汇或支付手续。

5、对外债权登记

担保履约后，成为对外债权人的境内担保人或境内反担保人，应办理对外债权登记。

对外债权人为银行的，通过资本项目信息报送对外债权相关信息。

对外债权人为非银行机构的，应在担保履约后 15 个工作日内到所在地外汇局办理对外债权登记，并按规定办理与对外债权相关的变更、注销手续。

6、无需登记的情形

（1）担保人对担保责任上限无法进行合理预计的内保外贷，如境内企业出具的不明确赔偿金额上限的项目完工责任担保，可以不办理登记，但其担保履约应经外汇局核准。

（2）境内机构提供其他形式跨境担保，可自行签订跨境担保合同，除非外汇局明确规定，无需办理登记或备案，无需向资本项目信息系统报送数据，但担保履约后构成对外债权的，应当办理对外债权登记。

（二） 关于担保人和被担保人（债务人）的主体资格

1、29 号文取消了此前对担保人和被担保人主体资格的诸多要求，比如：

（1）银行和非银行金融机构对外担保指标原则上不得超过其本外币合并的实收资本或营运资金的 50%，或其外汇净资产数额；

（2）担保人为企业，其净资产与总资产的比例原则上不低于 15%，余额指标或逐笔核准的对外担保余额不得超过其净资产的 50%；

（3）被担保人净资产数额应当为正值；最近三年内至少有一年实现盈利（资源开发企业五年内至少有一年实现盈利）等。

2、29 号文规定银行、非银行金融机构作为担保人，应具有行业主管部门规定的担保业务经营资格，以境内分支机构名义提供的担保，应当获得总行或总部授权；29 号文未规定企业作为担保人的主体资格；但是，29 号文要求为境外发债提供担保时，境外债务人应由境内机构直接或间接持股。

3、29 号文还规定，非银行机构发生担保履约的，在境外债务人偿清境内担保人的债务之前，未经外汇局批准，担保人必须暂停签订新的内保外贷合同，但因债务人破产、清算等原因导致其无法清偿债务的除外。

4、担保人、债务人不得在明知或者应知担保履约义务确定发生的情况下签订跨境担保合同。具体判断标准请见附件二。

（三） 关于募集资金的用途

在境外债券发行收入的使用上，29 号文重申了此前规定的精神，即限制境外募集资金回流境内，境外债券收入应用于与境内机构存在股权关联的境外投资项目，且相关境外机构或项目已经按照规定获得国内境外投资主管部门的核准、登记、备案或确认。其他具体限制请见附件三。

二、 29 号文关于海外发债跨境担保未明确的主要问题

1、境内房地产企业能否为其境外子公司海外发债提供跨境担保？

29 号文废止的《关于核定境内银行 2011 年度融资性对外担保余额指标有关问题的通知》（汇发[2011]30 号）明确规定“暂不受理境内房地产企业为其境外子公司在境外发行债券提供对外担保的申请”。

29 号文仅规定银行和非银行金融机构应具有相应担保业务经营资格，未就企业的跨境担保资格做出限制，但不排除外汇局将来可能出台针对房地产企业或其他企业跨境担保资格的实施细则。

2、29 号文规定的跨境担保是否仅限于外币担保，而不适用于人民币担保？

按照中国人民银行和外汇局《关于跨境人民币业务管理职责分工的通知》（银发[2012]103 号），跨境人民币业务由人民银行货币政策二司负责；人民银行货币政策二司在一封至银行的回函中，进一步明确银行办理人民币融资性对外担保无需事前核准、登记，银行应向人民币跨境收付信息管理系统报送保函及履约信息。

29 号文未区分外币跨境担保和人民币跨境担保，但亦规定银行作为担保人时，仅需通过数据接口程序向外汇局报送相关数据。如果企业提供**人民币**对外担保时，很可能亦需要按照 29 号文履行相关的登记手续。

