JUN HE BULLETIN

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Capital Market

New Regulation on Round-trip Investment - Circular 37

For the purpose of simplifying the approval process, and for the promotion of the cross-border investment, the State Administration of Foreign Exchange ("**SAFE**") promulgated the *Circular on the Management of Offshore Investment and Financing and Round-Trip Investment by Domestic Residents through Special Purpose Vehicles* on July 14, 2014 (No. 37 [2014], "**Circular 37**"). Circular 37 supersedes the *Circular on the Management of Offshore Financing and Round-Trip Investment by Domestic Residents through Special Purpose Vehicles* dated November 1, 2005 (No. 76 [2005], "**Circular 75**"), and revises and regulates the relevant matters involving foreign exchange registration for round-trip investment.

Circular 37 clearly indicates the current attitude of SAFE on the regulation of round-trip investment, which is "the cross-border capital flow-out shall be treated as overseas direct investment (ODI), and the cross-border capital flow-in shall be treated as foreign direct investment (FDI)", and re-defines the range and scope of the administration of foreign exchange on domestic resident round-trip investment. As the round-trip foreign exchange registration has always been a hot topic and difficult issue in the offshore private equity placement and offshore red-chip listing, soon after its promulgation, Circular 37 has attracted the attention of the capital market industry, and it will also exert substantial impact on the services provided by the onshore private enterprises, offshore private equity funds and the intermediaries. Below are the major characteristics of Circular 37 that are worth noting:

I. Expansion of the Regulatory Scope

Circular 37 has expanded the range of definition in relation to the round-trip investment by domestic resident under Circular 75, and the major changes are as follows:

1. Special Purpose Vehicle

The Special Purpose Vehicle ("**SPV**") under Circular 75 was defined as "offshore enterprise directly established or indirectly controlled by the domestic resident legal person or domestic natural person with their legally owned **assets and equity of the domestic enterprise**, for the purpose of offshore **equity financing** (including financing through the convertible bond)".

Under Circular 37, the SPV is defined as "offshore enterprise directly established or indirectly controlled by the domestic resident (including domestic institution and individual resident) with their legally owned **assets and equity of the domestic enterprise**, or legally

owned **offshore assets or equity**, for the purpose of offshore **investment and financing**".

The current definition under Circular 37 has expanded the "purpose" of the SPV established by domestic resident from the original "equity financing" to "investment and financing". Such change not only widens the scope of the SPV, it allows for the SPV to be set up for an offshore investment purpose.

Before the promulgation of Circular 37, except for the SPV under Circular 75, in practice, the local branch of SAFE will not accept the foreign exchange registration application by domestic natural persons for their direct offshore investment, due to the lack of detailed procedural rules. Under such circumstance, the domestic natural person usually was required to first set up an onshore holding company, and have such onshore holding company to establish an investment vehicle offshore, so as to conclude the offshore investment, and complete the relevant foreign exchange registration in the name of such domestic holding company. As the SPV under Circular 37 also includes companies for the investment purpose, prima facie, it seems that the domestic natural person is no longer required to set up an onshore holding company, and now it is possible for such person to establish the SPV offshore directly and complete the foreign exchange registration for the overseas investment.

The aim of Circular 75 is to regulate "offshore financing with onshore interest". Circular 37 has gone a step further and has widened the scope of assets and equity that can be injected into the SPV, so that the domestic resident can set up the SPV with assets and equity either onshore or offshore.

2. Round-trip Investment

Under the Circular 75, "round-trip investment" means the "direct investment activities carried out by a domestic resident via an SPV, including but not limited to the following methods: acquisition or exchange of the equity of the Chinese party to a domestic enterprise; establishment of a foreign-invested enterprise in the PRC and acquisition or contractual control of assets in the PRC via this enterprise; agreement-based acquisition of assets in the PRC and using the investment in the acquired assets to establish a foreign-invested enterprise, and increase capital to a domestic enterprise."

On the other hand, under the Circular 37, "round-trip investment" refers to the "direct investment activities carried out within the PRC by a domestic resident directly or indirectly via an SPV, i.e., establishing a foreign-invested enterprise or project within the PRC through a new entity, merger or acquisition and other ways, whilst obtaining ownership, control, operation and management and other rights and interests."

Unlike Circular 75, the Circular 37 also includes round-trip "green-field investment" by a domestic resident in the same regulatory system as a round-trip merger and acquisition.

