

外国投资者以 PIPE 方式投资 A 股上市公司的最新法律问题

PIPE (Private Investment in Public Equity) 是指投资已上市公司的私募股权投资, 与 Pre-IPO 的私募股权投资不同, 其是由 PE 以市场价格为参照, 购买已经公开上市公司股份的一种投资方式。由于中国的 A 股市场目前还不是一个完全开放的资本市场, 外国投资者并不能自由地投资 A 股上市公司, 故就题述事宜, 根据我们对中国相关法律法规的理解、对市场公开案例的研究以及我们在以往同类型项目中的操作经验, 简析如下:

一、 外国投资者以 PIPE 方式投资 A 股上市公司的基本法律架构

在中国现有的法律框架下, 外国投资者仅可通过两种方式直接投资 A 股上市公司: 一是外国投资者申请成为或者通过 QFII(即 Qualified Foreign Institutional Investors, 即合格境外机构投资者) 投资 A 股上市公司; 二是外国投资者作为战略投资者投资 A 股上市公司。

就上述两种投资方式涉及之监管法规而言, 外国投资者申请成为或者通过 QFII 投资 A 股上市公司主要适用中国证监会、中国人民银行、国家外汇管理局《合格境外机构投资者境内证券投资管理暂行办法》以及中国证监会于 2012 年 7 月 27 日颁布实施的《关于实施〈合格境外机构投资者境内证券投资管理暂行办法〉有关问题的规定》(以下合称“《QFII 相关规定》”)的规定。

而外国投资者作为战略投资者投资 A 股上市公司涉及的监管法规较多, 主要包括:

1. 涉及外资准入或行业监管的法规

(1) 商务部、中国证监会、国家税务总局、国家工商行政管理总局、国家外汇管理局《外国投资者对上市公司战略投资管理办法》(下称“《战投管理办法》”), 是外国投资者战略投资 A 股上市公司的核心规定。该办法明确了外国战略投资者的资格要求、战略投资的基本要求(比如投资比例不低于 10%、锁定期不少于 3 年等)、战略投资的方式(协议转让或定向增发)和审批流程等;

(2) 商务部《关于外国投资者并购境内企业的规定》, 是外国投资者并购境内企业的一般性规定, 《战投管理办法》未明确规定的, 应适用该规定;

(3) 国务院《指导外商投资方向规定》、国家发改委和商务部《外商投资产业指导目录(2011 年修订)》, 是关于外商投资行业准入和产业政策的基本规定;

(4) 《中华人民共和国反垄断法》(下称“《反垄断法》”)、国务院《关于经营者集中申报标准的规定》和商务部相关规定, 根据上述法规规定的要求, 外国投资者并购境内企业达到申报标准

的, 应当事先向商务部申报, 未申报不得实施交易;

(5) 国务院办公厅《关于建立外国投资者并购境内企业安全审查制度的通知》和商务部《实施外国投资者并购境内企业安全审查制度的规定》, 根据安全审查制度的要求, 外国投资者并购特殊行业的境内企业, 且获得实际控制权的, 应通过安全审查;

(6) 如果被并购的 A 股上市公司属于特定行业的, 例如银行、保险公司等, 还需要按相关规定报请相关行业主管部门审批, 比如中国银监会《境外金融机构投资入股中资金融机构管理办法》规定境外金融机构投资入股中资金融机构(包括中资商业银行、城市信用社、农村信用社、信托投资公司、企业集团财务公司、金融租赁公司等), 应报请中国银监会审批。

2. 涉及国资管理的法规

主要规定是国务院国资委和中国证监会《国有股东转让所持上市公司股份管理暂行办法》, 该办法明确了国有股东通过证券交易系统转让、协议转让、无偿划转和间接转让上市公司股份的相关程序。

3. 涉及证券监管的法规

(1) 中国证监会《上市公司收购管理办法》(下称“《收购管理办法》”)及其配套制度是证券监管的核心规定;

(2) 如果外国投资者以资产为对价投资 A 股上市公司, 还应适用中国证监会《上市公司重大资产重组管理办法》及其配套制度。

二、 外国投资者以 PIPE 方式投资 A 股上市公司的主要方式

1. 申请成为或者通过 QFII 投资 A 股上市公司

根据《QFII 相关规定》, 符合条件的 QFII 可以投资中国证监会批准的人民币金融工具(包括在证券交易所挂牌交易的 A 股股票)。由此, 外国投资者可以申请成为或者通过 QFII 取得上市公司 A 股股份。

就申请成为 QFII 而言, 外国投资者需符合一定的资格要求, 具体如下:

(1) 为中国境外基金管理机构、保险公司、证券公司以及其他资产管理机构。其中:

(a) 资产管理机构: 经营资产管理业务 2 年以上, 最近一个会计年度管理的证券资产不少于 5 亿美元;

(b) 保险公司: 成立 2 年以上, 最近一个会计年度持有的证券资产不少于 5 亿美元;

(c) 证券公司: 经营证券业务 5 年以上, 净资产不少于 5 亿美元, 最近一个会计年度管理的证券资产不少于 50 亿美元;

