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Finance Law

New Development on Foreign Exchange Control: Circular No.19 Clarifies and Simplifies Foreign Debt Registration

To deepen the reform of foreign exchange administration, the State Administration of Foreign Exchange ("**SAFE**") released *the Circular on Issuing the Measures for Administration of Foreign Debt Registration* (Hui Fa [2013] No.19, "**Circular No.19**") on April 28, 2013. Circular 19 substantially improved the current foreign debt registration regime by simplifying and clarifying the foreign debt registration procedures. Along with Circular No.19 coming into effect on May 13, 2013, eight previous administrative regulations and rules in connection with the foreign debt administration, including *the Circular on Issues Concerning Improvement of Foreign Debt Administration* (Hui Fa [2005] No.74), have lost their effects.

Circular No.19 is distinct from the current administration rules of foreign debt registration with the following notable highlights:

1. Upgrading foreign debt administration

Circular No.19 applies different foreign debt registration requirements to three different types of debtors within the PRC, namely the finance authority, the domestic banks and other domestic debtors. Where a debtor is a finance authority, it shall report to the local foreign exchange administration the preceding month's information on contract signing, withdrawal, repayment and account changes in relation to the foreign debts and the related currency conversion between foreign exchange and Renminbi (RMB) within the first 10 working days of each month. Where a debtor is a domestic bank, the debtor shall report the information of foreign debts through the relevant online administrative system run by SAFE for each of the debts. Where a debtor is an entity other than the foregoing two types of debtors, the debtor shall register or file each of the debts to the local foreign exchange administration within the designated time limit.

Furthermore, Circular No.19 explicitly provides that the following three types of enterprises with foreign investment shall for the purpose of foreign debt administration be treated in the same way as Chinese domestic enterprises[1]: (a) domestic enterprises in which the foreign capital contribution is less than 25%; (b) foreign-invested enterprises ("FIEs") with the total investment equal to the registered capital; and (c) FIEs with foreign capital contribution not less than 25% while the total investment amount not being specified. The foreign debt of FIEs below will be administered by reference to the rules applicable to Chinese domestic enterprises (i.e., quota control by NDRC and SAFE): (i) FIEs in which foreign capital contribution is reduced to below 25% due to capital increase (of Chinese investors), equity transfer or restructuring, or (ii) FIEs with their enterprise classification changed, making it impossible to calculate the difference between the total investment and the registered capital. With respect to such FIEs, the foreign debts that have been remitted to the related FIE's account before the occurrence of the above transactions or changes could still be converted into RMB and repaid in accordance with the operational guidance set forth in the related Appendix attached to Circular No.19. Nevertheless, such FIEs are not allowed to withdraw any new foreign debt after the related transactions or changes occur.

Circular No. 19 emphasizes that, unless otherwise provided under laws, the trading credits (such as foreign customer advances and payables to foreign sellers of goods or services), and payables to foreign entities arising from the trading of financial assets (other than foreign debts) including the ancillary interests and fees, shall not be deemed as foreign debts in terms of the foreign debt quantity control. In such cases foreign debt registration is not required, and the domestic entities shall pay relevant considerations and costs to foreign entities in accordance with the foreign exchange regulations applicable to the underlying transactions.

2. Clarifying the use of foreign debts

Pursuant to Circular No.19, foreign debts could be used for trading of goods and services within the borrower's business scope, and for financial asset transactions as prescribed by laws. With respect to the use on transactions of financial assets, the following requirements and restrictions are worth of noting:

(1) Repayment of existing debts with new borrowing is allowed, but the new foreign debts cannot be converted into RMB. The new debts raised by an FIE for the similar foreign debt restructuring will not deplete its foreign debt quota defined by the difference between total investment and registered capital, as long as the principal balance of such FIE's foreign debts does not increase and the new borrowings will not be converted into RMB;

(2) Foreign debts could be used for equity investment by, for example, setting up new enterprises or acquiring equity or shares in any Chinese or foreign enterprises, provided that for such purposes (a) only transfer with original currency of foreign debts is permitted, i.e., no conversion of foreign currencies into RMB is allowed, and (b) the borrowers should have the approved business scope to do equity investment;

[1] Pursuant to *the Interim Provisions on Statistics and Monitoring of Foreign Debt* which comes into effect on March 1, 2003, the borrowing of long-term or medium-term foreign debts by Chinese domestic enterprises or other domestic organizations shall be subject to the approval of quota by the National Development and Reform Commission (NDRC), and the borrowing of short-term foreign debts by Chinese domestic entities shall be subject to the approval and balance control of SAFE.