3、未办理签约登记的跨境担保能否要求境内担保人担保履约？

29 号文明确规定“外汇局对跨境担保合同的核准、登记或备案情况以及本规定明确的其他管理事项与管理要求，不构成跨境担保合同的生效要件”；

29 号文进一步规定，非银行机构未办理内保外贷登记需要办理担保履约，应申请补登记，办理补登记前应先移交外汇检查部门；

29 号文还规定，担保人未按规定办理内保外贷登记的，外汇局有权按照《外汇管理条例》（以下简称**“《条例》”**）进行处罚。具体处罚规定请见附件四。

依据上述规定，签约登记虽然不是担保合同的生效要件，但应是担保履约的前提条件，如果未申请签约登记或不符合登记条件，不仅无法担保履约，可能还面临处罚风险。在此情形下，跨境担保当事方可能在签约前不得不先与外汇局了解登记的可行性，这样可能大大降低 29 号文实施的效率。

4、担保人如何对境外债务人进行尽职调查及监督债务人使用募集资金？

29 号文规定“担保人办理内保外贷业务时，应对债务人主体资格、担保项下资金用途、预计的还款资金来源、担保履约的可能性及相关交易背景进行审核，对是否符合境内外相关法律法规进行尽职调查，并以适当方式监督债务人按照其申明的用途使用担保项下资金”。未履行该等义务，外汇局有权处罚。

29 号文并未规定尽职调查的方法和程序，登记申请文件中亦未要求提交上述尽职调查报告，但该等规定可能成为悬在担保人头上的达摩克利斯之剑。

5、境内机构与境外债务人之间的股权关系是否指控股关系？

29 号文规定“内保外贷项下担保责任为境外债务人债券发行项下还款义务时，境外债务人应由境内机构直接或间接持股”。

29 号文未明确持股是否为控股，根据过往实践，持股关系并非指控股关系。

29 号文亦未明确境内担保人（包括境内银行）能否为没有股权关系的境内机构持股的境外发行人海外发债提供担保，从条文看，应是不可以，但该等限制不尽合理，比如境内银行为其客户提供增信应是银行的固有业务之一。

6、如何处理 29 号文与未废止的跨境担保法规的冲突问题？

29 号文废止了一系列由外汇局出台的跨境担保法规，但因职权所限，外汇局无法废除其他政府部门或司法机构出台的规定，比如中国人民银行出台的《境内机构对外担保管理办法》和最高人民法院发布的《关于适用〈中华人民共和国担保法〉若干问题的解释》等，该等规章和解释仍规定，未办理审批、登记，跨境担保合同无效。

29 号文简化审批程序应是响应国务院简政放权的措施，上述冲突应只是部门协调和法规梳理问题，应不影响 29 号文的效力。

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附件一：签约登记手续

1、非银行机构到外汇局办理内保外贷签约登记时，应提供以下材料：

（1）关于办理内保外贷签约登记的书面申请报告（内容包括公司基本情况、已办理且未了结的各项跨境担保余额、本次担保交易内容要点、预计还款资金来源、其他需要说明的事项。有共同担保人的，应在申请报告中说明）；

（2）担保合同和担保项下主债务合同（合同文本内容较多的，提供合同简明条款并加盖印章；合同为外文的，须提供中文翻译件并加盖印章）；

（3）外汇局根据本规定认为需要补充的相关证明材料（如发改委、商务部门关于境外投资项目的批准文件等）。

2、外汇局按照真实、合规原则对非银行机构担保人的登记申请进行程序性审核，并为其办理登记手续。担保人未在规定期限办理登记的，可以申请办理补登记。

3、非金融机构可以向外汇局申请参照金融机构通过资本项目系统报送内保外贷数据。

4、同一内保外贷业务下存在多个境内担保人的，可自行约定其中一个担保人到所在地外汇局办理登记手续。

附件二：担保履约意图判断标准

担保人、债务人不得在明知或者应知担保履约义务确定发生的情况下签订跨境担保合同。担保合同是否具备明显的担保履约意图可依据以下标准判断：

1、签订担保合同时，债务人自身是否具备足够的清偿能力或可预期的还款资金来源；

2、担保项下借款合同规定的融资条件，在金额、利率、期限等方面与债务人声明的借款资金用途是否存在明显不符；

3、担保当事各方是否存在通过担保履约提前偿还担保项下债务的意图；

4、担保当事各方是否曾经以担保人、反担保人或债务人身份发生过恶意担保履约或债务违约。

附件三：内保外贷下资金用途限制

内保外贷项下资金用途应当符合以下规定：

1、内保外贷项下资金仅用于债务人正常经营范围内的相关支出，不得用于支持债务人从事正常业务范围以外的相关交易，不得虚构贸易背景进行套利，或进行其他形式的投机性交易。