(d) 商业银行: 经营银行业务 10 年以上, 一级资本不少于 3

亿美元，在最近一个会计年度管理的证券资产不少于 50 亿美元；

(e) 其他机构投资者(养老基金、慈善基金会、捐赠基金、信托公司、政府投资管理公司等)：成立 2 年以上，最近一个会计年度管理或持有的证券资产不少于 5 亿美元。

(2) 财务稳健，资信良好，达到中国证监会规定的资产规模等条件；

(3) 从业人员符合所在国家或者地区的有关从业资格的要求；

(4) 有健全的治理结构和完善的内控制度，经营行为规范，近 3 年未受到监管机构的重大处罚；

(5) 所在国家或者地区有完善的法律和监管制度，其证券监管机构已与中国证监会签订监管合作谅解备忘录，并保持着有效的监管合作关系；

(6) 中国证监会根据审慎监管原则规定的其他条件。

此外，外国投资者按照《QFII 相关规定》获得上市公司股份的，需经中国证监会批准，并取得国家外汇管理局额度批准。QFII 在经批准的投资额度内，可以投资于中国证监会批准的人民币金融工具，但需委托境内商业银行作为托管人托管资产，并委托境内证券公司办理在境内的证券交易活动。

就通过 QFII 取得上市公司 A 股股份而言，外国投资者可以委托一家或几家 QFII，QFII 直接在境内证券市场上购买上市公司 A 股股份，在有关信息披露中，QFII 将披露该外国投资者为实际投资人。与申请成为 QFII 以及本简析所述之其他投资方式投资 A 股上市公司需要取得交易对方的配合和/或涉及多处项审批程序不同，通过 QFII 投资 A 股上市公司可由外国投资者单方面实施，除了履行信息披露义务外不涉及政府部门的审批。然而，根据《QFII 相关规定》，外国投资者通过 QFII 投资 A 股上市公司存在投资比例限制，即单个境外投资者通过 QFII 持有一家上市公司股票的，持股比例不得超过该公司股份总数的 10%；所有境外投资者对单个上市公司 A 股的持股比例总和，不超过该上市公司股份总数的 30%。

2. 作为战略投资者投资 A 股上市公司

根据《战投管理办法》的规定，外国投资者作为战略投资者获得上市公司 A 股股份的，需符合一定的资格要求，具体如下：

(1) 依法设立、经营的外国法人或其他组织，财务稳健、资信良好且具有成熟的管理经验；

(2) 境外实有资产总额不低于 1 亿美元或管理的境外实有资产总额不低于 5 亿美元；或其母公司境外实有资产总额不低于 1 亿美元或管理的境外实有资产总额不低于 5 亿美元；

(3) 有健全的治理结构和良好的内控制度，经营行为规范；

(4) 近三年内未受到境内外监管机构的重大处罚(包括其母公司)。

根据《战投管理办法》的规定，外国投资者战略投资方式分为上市公司定向发行和协议转让两种方式。

(1) 通过上市公司定向发行方式进行战略投资的，按需要履行以下程序：

(a) 上市公司董事会通过决议；

(b) 上市公司股东大会通过决议；

(c) 上市公司与投资者签订定向发行的合同；

(d) 上市公司向商务部报送相关申请文件；

(e) 在取得商务部就投资者对上市公司进行战略投资的原则批复函后，上市公司向中国证监会报送定向发行申请文件；

(f) 中国证监会依法予以核准；

(g) 定向发行完成后，上市公司到商务部领取外商投资企业批准证书，并凭该批准证书到工商行政管理部门办理变更登记。

上市公司发行新股的价格不低于定价基准日前 20 个交易日公司股票均价的 90%，定价基准日可以为关于本次非公开发行股票董事会决议公告日、股东大会决议公告日，也可以为发行期的首日。

本方式下代表案例有南方建材(000906)向 Art Garden 定向增发和冀东水泥(000401)向菱石投资定向增发。

(2) 通过协议转让方式进行战略投资的，需要履行以下程序：

(a) 上市公司董事会通过决议；

(b) 上市公司股东大会通过决议；

(c) 转让方与投资者签订股份转让协议；

(d) 投资者向商务部报送相关申请文件；

(e) 投资者参股上市公司的，获得前述批准后向证券交易所办理股份转让确认手续、向证券登记结算机构申请办理登记过户手续，并报中国证监会备案；若投资者拟通过协议转让方式构成对上市公司的实际控制，投资者应向中国证监会报送上市公司收购报告书及相关文件，经中国证监会审核无异议后方可向证券交易所办理股份转让确认手续、向证券登记结算机构申请办理登记过户手续；

(f) 协议转让完成后，上市公司到商务部领取外商投资企业批准证书，并凭该批准证书到工商行政管理部门办理变更登记。

若转让方为上市公司国有股东，则在协议收购过程中，股份转让价格应当以上公司股份转让信息公告日前 30 个交易日的每日加权平均价格算术平均值为基础确定；确需折价的，其最低价格不得低于该算术平均值的 90%。

本方式下代表案例有 CVC 战略投资珠海中富(000659)和嘉士伯香港协议收购重庆啤酒(600132)。

无论采用何种战略投资方式，外国投资者取得的上市公司 A 股股份三年内不得转让。投资可分期进行，首次投资完成后取得的股份比例不低于该公司已发行股份的百分之十。

3. 通过间接收购方式投资 A 股上市公司

(1) 外国投资者通过由其控股的外商投资企业并购上市公司

外国投资者可以通过由其控股的具有中国法人资格的外商投资企业并购 A 股上市公司。外国投资者通过该种方式无需按照前述《战投管理办法》和《QFII 相关规定》达到战略投资者或 QFII 的资质要求，也无需履行战略投资者和 QFII 的审批程序。