As mentioned above, the core principle of legislation of the Circular 75 is "off-shore financing by taking advantage of on-shore interest". In other words, the pre-condition for the registration under the Circular 75 is that the domestic resident has existing assets and equity interest in the PRC. Before the promulgation of the Circular 37, it is generally acknowledged that establishing an FIE within the PRC through an offshore SPV does not fall into the category of "round-trip investment" and such arrangement was difficult to register at SAFE in accordance with the Circular 75[1]. In this regard, compared with the Circular 75, the scope of foreign

[1] In the Circular 75, "round-trip investment" means the direct investment activities carried out by a domestic resident via an SPV, including but not limited to the following methods: acquisition or exchange of the equity of the Chinese party to a domestic enterprise; establishment of a foreign-invested enterprise in the PRC and acquisition or contractual control of assets in the PRC via this enterprise; agreement-based acquisition of assets in the PRC and investment with the acquired assets to establish a foreign-invested enterprise, and increase capital to a domestic enterprise.

exchange registration required by the Circular 37 is widened in terms of “green-field investment”. Such adjustment reflects SAFE’s change in its mentality in respect of the post-registration supervision of round-trip investment. However, the implementation of the aforesaid principle is yet to be tested in practice.

3. Domestic Resident’s Participation in Equity Incentive Plan of an SPV before Listing

The Circular 37 takes the initiative to regulating the procedure of foreign exchange registration in relation to equity incentive plan (e.g. ESOP) of SPV before listing. In this regard, if a non-listed SPV grants equity incentives to its directors, supervisors, senior officers and employees in its domestic subsidiaries, the relevant domestic individual residents may register with SAFE before exercising their rights.

Since the previous SAFE Circular on Issues concerning the Administration of Foreign Exchange Used for Domestic Individuals' Participation in Equity Incentive Plans of Companies Listed Overseas (Hui Fa [2012] No. 7) only applies to the domestic resident who participates in equity incentive plan of an offshore listed company. In practice, some local SAFE required that the equity incentive plan of a pre-listed offshore company can only be registered after such company is listed. As a result, the equity/option incentive plan of an overseas non-listed company participated in by the domestic resident can not actually registered at the foreign exchange authority. The promulgation of the Circular 37 fills the blanks in terms of legislation and supervision in this area with enterprise now having rules to follow when applying for foreign exchange registration of the equity incentive plan before listing.

II. Relax on the Regulatory Scale

In addition to the expansion of the regulatory scope, Circular 37 facilitates the cross-border investment, by substantially relaxing the restriction on the foreign exchange registration procedure of round-trip investment by domestic individual residents and the transfer of funds. These supportive measures are mainly manifested in the following aspects:

1. Allowing Domestic Residents to Provide Funds to SPV

According to Circular 37, domestic enterprises which are directly or indirectly controlled by domestic residents are allowed to advance loans in compliance with existing regulations to the registered SPV based on real and reasonable demands. From the legislation perspective, Circular 37 is consistent with the SAFE Circular on Further Improving and Adjusting the Policy for Foreign Exchange Control of Capital Accounts"(HUI FA No. [2014] 2), which allow a domestic enterprise to advance loans to offshore enterprises that have equity relationship. Circular 37 aims to help the SPV obtain financial support from domestic residents, so as to broaden its capital flow channels.

2. Abolishing the Requirement on the Repatriation of Offshore Foreign Exchange Proceeds Back to the PRC within a Specified Time Period

According to Circular 75, the offshore profit, dividend and the foreign exchange proceeds from the capital investment shall be repatriated back to the PRC within 180 days after the obtaining of the same by the domestic resident from the SPV. Circular 37 has abolished the aforesaid time limit on the proceeds repatriation, which is consistent with the relevant amendment as made in the Foreign Exchange Administrative Regulation (Order of the State Council No. 532).

It is worth noting that under Circular 37, the repatriation of the profit, dividend obtained by the domestic resident from the SPV shall be conducted in accordance with the foreign exchange administrative regulation on the

current account; the repatriation of the proceeds from the capital investment shall be conducted in accordance with the foreign exchange administrative regulation on the capital account. Such provision means that although the requirement on the proceeds repatriation has been removed, SAFE will still supervise the cross-border flow of foreign exchange. Notwithstanding the foregoing, the new regulatory measure will provide SPV with more discretion on the allocation and use of its legally obtained income.