(3) No foreign debts could be used for providing loans, except for the loan extension by foreign-invested leasing companies or foreign-invested small loan companies;

(4) No foreign debt could be used for providing mortgage or pledge, except for that made by guarantee companies,;

(5) No fund raised by foreign debts could be used for securities investment; and

(6) Where the funds in a foreign debt account need to be saved as fixed-term deposits, the debtor can carry out the relevant procedures with the same bank in the jurisdiction of the same branch of SAFE, as long as there is no conversion or transfer of funds.

As far as item (2) above is concerned, we understand, based on the restrictions on fund transfer and business scope, that the provision should only apply to FIEs having the business scope to do investment activities, such as foreign-funded investment companies, foreign-invested venture capital companies, and foreign-invested partnership enterprises which engage in private equity investment. Ordinary FIEs cannot use foreign debt for reinvestment in China.

As for the period for use of foreign debts, Circular No.19 requires that the use period shall match the repayment period of foreign debts. Except for a bridge loan, as a principle, short-term foreign debts may only be used as working capital, and may not be used in medium-term or long-term usages such as investment in fixed assets. Unless the approval authority or the creditor specifies the use method, medium-term or long-term foreign debts could be used for short-term purposes.

Regarding foreign exchange settlement, Circular No. 19 provides that in principle foreign debt borrowed by a domestic financial institution or a domestic enterprise may not be converted into RMB, unless otherwise approved by SAFE as an exceptional case. Foreign debts borrowed by an FIE may be converted into RMB based on the actual needs of such FIE. In this connection, Circular No.19 continues the administrative mode set up by Circular No.142 of SAFE issued in 2008, which requires the bank to examine the documents related to the use of RMB converted from foreign debts, including the related contracts, agreements, invoices, payment orders (from the payee), payment instructions (form the payer), checklists or certificates, etc. Banks are also required to carry out due diligence investigations on the use of foreign debts declared by a debtor (other than any bank) with regard to the foreign exchange settlement, and to provide necessary reminders to debtors regarding legal compliance issues. In addition, Circular No.19 requires the enterprise applicants to provide the following written statement: “the company undertakes that the use of the RMB funds converted from the foreign debts complies with the declared using methods; if the actual usage does not comply with the declared using methods, the company will take the corresponding legal liabilities.”

3. Specifying procedures and approval principles for onshore loans guaranteed by offshore entities

Circular No.19 provides that when an FIE borrows onshore loans with guarantees provided by an offshore entity, the FIE can directly enter into the guarantee agreement with the foreign guarantor and the creditor. Where the debtor defaults and the foreign guarantor repays the debts, the foreign debt arising from the performance of guarantee should be deemed as short-term foreign debt (calculated based on the balance of principal owed by the onshore debtor to the offshore guarantor). Such foreign debts shall be subject to SAFE’s quantity control according to the difference between the FIE’s total investment and registered capital.

As to Chinese domestic enterprises, Circular No. 19 provides that any Chinese domestic enterprise which intends to receive foreign guarantees for onshore debts should apply to the local branch of SAFE for a quota. After the quota is granted by SAFE, the Chinese domestic enterprise may enter into the guarantee agreement to the extent of the approved quota. SAFE will review the applications by considering the following principles:

(1) Whether the enterprise’s business falls into an encouraged industry according to the State’s policy;

(2) Whether the enterprise gained profits during the past three years consecutively, or has a positive outlook of business operation;

(3) Whether the enterprise has the sound financial management system and internal control system;

(4) the ratio of net assets against total assets of the enterprise shall not be less than 15%; and

(5) the total balance of the foreign debts and the offshore guarantees shall not exceed 50% of the enterprise’s net assets.