外国投资者通过由其控股的外商投资企业并购 A 股上市公司的，应按照《收购管理办法》、《上市公司证券发行管理办法》以及《上市公司非公开发行股票实施细则》的规定，通过要约收购、协议收购、认购上市公司定向发行股票的方式履行相应的并购程序。

需要指出的是，中国外汇管理部门目前对外商投资企业资本金用于境内股权投资有严格限制，因此外国投资者拟通过境内已设立的外商投资企业实施上市公司收购的，该等外商投资企业应有收购的自有资金。此外，该等外商投资企业亦不得为外资股权投资企业，根据国家发展改革委办公厅于 2011 年 11 月 23 日发布的《关于促进股权投资企业规范发展的通知》(发改办财金[2011]2864 号)，股权投资企业(包括外资股权投资企业)的投资领域限于非公开交易的股权，而不包括 A 股上市公司股票。

本方式下代表案例有 Everwin Pacific Limited 通过中皇公司收购酒鬼酒(000799)。

(2) 外国投资者通过其在中国境内设立的投资性公司并购上市公司

外商设立的投资性公司，根据现行规定，其不但可以对境内上市公司实施战略投资，还可以通过二级市场买卖境内上市公司的 A 股股票。当然，设立投资性公司有一定门槛要求，具体如下：

(a) 外国投资者资信良好，拥有举办投资性公司所必需的经济实力，申请前一年该投资者的资产总额不低于四亿美元，且该投资者在中国境内已设立了外商投资企业，其实际缴付的注册资本的出资额超过一千万美元；或者外国投资者资信良好，拥有举办投资性公司所必需的经济实力，该投资者在中国境内已设立了十个以上外商投资企业，其实际缴付的注册资本的出资额超过三千万美元；

(b) 以合资方式设立投资性公司的，中国投资者应为资信良好，拥有举办投资性公司所必需的经济实力，申请前一年该投资者的资产总额不低于一亿元人民币；

(c) 投资性公司的注册资本不低于三千万美元。

(3) 外国投资者通过并购上市公司的控股股东间接控股上市公司

外国投资者可根据《关于外国投资者并购境内企业的规定》和《收购管理办法》所规定的程序，以及《外商投资产业指导目录》中鼓励和支持的投资方向，整体或部分买断上市公司的母公司或控股股东企业，将该企业变成外商独资企业或外商投资企业，从而间接控股上市公司。提请注意，如果上市公司的母公司为国有性质，还需要履行相应的国资审批程序。

本方式下代表案例有鼎晖间接入股鲁西化工(000830)。

4. 通过以资产认购股份方式取得 A 股上市公司股份

外国投资者除了以现金购买上市公司股票外，还可以其依法拥有

的境内、外资产作为对价认购上市公司向其定向发行的 A 股股票，若其拟注入上市公司的资产达到一定标准，则将构成上市公司重大资产重组，通常涉及商务部和中国证监会的审批。

本方式下代表案例有亿晶光电借壳海通食品(600537)和梅花味精吸收合并五洲明珠(600873)。

三、 外国投资者以 PIPE 方式投资 A 股上市公司应注意的问题

1. 行业准入

已如前述，外国投资者投资 A 股上市公司应取得中国相关政府部门的审批，且应符合相关行业外资准入政策。根据《战投管理办法》的规定，法律法规对外商投资持股比例有明确规定的行业，投资者持有上述行业股份比例应符合相关规定；属法律法规禁止外商投资的领域，投资者不得对上述领域的上市公司进行投资。

中国对外商投资实行行业准入政策，将外商投资项目划分为四类，即鼓励类、允许类、限制类和禁止类。《外商投资产业指导目录》(2011 年修订)列举了鼓励类、限制类、禁止类的项目，该目录还对部分外商投资项目的具体外资持股比例作出了限制。

2. 反垄断审查

外国投资者投资 A 股上市公司可能视情况需要进行反垄断审查。自 2008 年《反垄断法》颁布后，国务院及商务部又相继发布了《关于经营者集中申报标准的规定》、《经营者集中审查办法》、《关于评估经营者集中竞争影响的暂行规定》等规定，就反垄断审查的程序、申报文件作出具体规定。根据前述法规，外国投资者在收购上市公司时，如果取得上市公司的控制权(包括共同控制权)，且参与集中的所有经营者上一会计年度在全球范围内的营业额合计超过 100 亿元人民币，并且其中至少两个经营者上一会计年度在中国境内的营业额均超过 4 亿元人民币；或参与集中的所有经营者上一会计年度在中国境内的营业额合计超过 20 亿元人民币，并且其中至少两个经营者上一会计年度在中国境内的营业额均超过 4 亿元人民币的，外国投资者要向商务部申报，取得其批准。

据我们所知，2007 年 CVC 通过子公司 Asia Bottles (HK) Company Limited 战略投资境内 A 股上市公司珠海中富时，曾向商务部递交了反垄断申报文件。