3. Relax on the Time Requirement of "Change of Registration"

According to Circular 37, in the event the change of basic information such as the individual shareholder, name, operation term, etc., or if there is a capital increase, decrease, equity transfer or swap, merge, spin-off or other amendment of the material items, the domestic resident shall complete the change of foreign exchange registration formality for offshore investment.

With respect to the time requirement for the aforesaid change of registration, Circular 37 only requests the domestic resident to "timely" complete the change of registration formality, and the 30 days period as provided in Circular 75 is no longer applicable. Such amendment is consistent with the legislative spirits as indicated in the implementation rules issued by SAFE after Circular 75.

In addition, the scope of the change of registration is limited to the change of information in relation to the domestic individual resident, and the capital increase, decrease, equity transfer or swap, etc., by domestic individual resident. Superficially, if the change of the offshore SPV does not involve the domestic individual resident shareholder, there is no need to conduct the change of registration formality. With respect to the offshore financing project with newly established offshore structure, the offshore SPV may only be required to conduct registration prior to the completion of its financing, and therefore, there is no need to conduct the pre-registration and change of registration formalities as required under Circular 75. Such change by Circular 37 will reduce the time for the private placement transaction with offshore structure.

4. Simplify the Registration Content

In practice, the offshore financing structure established by a domestic resident normally includes 3 to 4 levels of offshore holding company. Previously, when conducting the Circular 75 registration, the domestic resident is usually required to submit the full-set of offshore financing documents, including the financing proposal, whereby the detail information and the financing transaction of the holding company at each level would be subject to the scrutiny of SAFE.

According to the procedural guideline as attached to Circular 37, the principle of review on this issue has been changed to "the domestic individual resident is only required to register the SPV directly established or controlled (first level)". In addition, the offshore financing proposal is removed from the list of documents to be reviewed. With these changes, the registration process is simplified.

5. Administrative Nature of Foreign Exchange Registration

It is specifically "declared" in Circular 37 that the registration of offshore SPV does not prove that its investment and financing activity has complied with all the relevant regulations issued by the competent government authorities. Such declaration set limits on the power of SAFE and the effectiveness of the foreign exchange registration under Circular 37, which means SAFE will no longer conduct a compliance review other than in the foreign exchange aspects. Therefore, under no circumstance, the

completion of Circular 37 registration will exempt the enterprise's obligation to obtain the approval from, or complete the filing with the competent industrial regulatory authority (if applicable).

III. Circular 37's Impact on the Offshore Private Placement and IPO

Given Circular 75 brought the round-trip investment into the foreign exchange regulatory system, it is one of the most controversial subjects in private enterprises' offshore private placement and IPO since its promulgation in 2005. Unfortunately, certain provisions of Circular 75 are vague and as a result there are different understandings and criteria among local SAFE. To some extent, the Circular 75 becomes the primary obstacle to private enterprises' entrance into offshore capital market, increasing the compliance costs of enterprises involved and adversely encouraging various "cross the wall" attempts. The limited legislative efficiency of Circular 75 has always been criticized by the industry. Circular 37 is published in such settings that its effectiveness and implementation will have significant implications on the private enterprises' offshore financing and red-chip IPO.

1. Registration Is More Convenient

Circular 37 simplifies the registration requirement (e.g. only the first level SPV controlled by domestic resident is required to be registered; letter of intent for the financing executed with investor is no longer required; SAFE will not review whether the round-trip investment is subject to the approval of other regulatory authority, etc.), and in the attached procedural guideline, Circular 37 also provides clarity and more concise requirements on the latitude of review by the SAFE. These changes will limit the discretionary power of local SAFE, and uniform administrative practice of SAFE at different locations, so as to make the time and result of foreign exchange registration more predictable.

2. More Difficult to "Cross the Wall"

With the expansion of the range of definition such as "Special Purpose Vehicle", "Round-trip Investment", and the arrangement such as the foreign exchange registration for the ESOP implemented by the SPV at the pre-IPO stage, Circular 37 put the current prevailing practice for the purpose of circumventing the Circular 75 registration (i.e., establishment of offshore trust, doing a limit explanation of "equity financing", etc.) under the regulation of SAFE. Pursuant to Circular 37, the round-trip investment by domestic resident through its owned or controlled SPV for investment of financing purpose is subject to the foreign exchange registration requirement; the exercise of the rights under the ESOP by the officers and employees of a pre-listing SPV is also subject to the completion of round-trip investment foreign exchange. With the implementation of these measures, the room for operation in such "grey area" will be substantially reduced.