2、未经外汇局批准，债务人不得通过向境内进行借贷、股权投资或证券投资等方式将担保项下资金直接或间接调回境内使用。

3、担保项下资金不得用于境外机构或个人向境内机构或个人进行直接或间接的股权、债权投资，包括但不限于以下行为：

（1）债务人使用担保项下资金直接或间接向在境内注册的机构进行股权或债权投资。

（2）担保项下资金直接或间接用于获得境外标的公司的股权，且标的公司 50%以上资产在境内的。

（3）担保项下资金用于偿还债务人自身或境外其他公司承担的债务，而原融资资金曾以股权或债权形式直接或间接调回境内的。

（4）债务人使用担保项下资金向境内机构预付货物或服务贸易款项，且付款时间相对于提供货物或服务的提前时间超过 1 年、预付款金额超过 100 万美元及买卖合同总价 30%的（出口大型成套设备或承包服务时，可将已完成工作量视同交货）。

4、内保外贷项下担保责任为境外债务人债券发行项下还款义务时，境外债券发行收入应用于与境内机构存在股权关联的境外投资项目，且相关境外机构或项目已经按照规定获得国内境外投资主管部门的核准、登记、备案或确认；

5、内保外贷合同项下融资资金用于直接或间接获得对境外其他机构的股权（包括新建境外企业、收购境外企业股权和向境外企业增资）或债权时，该投资行为应当符合国内相关部门有关境外投资的规定；

6、内保外贷合同项下义务为境外机构衍生交易项下支付义务时，债务人从事衍生交易应当以止损保值为目的，符合其主营业务范围且经过股东适当授权。

附件四：内保外贷下违规行为处罚

<table>
<tr><th>违规行为</th><th>处罚措施</th></tr>
<tr><td>违反 29 号文第十一条第（二）项规定，债务人将担保项下资金直接或间接调回境内使用的。</td><td>《条例》第四十一条，违反规定将外汇汇入境内的，由外汇管理机关责令改正，处违法金额 30%以下的罚款；情节严重的，处违法金额 30%以上等值以下的罚款。非法结汇的，由外汇管理机关责令对非法结汇资金予以回兑，处违法金额 30%以下的罚款。</td></tr>
<tr><td>违反 29 号文第八条规定，担保人办理内保外贷业务违反法律法规及相关部门规定的；</td><td rowspan="5">《条例》第四十三条，有擅自对外借款、在境外发行债券或者提供对外担保等违反外债管理行为的，由外汇管理机关给予警告，处违法金额 30%以下的罚款。</td></tr>
<tr><td>违反 29 号文第十条规定，担保人超出行业主管部门许可范围提供内保外贷的；</td></tr>
<tr><td>违反 29 号文第十二条规定，担保人未对债务人主体资格、担保项下资金用途、预计的还款资金来源、担保履约的可能性及相关交易背景进行审核，对是否符合境内、外相关法律法规未进行尽职调查，或未以适当方式监督债务人按照其申明的用途使用担保项下资金的；</td></tr>
<tr><td>违反 29 号文第十四条规定，担保人未经外汇局批准，在向债务人收回提供履约款之前签订新的内保外贷合同的；</td></tr>
<tr><td>违反 29 号文第二十七条规定，担保人、被担保人明知或者应知担保履约义务确定发生的情况下仍然签订跨境担保合同的。</td></tr>
<tr><td>违反 29 号文第二十八条规定，境内银行对跨境担保交易的背景未进行尽职审查，以确定该担保交易符合中国法律法规和本规定的。</td><td>《条例》第四十七条，外汇管理机关责令限期改正，没收违法所得，并处 20 万元以上 100 万元以下的罚款；情节严重或者逾期不改正的，由外汇管理机关责令停止经营相关业务。</td></tr>
<tr><td>违反 29 号文第九条规定，担保人未按规定办理内保外贷登记的；</td><td rowspan="3">《条例》第四十八条，外汇管理机关责令改正，给予警告，对机构可以处 30 万元以下的罚款，对个人可以处 5 万元以下的罚款。</td></tr>
<tr><td>违反 29 号文第十三条规定，担保人未按规定办理内保外贷登记注销手续的；</td></tr>
<tr><td>违反 29 号文第十五条规定，担保人或反担保人未按规定办理对外债权登记手续的。</td></tr>
</table>