3. 安全审查

外资并购涉及下述安全审查范围的，外国投资者应当在申请并购交易前，向商务部申请进行安全审查。安全审查的范围包括国防安全、涉及国家安全的重要农产品、重要能源和资源、重要基础设施、重要运输服务、关键技术、重大装备制造等。对于涉及国防安全的企业并购，不论外国投资者是否可能取得实际控制权，都要求申请安全审查；对于涉及国家安全的外资并购，外国投资者只有在可能通过并购取得相关企业实际控制权的情况下才需申请安全审查。需要说明的是，由于目前商务部门并未公布安全审查范围涉及的具体行业目录，所以，为降低法律风险，外国投资者可通过预约商谈程序与商务部门就其并购是否涉及安全审查进行事前沟通。

4. 要约收购豁免

根据《收购管理办法》的规定，收购人拥有权益的股份达到上市公司已发行股份的 30%时，继续进行收购的，应当依法向该上市公司的股东发出全面要约或者部分要约。符合《收购管理办法》规定情形的，收购人可以向中国证监会申请免除发出要约。前述可以向中国证监会提出免于以要约方式增持股份申请的情形包括：

- (1) 收购人与出让人能够证明本次转让未导致上市公司的实际控制人发生变化；
- (2) 上市公司面临严重财务困难，收购人提出的挽救公司的重组方案取得该公司股东大会批准，且收购人承诺 3 年内不转让其在该公司中所拥有的权益；
- (3) 经上市公司股东大会非关联股东批准，收购人取得上市公司向其发行的新股，导致其在该公司拥有权益的股份超过该公司已发行股份的 30%，收购人承诺 3 年内不转让本次向其发行的新股，且公司股东大会同意收购人免于发出要约；
- (4) 中国证监会为适应证券市场发展变化和保护投资者合法权益的需要而认定的其他情形。

邵春阳 合伙人 Tel: 8621 2208 6241 Email: shaochy@junhe.com

冯诚 律师 Tel: 8621 2208 6356 Email: fengch@junhe.com

根据上述规定，外国投资者通过协议转让的方式对上市公司实施战略投资较之于定向发行方式较难获得中国证监会关于要约方式收购的豁免。

5. 同业竞争与关联交易

根据《收购管理办法》，外国投资者就其投资 A 股上市公司所编制、公告的信息披露文件中应披露投资者、一致行动人及其控股股东、实际控制人所从事的业务与上市公司的业务是否存在同业竞争或者潜在的同业竞争，是否存在持续关联交易；存在同业竞争或者持续关联交易的，是否已做出相应的安排，确保投资者、一致行动人及其关联方与上市公司之间避免同业竞争以及保持上市公司的独立性。

若外国投资者投资 A 股上市公司达到《上市公司重大资产重组管理办法》所规定的借壳上市标准，则根据前述《重组管理办法》的规定，该等重大资产重组完成后，上市公司应当符合中国证监会关于上市公司治理与规范运作的相关规定，在业务、资产、财务、人员、机构等方面独立于控股股东、实际控制人及其控制的其他企业，与控股股东、实际控制人及其控制的其他企业间不存在同业竞争或者显失公平的关联交易。

JUN HE SPECIAL REPORT



2012年8月6日

The Latest Legal Issues of Brief Introduction of Relevant Legal Issues of Foreign Investor's PIPE Investment in A-Share Listed Companies

PIPE (Private Investment in Public Equity), the PE investment in listed companies, which is different from PE investment in Pre-IPO companies, is another type of PE investment by way of purchasing the shares of a publicly listed company based on the market price. Because the current PRC A-Share securities market is not a fully opened capital market, foreign investors are unable to freely invest in A-Share listed companies. Therefore, based on our understanding of relevant PRC laws and regulations, our research on the publicly available cases and our prior practical experience in similar kinds of projects, we have prepared this introduction for your general reference.

I. Basic Legal Framework for the PIPE Investment in A-Share Listed Companies by Foreign Investors

Under the current existing PRC legal framework, foreign investors can only conduct direct investment in A-Share listed companies through the following two methods: the foreign investors can apply for a QFII (**“Qualified Foreign Institutional Investors”**) license or conduct the investment via QFII; or the foreign investors can invest in A-Share listed companies as strategic investors.

With respect to the laws and regulations that are applicable to the above-mentioned two investment methods, application of a QFII license or conducting the investment in A-Share listed company via QFII is subject to the requirements under the *Administrative Measures for the Domestic Securities Investment by Qualified Foreign Institutional Investors* jointly promulgated by the China Securities Regulatory Commission (**“CSRC”**), People's Bank of China (**“PBOC”**) and State Administration of Foreign Exchange (**“SAFE”**) and the *Regulation regarding the Implementation of Administrative Measures for the Domestic Securities Investment by Qualified Foreign Institutional Investors* promulgated and implemented by CSRC on July 27, 2012 (collectively **“QFII Regulations”**); on the other hand, investment in A-Share listed companies by foreign investors as strategic investors will involve more regulatory regulations, including:

1. Regulations governing the entry of foreign investment or industrial regulatory rules

(1) The *Administrative Measures on the Strategic Investment in Listed Companies by Foreign Investors* (**“Strategic Investment Measures”**) jointly promulgated by the Ministry of Commerce (**“MOFCOM”**), CSRC, the State Administration of Taxation (**“SAT”**), the State Administration of Industry and Commerce (**“SAIC”**) and SAFE, is the key regulation governing strategic investment in A-Share listed companies by foreign investors. The measures specify the qualification requirements of foreign strategic investors, the basic requirement for the strategic investment (i.e.: the investment ratio shall be no less than 10%, the minimum 3 year lock-up period, etc.), the method of the strategic investment (acquisition by agreement or the private placement of shares) and the approval process, etc.