3. Increased Punishment for Violation of Regulation

According to Circular 37, if a domestic resident has already made capital contribution to the SPV with his legally owned onshore or offshore assets or interest prior to the promulgation of Circular 37, but failed to complete the foreign exchange registration, the domestic resident shall provide the SAFE with an explanation. SAFE will make the supplementary registration based on the principle of legality and reasonableness. In the event the domestic resident violates the foreign exchange regulations, SAFE may also impose administrative sanction on the violator in accordance with the applicable laws. Such "Sanction first, Registration Later" principle is not the innovation of Circular 37. The same principle has been provided in the various implementation rules of SAFE after the promulgation of Circular 75.

Article 15 of Circular 37 uses a whole paragraph to list the detailed sanctions to be imposed under the Foreign Exchange Administrative Regulation on non-compliant activities. Pursuant to the legislative intent as embodied Circular 37 "relaxing the pre-registration review, and strengthen post-registration supervision", if the domestic resident still fails to complete the round-trip investment foreign exchange registration in accordance with the requirement of Circular 37 after the relaxed conditions for the registration, the likelihood and scale of the administrative punishment may be greatly increased.

It should be particularly noted that in defining the "round-trip investment", Circular 75 clearly covered the "contractual control". However, the local counterparts of SAFE used different "rulers" when taking applications from domestic residents for foreign exchange registration regarding offshore financing. Particularly, in terms of whether the applicant should faithfully and completely disclose the VIE structure, the practice of local SAFE varies. The terminology of "obtaining ownership, controlling right, operation and management right and other rights and interests" adopted by Circular 37 does not cover "contractual control". In this regard, in the future, when applying for foreign exchange registration, whether a VIE arrangement shall be fully disclosed and whether the registration can be accepted are yet to be tested. Circular 37 does not repeal the Regulation on the Merger and Acquisition of Domestic Enterprise by Foreign Investor jointly promulgated by six authorities including the Ministry of Commerce ("**MOFCOM**") in 2006 ("**M&A Rules**"). M&A Rules requires "domestic company, enterprise or natural person that intends to acquire its related domestic company with the duly established or controlled offshore company shall obtain the approval from MOFCOM". However, as during the past eight years, the MOFCOM rarely approves the application for such "related acquisition". Therefore, M&A Rules has become an insurmountable barrier for the company that intends to conduct offshore financing with an offshore SPV through "related acquisition". The direct establishment or indirectly control of a "SPV" offshore with the legally owned assets or equity either onshore or offshore by domestic resident (including the domestic institution and individual) is a part of the "related acquisition". If the restriction under M&A Rules still remains unchanged, the enterprise that intends to conduct offshore financing will not be actually benefited by the registration as contemplated under the Circular 37. Therefore, whether there is any implementation rule to Circular 37 to cure the defect and make up the loop holes, or whether SAFE has reached consensus with MOFCOM on the aforesaid "related acquisition", or the promulgation of Circular 37 means the approval and practice by MOFCOM in connection with the "related acquisition" are issues worthy of attention.

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资本市场法律热点问题

返程投资新规 37 号文简析

为了简政放权、促进跨境投资便利化，国家外汇管理局（下称“**外管局**”）于 2014 年 7 月 14 日发布了《国家外汇管理局关于境内居民通过特殊目的公司境外投融资及返程投资外汇管理有关问题的通知》（汇发[2014]37 号，下称“**37 号文**”），同时废止了 2005 年 11 月 1 日实施的《国家外汇管理局关于境内居民通过境外特殊目的公司融资及返程投资外汇管理有关问题的通知》（汇发[2005]75 号，下称“**75 号文**”），并就涉及返程投资外汇登记的相关问题进行了重新梳理和规范。

37 号文清晰地反映了外管局对待返程投资的最新监管思路，即“跨境流出按对外直接投资（ODI）管理，跨境流入按境内直接投资（FDI）管理”，并以此为基础重新界定境内居民返程投资外汇管理的尺度及范围。由于返程投资外汇登记一直是国内民营企业境外私募融资及海外红筹上市的热点和难点之一，37 号文一经颁布就引起了业界的密切关注，其也势必对境内民营企业、海外私募基金及中介机构有关的服务产生重要的影响。以下是值得关注的 37 号文的主要特点：