Where the offshore guarantor repaid the debts, the Chinese domestic debtor shall carry out short-term foreign debt registration for such payables and file the required information with the local branch of SAFE.

4. Brief Comments

Circular No.19 is another major milestone of foreign exchange administration after the SAFE release of *the Circular on Further Improving and Adjusting Foreign Exchange Administration Policies on Direct Investment* (Hui Fa [2012] No.59). Circular No.19 combines and integrates the previous departmental regulations and normative documents, and defines and clarifies the principles of approval throughout various steps of foreign debt registration and administration in a systematic way. Save the registration of signing of foreign debt contracts (which remains to be a SAFE handling), most of other procedures, such as foreign-debt account opening, foreign exchange conversion and repayment of principal and interests of foreign debts, may be processed solely with the banks designated to handle foreign exchange affairs. Circular No. 19 further strengthens the SAFE’s indirect administration mechanism with banks as the major interface. SAFE will primarily depend on the information system for capital account matters to monitor the banks’ foreign debt processing and conduct statistics and analysis of foreign debt situations. This approach, while trying to actively prevent the risks in association with foreign debts, facilitates the borrowing and extension of foreign debts by enterprises in China. We envisage the future trend in foreign exchange administration following the route of “simplifying the procedures while strengthening the supervisions”.

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金融法律热点问题

外汇管理法律的新发展——细化和简化外债登记程序

为进一步深化外汇管理体制改革，国家外汇管理局于 2013 年 4 月 28 日下发《关于发布〈外债登记管理办法〉的通知》(汇发[2013]19 号，以下简称“**19 号文**”)，对现行外债登记管理方式进行了大幅度的改革，简化和细化了外债登记程序。19 号文于 2013 年 5 月 13 日开始实施。随着 19 号文的实施，《国家外汇管理局关于完善外债管理有关问题的通知》(汇发[2005]74 号）等 8 项规定予以废止。

与现有外债登记管理制度相比， 19 号文的要点包括：

一、 细化外债管理方式

19 号文区分财政部门、境内银行和其他境内债务人等三种债务人类型规定了不同的外债登记方式，其中：债务人为财政部门，应在每月初 10 个工作日内逐笔向所在地外管局报送上个月外债的签约、提款、结汇、购汇、偿还和账户变动等信息；债务人为境内银行，应通过外管局相关系统逐笔报送其借用外债信息；债务人为财政部门、银行以外的其他境内债务人，应在规定时间内到所在地外管局办理外债签约逐笔登记或备案手续。

此外，19 号文还明确规定，以下三类含有外国投资的境内机构举借外债参照境内中资企业举借外债的规定办理[1]：(1)外国投资者出资比例低于 25%的境内企业；(2)投资总额与注册资本相等的外商投资企业；(3)外国投资者比例不低于 25%，但未明确投资总额的外商投资企业。外商投资企业因增资、转股和改制等原因，导致外国投资者出资比例低于 25%，或企业类型发生改变，而无法计算其“投注差”的，则改为参照中资企业借用外债进行管理。其作为外商投资企业时已发生的外债提款，可按 19 号文操作指引规定继续办理结汇、还本付息等相关手续，但该企业不得再发生新的外债提款业务。

19 号文特别强调，除非另有规定，境内企业与境外企业间发生的贸易信贷（比如对外货物或服务贸易中产生的预收款和应付款)，以及除外债之外其他金融资产交易产生的对外应付款及相关息费，不纳入外债规模管理，无需办理外债登记。境内付款方须按照与基础交易相关的外汇管理规定办理对价及附属费用的对外支付。

二、 明确外债资金的使用

19 号文规定，允许境内企业借用的外债资金用于自身经营范围内的货物与服务贸易支出，以及规定范围内的金融资产交易。对于境内企业将外债资金用于金融资产交易的，下述要求和限制值得注意：

(1) 允许通过借新还旧等方式进行债务重组，但外债资金不得办理结汇。外商投资企业的中长期外债办理展期，或借用新的中长期外债偿还过去借用的中长期和短期外债时，在不增加该企业现有外债本金余额和不办理结汇的前提下，不重复占用外商投资企业的“投注差”额度；