(2) *Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* promulgated by MOFCOM, is the general regulation governing the M&A of domestic enterprises by foreign investors. The provisions are the default rule when certain things are not clearly specified under the *Strategic Investment Measures*.

(3) *Provisions on Guiding Direction of Foreign Investment* promulgated by the State Council and the *Foreign Investment Industrial Guidance Catalogue* (amended in 2011) promulgated by the National Development and Reform Commission (**“NDRC”**) and MOFCOM, are the fundamental regulations governing the industrial access and policy of foreign investment.

(4) According to the requirement under the *PRC Anti-monopoly Law* (**“Anti-monopoly Law”**), *Regulation on the Filing Threshold for the Concentration of Business Operators* published by the State Council and other relevant regulatory requirements of MOFCOM, in the event the foreign investor's M&A of a domestic enterprise reaches the filing threshold, the foreign investor is required to make a prior filing at MOFCOM, otherwise the M&A transaction is not allowed to proceed.

According to the requirements under the *Notice of the General Office of the State Council on Establishing the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors and the Rules of Ministry of Commerce on Implementation of Security Review System of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, in

the event of the foreign investor's M&A of a domestic enterprise that falls under certain industries and where the foreign investor will have de facto control of such domestic enterprise following the M&A transaction, a security review is required.

(5) If the target A-Share listed company is within certain special industries, such as a bank, an insurance company, etc., the approval from the *relevant* industrial regulatory authority is required, according to applicable regulations. For example, according to China Banking Regulatory Commission ("CBRC")'s *Administrative Measures on the Equity Investment in Chinese Financial Institution by Overseas Financial Institution*, approval from CBRC is required in the event of equity investment by overseas financial institutions in Chinese financial institutions (including Chinese commercial bank, urban credit cooperative, rural credit cooperative, trust and investment corporation, financial company for the group enterprise, financial leasing company, etc.)

2. Laws and regulations in relation to the management of state owned asset

The major rule is the *Interim Administrative Measures on the Transfer of Shares of Listed Company by State-Owned shareholders* jointly promulgated by State-owned Assets Supervision and Administration Commission of the State Council ("SASAC") and CSRC, which specifies the procedure that is applicable to the trading conducted by state-owned shareholders via securities exchange system, transfer by agreement, gratuitous transfer and indirect transfer.

3. Laws and regulations in relation to the securities regulation

(1) *Administrative Measures on the Acquisitions of Listed Companies* ("**Administrative Measures on Acquisitions**") promulgated by CSRC and its applicable rules are the key securities regulatory regulations.

(2) If the consideration paid by the foreign investor for its investment in A-Share listed companies is in the form of the asset, CSRC's *Administrative Measures for the Material Asset Reorganization of Listed Companies* and its applicable rules are also applicable.

II. General Methods for PIPE Investment in A-Share Listed Companies by Foreign Investors

1. Applying for a QFII license or conducting the investment in A-Share listed companies via QFII

According to the QFII Regulations, qualified QFII can invest the RMB financial instruments approved by CSRC (including trading the listed A-Share at the securities exchange). Therefore, foreign investors can acquire the A-Share of the listed companies by applying for a QFII license or via QFII.

A foreign investor must meet the following qualification requirements for the application of a QFII license:

(1) The foreign investor should be an overseas fund management institution, insurance company, securities company and other asset management institution, and if the foreign investor is a:

(a) asset management institution, it shall have at least 2 years of experience in assets management and a minimum USD 0.5 billion of securities assets managed by it in the most recent fiscal year;

(b) insurance company, it shall have an at least 2 years of history since its establishment, and it must have held a minimum USD 0.5 billion securities assets in the most recent fiscal year;

(c) securities company, it shall have at least 5 years of experience in securities operation with a minimum USD 0.5 billion net assets, and managed a minimum USD 5 billion securities assets in the most recent fiscal year;

(d) commercial bank, it shall have at least 10 years of experience in the operation of banking business with a core capital of minimum USD 0.3 billion, and managed a minimum USD 5 billion securities assets within the most recent fiscal year;

(e) other institutional investor (pension fund, charitable foundation, donation foundation, trust company, government investment management company), it shall have at least 2 years of history since its establishment and managed or held a minimum USD 0.5 billion securities assets within the most recent fiscal year.

(2) the applicant is in sound financial shape and credit status, and should meet the requirements set forth by CSRC on the size of the assets and other factors;

(3) employees of the applicant should meet the relevant professional qualification requirement of its home country/region;

(4) the applicant should have a sound management structure and a well-established internal control system, and should conduct business operations in accordance with applicable laws and regulations, and it must not have been substantially punished by regulatory authorities within the most recent 3 years;

(5) the home country/region of the applicant should have a well-established legal and regulatory system, and its securities regulatory authority must have signed the memorandum of understanding with CSRC and has maintained an effective cooperative supervisory relationship;

(6) other criteria as stipulated by CSRC based on the principle of prudent supervision.