一、 监管范围的拓展

37 号文对 75 号文项下与境内居民返程投资相关的概念的定义进行了拓展，主要内容如下：

1. 关于特殊目的公司

75 号文下，特殊目的公司的定义为“境内居民法人或境内居民自然人以其持有的**境内企业资产或权益**在境外进行**股权融资**（包括可转换债融资）为目的而直接设立或间接控制的境外企业。”

37 号文下，特殊目的公司被定义为“境内居民（含境内机构和境内居民个人）以**投融资**为目的，以其合法持有的**境内企业资产或权益**，或者以其合法持有的**境外资产或权益**，在境外直接设立或间接控制的境外企业。”

37 号文对特殊目的公司的最新定义拓展了境内居民设立特殊目的公司的“目的”，即由原先的“股权融资”扩展至“投融资”。这一变化，不仅扩大了特殊目的公司的认定范围，更具突破意义的是，其还增加了“投资”的内容。

在 37 号文出台前，除了 75 号文下的特殊目的公司，由于缺乏明确的操作细则，各地外汇管理部门在实践中并不受理境内自然人境外投资的外汇登记申请。在此情形下，境内自然人通常需要通过

设立一家境内持股公司，再安排其在境外设立投资主体的方式实现境外投资，并以该等境内持股公司的名义完成相关外汇登记。 由于 37 号文下的特殊目的公司还包括了以投资为目的的公司，从字面上理解，境内自然人似乎无需设立境内持股公司，即可在境外设立特殊目的公司并直接办理境外投资外汇登记手续。

此外，75 号文的立法核心理念是“境内权益、境外融资”，而 37 号文则扩大了境内居民可注入特殊目的公司的资产范围，即境内居民不仅可以“境内企业资产或权益”，亦可以其合法持有的“境外资产或权益”设立特殊目的公司。

2. 返程投资

在 75 号文中，“返程投资”一词是指“境内居民通过特殊目的公司对境内开展的直接投资活动，包括但不限于以下方式：购买或置换境内企业中方股权、在境内设立外商投资企业及通过该企业购买或协议控制境内资产、协议购买境内资产及以该项资产投资设立外商投资企业、向境内企业增资。”

37 号文则将“返程投资”一词定义为“境内居民直接或间接通过特殊目的公司对境内开展的直接投资活动，即通过**新设、并购**等方式在境内设立外商投资企业或项目，并取得**所有权、控制权、经营管理权**等权益的行为。”

相比 75 号文，37 号文正式将境内居民返程“新设”外商投资企业规定为返程投资行为的一种，将其与返程并购行为纳入相同的监管体系。

如前文所述，75 号文的立法核心理念是“境内权益境外融资”，换言之，境内居民已在国内拥有境内权益是办理 75 号文登记的先决条件。37 号文出台前，业内通常认为,境内居民通过境外特殊目的公司新设外商投资企业，不属于 75 号文规定的“返程投资”的范畴，该等架构很难在各地外汇管理部门办理 75 号文登记[1]。因此，在这一点上，相比 75 号文，37 号文将“新设”纳入监管范围后，境内居民可以办理外汇登记的范围似乎有所扩大。该等调整可能体现了外管局事中、事后监管的外汇风险防控的理念。然而，关于返程新设外汇登记具体如何操作，还有待实践检验。

3. 境内居民参与特殊目的公司上市前股权激励计划

37 号文首次对与特殊目的公司上市前的股权激励计划相关的外汇登记程序作出了明确规定。据此，特殊目的公司在上市前以其股权或期权等为标的，对其直接或间接控制的境内企业的董事、监事、高级管理人员及员工进行股权激励的，相关境内居民个人在行权前可在外管局办理登记手续。

由于《国家外汇管理局关于境内个人参与境外上市公司股权激励计划外汇管理有关问题的通知》（汇发[2012]7 号）仅适用于境内居民参与境外上市公司股权激励计划的情形，实践中，有些地方的外管局认为，即使境外公司在上市前制订了股权激励方案，但行权必须要在上市后才能办理，此等实践操作使得境内居民参与境外注册的非上市公司的股权/期权激励计划长期处于无法实际办理外汇登记的“尴尬”状态。37 号文的出台弥补了这一立法和监管空白,使得企业办理上市前的股权激励计划的外汇登记变得有章可循。