(2) 允许通过新建企业、购买境内外企业股份等方式进行股权投资，可原币划转但不得办理结汇，且债务人的股权投资符合其经营范围；

(3) 除外商投资租赁公司、外商投资小额贷款公司外，不得用于放款；

(4) 除担保公司外，不得用于抵押或质押；

(5) 不得用于证券投资；

(6) 外债账户内资金需要转存定期存款的，在不发生资金汇兑的前提下，债务人可在同一分局辖区内、同一银行自行办理。

就上述第（2）点而言，我们理解，“原币划转”和“股权投资符合其经营范围”两点决定了其适用范围只能是外商投资性公司、外商投资创投公司、从事股权投资的外商投资合伙企业等被批准以投资活动为其经营范围的外商投资企业，而一般外商投资企业不得将外债资金用于境内再投资。

就外债资金使用期限，19 号文要求外债资金的运用期限应与外债的还款期限相匹配。除搭桥（过桥贷款）的情形外，短期外债原则上只能用于流动资金，不得用于固定资产投资等中长期用途；如审批部门或债权人未指定外债资金用途的，中长期外债可用于短期流动资金。

就外债资金结汇，19 号文规定，境内金融机构和中资企业借用的外债资金原则上不能结汇，如需结汇需经外管局批准；而外商投资企业借用的外债资金可以结汇使用，依据实需原则由银行办理。对于外商投资企业的外债资金结汇，19 号文延续了外管局 2008 年 142 号文的管理模式，即要求银行审查与结汇资金用途相关的合同、协议、发票、收款通知(收款人)、付款指令(付款人)、清单或凭证等证明文件，并对非银行债务人申明的结汇资金用途进行尽职审查，并进行必要的合规提示。同时，19 号文要求申请企业书面声明“本公司承诺该笔外债资金结汇所得人民币资金实际用途与申请用途保持一致；若不一致，本公司愿承担相应法律后果。”

三、 明确外保内贷的程序和审核原则

对于外商投资企业，19 号文规定，在办理境内借款接受境外机构或个人提供的担保(以下称“**外保内贷**”)时可以直接与境外担保人、债权人签订担保合同。发生境外担保人履约的，因担保履约产生的对外负债应视同为短期外债（按债务人实际发生的对境外担保人的外债本金余额计算）纳入外商投资企业“投注差”额度管理。

对于中资企业，19 号文规定，借用境内贷款需要接受境外担保的须事先向中资企业所在地外汇管理分局申请外保内贷额度，经所在地外汇管理分局核定后，中资企业方可在核定额度内签订担保合同。所在地外汇管理分局将按照以下审核原则对申请进行审查：

[1] 根据 2003 年 3 月 1 日起施行的《外债管理暂行办法》，境内中资企业举借中长期外债须经国家发展和改革委员会批准，举借短期外债需由外汇管理部门核定余额。

(1) 属于国家鼓励行业；

(2) 过去三年内连续盈利，或经营趋势良好；

(3) 具有完善的财务管理制度和内控制度；

(4) 企业的净资产与总资产的比例不得低于 15%；

(5) 对外借款与对外担保余额之和不得超过其净资产的 50%；

中资企业外保内贷项下发生境外担保履约的，债务人应到所在地外汇管理分局办理短期外债签约登记及相关信息备案。

四、 简评

19 号文是国家外汇管理局继去年发布《关于进一步改进和调整直接投资外汇管理政策的通知》（汇发[2012]59 号）之后，对外汇登记管理制度的又一改革举措。该通知梳理和整合了既往散落的部门规章和规范性文件，系统地明确和细化了外债登记业务各个环节及审核原则。除外债签约登记外，外债账户的开立、资金结汇和还本付息等均由外汇指定银行直接审核办理。19 号文进一步强化了以银行为主要审核主体的间接管理体制。而外管局将主要依托资本项目信息系统，强化外债统计监测分析和非现场核查，在积极防范外债风险的同时，为企业举借外债提供了便利。这种“简化程序、强化监督”的管理思路应该是未来外汇管理体制的改革方向。

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