In addition, approval from CSRC and the quota approval by SAFE are required for the acquisition of the shares of listed companies by foreign investors according to the QFII

Regulations. Within the approved quota, QFII can invest the RMB financial instrument approved by CSRC. However, QFII is required to entrust a domestic commercial bank as the trustee to manage the assets on behalf of QFII, and is also required to entrust a domestic securities company to conduct the domestic securities exchange transaction.

With respect to the acquisition of shares of A-Share listed companies via QFII, foreign investors can entrust one or several QFII(s). The QFII will directly purchase the shares of A-Share listed companies on the domestic securities market and the QFII will disclose that such foreign investor is the actual investor in the relevant information disclosure. In comparison with the required cooperation provided by the transaction's opponents and the various approval requirements as required for the investment in A-Share listed companies by way of applying a QFII license, and other investment methods as mentioned herein, investment in A-Share listed companies via QFII can be conducted by the foreign investor unilaterally, and there is no need to obtain approval from governmental authority, except with respect to the information disclosure obligation. However, according to the QFII Regulations, there is an investment ratio limitation on the investment in A-Share listed companies via QFII by foreign investors, under which if a single overseas investor holds the shares of a listed company via QFII, the equity interest held by it shall not exceed 10% of the issued shares of such a listed company; and the total equity interest held by all overseas investors in a listed company shall not exceed 30% of the issued shares of such a listed company.

2. Investment in an A-Share listed company as a strategic investor

According to the *Strategic Investment Measures*, a foreign investor must meet the following qualification requirements for its acquisition of the shares of an A-Share listed company as a strategic investor:

- (1) It is a legally established and operated foreign legal person or other organization, with stable financial status, good credit standing and mature management experience;
- (2) The total amount of its actual overseas assets shall be no less than USD 100 million or the actual overseas assets managed by it shall be no less than USD 500 million; or the total amount of its parent company's actual overseas assets shall be no less than USD 100 million or the actual overseas assets managed by its parent company shall be no less than USD 500 million;
- (3) It has a sound management structure and a well-established internal control system, and its business operation activities are in compliance with applicable laws and regulations;
- (4) It has not received any substantial punishment by an overseas or domestic regulatory authority within the most recent 3 years (including its parent company).

According to the *Strategic Investment Measures*, a foreign investor's strategic investment methods can be categorized by the following two methods: private placement and transfer by agreement.

(1) The following procedures shall be completed if the strategic investment is conducted in the form of the private placement of shares by listed companies:

- (a) the board of directors of the listed company passes a board resolution;
- (b) the shareholder general meeting of the listed company passes a resolution;
- (c) the listed company signs the subscription agreement for the private placement of shares with the investor;
- (d) submit relevant application documents to the MOFCOM;
- (e) after the obtainment of MOFCOM's approval for the strategic investment by an investor in the listed company, the listed company submits the private placement application documents to CSRC;
- (f) obtains CSRC's approval;
- (g) after the completion of the private placement, the listed company obtains the approval certificate for a foreign invested enterprise at MOFCOM, and makes an amendment registration at SAIC based on such approval.

The issuance price of the shares subject to the private placement of the listed company should be no lower than 90% of the average price of the issuer's shares for the 20 trading days prior to the date of the benchmark pricing. The date of the benchmark pricing can be the date of the announcement of the board resolution, the date for the announcement of the shareholder general meeting resolution, or the initial day of the placement period.

In practice, Art Garden's subscription of the private placement of shares of Southern Building Material (000906) and Diamondrock Investment's subscription of the private placement of shares of Jidong Cement (000401) are typical cases of private placement..

(2) The following procedures shall be completed if the strategic investment is conducted through transfer by agreement:

- (a) the board of directors of the listed company passes a board resolution;
- (b) the shareholder general meeting of the listed company passes a shareholder resolution;
- (c) the transferor signs the share purchase agreement with the investor;
- (d) the investor submits the relevant application documents

to the MOFCOM;

(e) if the investor is an equity holder of the listed company and has obtained the above-mentioned approval, the investor must complete the formalities for the confirmation of the share transfer at a securities exchange, complete the formalities for the registration at a securities registration and settlement institution, and makes a filing at CSRC; if the investor intends to have de facto control of the listed company by way of transfer by agreement, the investor shall submit an acquisition report and relevant document to CSRC for its review and can only proceed with the share transfer confirmation formalities at a securities exchange and apply for the registration at a securities registration and settlement authority if CSRC raises no objection after the review;

(f) After the transfer by agreement is completed, the listed company obtains the approval certificate for a foreign invested enterprise at MOFCOM and makes an amendment registration at SAIC based on such approval.

If the transferor is a state-owned shareholder of the listed company, during the process of transfer by agreement, the share transfer price should be determined based on the average of the weighted average prices of 30 trading days prior to the date of the announcement of the proposed share transfer; where there exists the necessity for a lower transfer price, the minimum price should not be lower than 90% of such averaged price.

In practice, the strategic investment by CVC in “Zhuhai Zhongfu” (000659) and “Carlsberg Hong Kong’s acquisition by agreement of Chongqing Beer” (600132) are typical cases of transfer by agreement.