[1] 关于这一问题，在实践中，各地外汇管理部门理解各有不同。比如，北京、上海的外汇管理部门明确境内居民通过境外设立的特殊目的公司再新设外商投资企业不属于 75 号文涵盖的范围，不能办理 75 号文登记。

二、 监管尺度的放宽

在拓展监管范围的同时，37 号文对于境内居民返程投资外汇登记手续和资金往来方面大幅放松了限制，为跨境投资手续的便利提供了外汇管理法规方面的重要支持。主要体现在如下几个方面：

1. 允许境内居民对特殊目的公司提供资金

根据 37 号文，境内居民直接或间接控制的境内企业，可在真实、合理需求的基础上按现行规定向其已登记的特殊目的公司放款。从立法初衷看，其与外管局《关于进一步改进和调整资本项目外汇管理政策的通知》（汇发[2014]2 号）中关于允许境内企业向境外与其具有股权关联关系的企业放款的规定相一致，旨在帮助特殊目的公司得到来自境内居民的资金支持，有利于其拓宽资金流出渠道。

2. 取消外汇收入限期调回境内的要求

根据 75 号文的规定，境内居民从特殊目的公司获得的利润、红利及资本变动外汇收入应于获得之日起 180 日内调回境内。37 号文取消了将境内居民境外取得的外汇收入在 180 天调回境内的要求，从而与其上位法规《外汇管理条例》（国务院第 532 号令）就此问题作出的修改保持一致。

值得注意的是，37 号文规定，境内居民从特殊目的公司获得的利润、红利调回境内的，应按照经常项目外汇管理规定办理；资本变动外汇收入调回境内的，应按照资本项目外汇管理规定办理。这表明，虽然境外外汇收入限期调回境内的要求已被取消，外管部门仍需对外汇的进出境进行监管。尽管如此，这一举措无疑给了特殊目的公司调拨和使用自身合法取得的收入更大的自由度。

3. “变更登记”时间要求放宽

37 号文规定，已登记境外特殊目的公司发生境内居民个人股东、名称、经营期限等基本信息变更，或发生境内居民个人增资、减资、股权转让或置换、合并或分立等重要事项变更后，应及时到外汇局办理境外投资外汇变更登记手续。

就上述变更登记的时间，37 号文仅要求境内居民应“及时”办理变更登记，不再适用 75 号文限定的 30 天。这一点，沿袭了外管局在 75 号文之后颁布的一系列实施细则中所体现的立法精神。

另外，变更登记的范围被缩小至与境内居民个人有关的信息变更和境内居民个人增资、减资、股权转让或置换等事项，从字面上理解，境外特殊目的公司的变化如不涉及境内居民个人股东的，则无需办理变更登记。对于新设境外架构在境外融资的项目，有可能只需在境外公司设立后、融资完成前进行一次登记即可，而无需再执行 75 号文项下之预登记和变更登记两次登记手续。37 号文的这一变化，将在很大程度上缩短通过境外结构进行私募融资项目的交易时间。

4. 登记内容简化

由于实践中境内居民搭建的境外融资架构通常包括三、四层境外持股公司，之前境内居民办理 75 号文登记时，需要报送包括融资意向书在内的全套境外融资文件，使得每一层持股公司的详细信息及融资交易都受到审查。

根据 37 号文所附的操作指引，外管局就此问题的审核原则已调整为“境内居民个人只为直接设立或控制的（第一层）特殊目的公司办理登记。”另外，37 号文所附操作指引中的审核文件亦不再要

求境内居民提供境外融资商业计划书。这些新的规定大大简化了登记申报的手续和内容。

5. 外汇登记和行业主管部门审批的区分

37 号特别“声明”，境外特殊目的公司登记不具有证明其投融资行为已符合行业主管部门合法合规的效力。该声明是外管局对其职责以及 37 号文项下外汇登记证明效力的限定，即外管局将不再审核除外汇管理合规性以外其他方面的合规性。因此，37 号文登记并不在任何意义上豁免企业需要取得行业主管部门审批或向其备案的义务（如适用）。

三、 37 号文对境外私募及上市的影响

由于 75 号文将返程投资外汇管理纳入了外汇监管的范围，该文自 2005 年颁布以来就一直是民营企业海外私募融资及上市重点关注的问题之一。然而，令人遗憾的是，由于 75 号文的部分条款的含义较为模糊，加之各地外管局对于 75 号文条文的理解和执行尺度不一，使 75 号文登记在某种程度上成为民营企业进入海外资本市场的“拦路虎”，其不仅增加了所涉企业的合规成本，也从反面助长了各种“翻墙”行为，其立法效益饱受业界诟病。37 号文正是在这种背景下应运而生，37 号文的生效和实施亦将对民营企业的海外融资和红筹上市产生重大的影响,其主要体现在如下几个方面：

1. 登记更便利

37 号文对登记内容进行了大幅简化（如：只对境内居民控制的第一层特殊目的公司进行登记、不再要求提供与投资机构签署的融资意向书、不再审核外汇返程投资是否需要其他主管部门批准等），在操作规程中对于外管局的审核尺度也提供了更清晰和更具操作性的标准和要求。这些变化将有助于限制地方外管局的自由裁量权，扭转各地执法尺度宽严不一的局面，使得办理外汇登记的时限及结果更加可预期。

2. “翻墙”更困难

37 号文通过拓展“特殊目的公司”、“返程投资”等定义、增加特殊目的公司上市前股权激励的外汇登记程序等安排，把目前市场上比较流行的设立海外信托、狭义解释“股权融资”等规避 75 号文登记的手段纳入到了外管局的监管范围。按照 37 号文的规定，境内居民通过其拥有或控制的以投融资为目的的特殊目的公司返程投资，都需要办理返程投资外汇登记；公司高管和员工在特殊目的公司上市前行权，也需要办理返程投资外汇登记。这些规定将大大限缩灰色操作的空间。

3. 违规成本更高

根据 37 号文的规定，境内居民在 37 号文颁布之前，以境内外合法资产或权益已向特殊目的公司出资但未按规定办理境外投资外汇登记的，境内居民应向外汇局出具说明函说明理由。外汇局根据合法性、合理性等原则办理补登记，对涉嫌违反外汇管理规定的，依法进行行政处罚。关于“先处罚、后补办”原则，并非 37 号文的首创，此前已体现在外管局在 75 号文之后颁布的一系列实施细则中。

37 号文第 15 条，不惜重墨详细列举了违反该通知的各种行为将受到的《外汇管理条例》设定的处罚。按照 37 号文所揭示的国家外管局弱化事前审批、强化事中事后监管的思路，在新规则大幅放松登记条件的情况下，如果境内居民仍不按 37 号文的要求办理返程投资外汇登记，其受处罚的概率和行政处罚的幅度将有可能大幅提高。

值得注意的是，在界定“返程投资”时，75 号文明确涵盖了“协议控制”，但各地外管局过去在办理涉及VIE结构的境内居民境外融资的外汇登记时存成不同的监管尺度，尤其在是否要求申请人如实、全面披露 VIE 结构方面存在不同的实践。37 号所述的“取得所有权、控制权、经营管理权等权益的行为”没有明确涵盖“协议控制”，将来境内居民在申请办理涉及 VIE 结构的外汇登记时，是否能全面披露VIE结构并顺利获得登记还有待实践检验。37 号文也没有排除 2006 年商务部等六部委联合颁布的《关于外国投资者并购境内企业的规定》（下称“**10 号令**”）的效力。 10 号令所设定的“境内公司、企业或自然人以其在境外合法设立或控制的公司名义并购与其有关联关系的境内的公司，应报商务部审批”这一要求，因为 8 年来商务部鲜有批准关联并购的先例，故成为试图通过“关联并购”在境外设立特殊目的公司并在境外融资企业的不可逾越的屏障。境内居民（含境内机构和境内居民个人）以投融资为目的，以其合法持有的境内企业资产或权益，或者以其合法持有的境外资产或权益，在境外直接设立或间接控制的“特殊目的公司”的过程本身是一个“关联并购”的过程。如果 10 号令的限定依然存在，37 号文预期的登记对有意进行境外融资的企业而言并没有什么“实惠”。因此，37 号文是否还有实施细则“拾遗补缺”，外管局是否已与商务部就前述“关联并购”问题达成一致，或者说 37 号文的颁布是否预示着商务部对于关联并购的审批要求和实践亦将发生变化，值得各方关注。

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