No matter what strategic investment method is adopted, the A-Shares of the listed company acquired by foreign investors may not be transferred within 3 years. The investment can be conducted in several installments and the proportion of the shares obtained after the completion of the initial investment shall be no less than 10% of the shares issued by the company.

3. Investing the A-Share listed company by way of indirect acquisition

(1) M&A of a listed company via its controlling foreign invested enterprise

Foreign investors can merge and acquire the A-Share listed companies via its foreign invested enterprise with PRC legal person qualification. Foreign investment in this pattern does not need to meet the qualification requirement for the strategic investor or QFII as required under the above-mentioned *Strategic Investment Measures* or QFII Regulations and there is no need to go through the approval procedure as required for the strategic investor and QFII.

The M&A of A-Share listed companies by foreign investors via its controlled foreign invested enterprise shall be conducted in

accordance with the *Administrative Measures on Acquisitions, Administrative Measures on the Issuance of Securities by Listed Companies and Implementing Rules on the Private Placement of Shares by Listed Companies*, by way of tender offer, acquisition by agreement, subscription of private placement of shares of listed companies to complete the relevant acquisition procedures.

Please note that due to the current strict foreign exchange control of SAFE on the equity investment of foreign invested enterprise by way of using the fund in its capital account, if the foreign investor intends to acquire the listed company via its already established foreign invested enterprise, such foreign invested enterprise should use its self-owned fund. In addition, such a foreign invested enterprise should not be a foreign equity investment enterprise. According to the *Circular on the Promoting the Standardized Development of Equity Investment Enterprises* promulgated by the General Office of NDRC (Fa Gai Ban Cai Jin [2011] No. 2864), the scope of investment for the equity investment enterprise (including foreign equity investment enterprise) is limited to non-publicly traded securities, which does not include the A-Share of the listed companies.

A typical case was Everwin Pacific Limited’s acquisition of Jiugui Liquor (000799) via Zhonghuang Company.

(2) M&A of a listed company via a foreign investor’s domestically established investment company.

According to the current regulations, the investment company established by the foreign investor may not only make the strategic investment in a domestically listed company, but it also may trade A-Share of domestically listed companies in the secondary market. Of course, there are certain qualification requirements for the establishment of an investment company:

(a) The foreign investor has good credit standing and has the financial strength necessary for the establishment of the investment company, and its total assets shall be no lower than USD 400 million for the year prior to the establishment, and it has established a foreign invested enterprise in China, and its actual paid-in capital contribution to the registered capital exceeds USD 10 million, or (ii) has good credit and the financial strength necessary for the establishment of the investment company, and it has established ten or more foreign invested enterprises in China, and the actual paid-in capital contribution to the registered capital exceeds USD 30 million.

(b) To establish an investment company in the form of an equity joint venture, the Chinese investor shall have good credit standing and the financial strength necessary for the establishment of an investment company, and its total assets shall be no less than RMB100 million for the year prior to the application;

(c) The registered capital of the investment company shall be no lower than USD 30 million.

(3) Foreign investor's M&A of the controlling shareholder of the listed company to indirectly control the listed company

A foreign investor can wholly or partially acquire the parent company or the controlling shareholder of the listed company in accordance with the *Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investor and the Administrative Measures on Acquisitions*, that falls under the supported or the encouraged industry according to the *Foreign Investment Industrial Guidance Catalogue*, to convert such listed company to a wholly foreign owned enterprise or a foreign invested enterprise, and realize its indirect control of the listed company. Please note that if the parent company of the listed company is a state-owned company, the relevant approval process for the transfer of state-owned assets shall be completed.

The typical case under this method is CDH Investment's indirect equity investment in Luxi Chemical (000830).

4. Acquire the shares of A-Share listed company by using assets for consideration

Except for using cash for the consideration to purchase the shares of a listed company, foreign investors are allowed to use their legally owned domestic or overseas assets for consideration for the subscription of private placement A-shares by listed companies. If the asset contributed by such foreign investors reaches a certain threshold, then the transaction constitutes a material asset reorganization of the listed company, and such transaction usually is subject to relevant approval from MOFCOM and CSRC.

The typical case under this method includes EGING PV's reverse merger of Haitong Food (600537) and Meihua MSG's absorption merger of Wuzhou Minovo (600873).

III. Issues noteworthy for PIPE investment in A-Share Listed Companies by Foreign Investors

1. Industrial Access

As discussed above, the investment by foreign investors in A-Share listed companies is subject to the approval of relevant PRC government authorities and must also comply with relevant foreign investment entry policies. According to the *Strategic Investment Measures*, with respect to an industry for which the laws and regulations have expressly specified the limitation on the proportion of shares held by a foreign investor, the proportion of the shares of the company that fall under such industry held by such investor shall comply with such requirements; with regard to an industry that is prohibited entry of foreign investment as specified in applicable laws and regulations, the investor shall not invest in the listed company within such an industry. The PRC government has established an industrial entry system for foreign investment and the industries for foreign investment are divided into four categories, which are: encouraged, permitted, restricted and

prohibited industries. *Foreign Investment Industrial Guidance Catalogue* (amended in 2011) in detail lists the encouraged, restricted and prohibited industries and also specifies the limitation on the proportion of shares to be held by the foreign investors for certain industries.

2. Anti-monopoly Review

Investment by foreign investors in A-Share listed companies may be subject to anti-monopoly review depending on the actual circumstances. Since the publishing of *Anti-Monopoly Law* in 2008, the State Council and MOFCOM consecutively promulgated *Regulation on the Filing Threshold for the Concentration of Business Operators*, *the Measures for the Review of the Concentration of Business Operators*, *the Interim Measures for the Evaluation of the Competitive Effect on the Concentration of the Business Operators*, and other regulations, to specify the anti-monopoly review procedure and the required filing documents. According to the above-mentioned regulations, in the event of the acquisition of a listed company by a foreign investor, if the foreign investor has acquired the control (including the common control) of the listed company and the total worldwide revenue of all business operators participating in the concentration for the prior fiscal year exceeds RMB 10 billion, and at least two business operators' revenue in China for the prior fiscal year each exceeds RMB 40 million; or the total revenue in China of all business operators participating in the concentration for the prior fiscal year exceeds RMB 2 billion, and at least two business operators' revenue in China for the prior fiscal year each exceeds RMB 40 million, such foreign investor is required to make a filing at MOFCOM to seek its approval.

By our knowledge, CVC submitted the anti-monopoly filing document to MOFCOM at the time of its strategic investment in the domestic A-Share listed company, Zhuhai Zhongfu, via its subsidiary Asia Bottles (HK) Company Limited in 2007.

3. Security Review

In the event of the M&A of domestic enterprises within the following industries, the foreign investor shall make a filing at MOFCOM for a security review. The industries within the scope of the security review includes national security, material agriculture products in relation to the national defense security, critical energy and resource, critical infrastructure, critical transportation service, key technology, manufacture of critical equipments. If the M&A transaction has a national defense security implication, a security review is required irrespective of whether the foreign investor will have de facto control of the domestic enterprise or not; if the M&A transaction has a national security implication, a security review is required if the foreign investor will have the de facto control of domestic enterprise. Please note that currently MOFCOM has not published the detailed catalogue of the industries within the scope of security review, therefore, for the purpose of reducing

the legal risk, it is suggested that the foreign investor make a prior consultation with MOFOCM to discuss whether the M&A transaction is subject to a security review.

4. Waiver of Tender Offer

According to the *Administrative Measures on Acquisition*, in the event the shares of a listed company held by a purchaser reaches 30% of the issued shares of the company, the purchaser shall deliver a general offer or partial offer to the shareholders of the listed company before the acquisition can proceed. The purchaser may file an application at CSRC to waive such a tender offer requirement, if the acquisition is in compliance with certain requirements under the *Administrative Measures on Acquisition*. Under the following circumstances, the purchaser can send an application to CSRC to waive the tender offer requirement:

- (1) The purchaser and the transferor can prove that the share transfer will not result in the change of the actual control person of the listed company;
- (2) The listed company is facing a severe financial crisis, and the reorganization plan proposed by the purchaser to save the company has been approved by a general shareholder meeting of the company, and the purchaser warrants that it will not transfer its interest in the company within 3 years;
- (3) Subject to the approval of the non-affiliated shareholders of a general shareholder meeting of the company, the newly issued shares of the listed company acquired by the purchaser will result in its shares in the listed company exceeding 30% of the issued shares of such company, and the purchaser warrants that it will not transfer the shares newly issued to it under this transaction within 3 years, and the waiver of the tender offer is approved by a general shareholder meeting of the company;
- (4) Other circumstances approved by CSRC as necessary for the development of securities market and for the protection of legal interest of the investor.

According to the above-mentioned requirements, it is relatively difficult for the foreign investor to obtain CSRC's approval for

the waiver of the tender offer requirement, if the strategic investment in the listed company is conducted by way of transfer by agreement, compared with the investment by way of private placement.

5. Horizontal Competition and Affiliate Transaction

According to the *Administrative Measures on Acquisition*, in the information disclosure documents prepared and published by the foreign investor for its investment in the A-Share listed company, the foreign investor shall disclose whether there exists any horizontal competition or potential horizontal competition between the business of the investor, person acting in concert and its controlling shareholders, actual control person and the business of the listed company, and whether there exists any continuingly affiliate transaction; if there exists any horizontal competition or affiliate transaction, whether relevant arrangement has been implemented to ensure the avoidance of horizontal competition between the investor, person acting in concert and its affiliated party and the listed company, and to ensure the independence of the listed company.

If the investment in an A-Share listed company by the foreign investor satisfies the back door listing requirements as specified in the *Administrative Measures for the Material Asset Reorganization of Listed Companies*, then according to the above-mentioned *Administrative Measures for the Reorganization*, after the completion of such material asset reorganization, the listed company shall comply with the relevant requirement by CSRC in the corporate governance and standardized operation of the listed company, to ensure its independence from the controlling shareholder, actual control person and other enterprises that are controlled by such person, in the business, assets, finance, employee, organization and other aspects, and to ensure there is no horizontal competition and other unconscionable affiliate transaction between the controlling shareholder, actual control person and other enterprises that are controlled by such person.

Shao Chunyang Partner Tel: 8621 2208 6241 Email: shaochy@junhe.com
Feng Cheng Associate Tel: 8621 2208 6356 Email: fengch@junhe.com