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Hot Topics in Banking Rules

New SAFE Rules Provide More Structuring Options for Cross Boarder Financing

On May 19, 2014, the State Administration of Foreign Exchange ("SAFE") released the Foreign Exchange Administrative Provisions on Cross-Border Security ("New Rules"). The New Rules came into effect on June 1, 2014 and fundamentally change the cross-border security regime and provide more structuring options to financiers in cross-border financing.

Key Changes

As defined under the New Rules, "cross-border security" means the security which may result in cross-border payment or cross-border title transfer of collateral, including (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.

The New Rules substantially streamline the SAFE administration on cross-border security:

1. Qualification Requirement

In relation to the Outward Security for Offshore Lending, SAFE has removed the requirement of pre-approval, quota limitation, financial test (e.g. the profitability of the debtor), shareholding relations between security providers and secured parties and other qualification requirements (to be further discussed below).

In relation to the Inward Security for Onshore Lending, before the enactment of the New Rules, only foreign invested enterprises and domestic enterprises which have obtained a special quota from SAFE may borrow onshore loans secured by offshore security providers from onshore financial institutions. Now, all types of non-financial institutions registered in PRC may borrow this type of loan. That said, only financial institutions registered in PRC (which is generally regarded as entities holding license from a financial regulator, like CBRC, CSRC or CIRC) are qualified lenders of this type of loans. In another words, domestic inter-company debts (including entrustment loan) or individual debts are still not permitted to take offshore security.

Individuals are expressly permitted to provide Outward Security for Offshore Lending whether or not a corporate security provider is involved in the transaction.

2. Registration Requirement

No SAFE registration/approval is required for the creation of cross-border security (subject to other

applicable SAFE rules), except that for the Outward Security for Offshore Lending and Inward Security for Onshore Lending, a post-signing registration is still needed. For Outward Security for Offshore Lending, such registration shall be made with SAFE within 15 working days after the execution of the relevant security agreements. For Inward Security for Onshore Lending, the onshore financial institution shall report the relevant transaction data to SAFE.

Note, however, that registration of cross-border security with SAFE is no longer a "perfection" requirement. The New Rules have helpfully specified that the validity of any cross-border security agreement will not be impacted by any failure to carry out any SAFE approval, registration or filing.

The New Rules also remove the requirements for SAFE approval or registration in relation to the other types of cross-border security (for instance, the security provided by onshore entities to secure its own foreign debts or other onshore entities' foreign debts), provided that other applicable SAFE rules are complied with.

3. Enforcement

Prior SAFE verification is not required in general for the enforcement of any cross-border security. Commercial banks may process the currency conversion and remittance as required for enforcement of cross border security.

For Outward Security for Offshore Lending, if the security provider is a non-bank institution, it shall not provide new Outward Security for Offshore Lending before the offshore debtor fulfills all its obligations to the security provider arising out of the enforcement under the existing Outward Security for Offshore Lending; for Inward Security for Onshore Lending, the onshore debtor shall not accept new Inward Security for Onshore Lending before it fulfills all its obligations to the offshore security provider arising out of the enforcement under the existing Inward Security for Onshore Lending.

4. Use of Proceeds - "No Flow-back" Restriction

According to the New Rules, "no flow-back" restriction still applies under the Outward Security for Offshore Lending, namely, loan proceeds advanced by offshore lenders to offshore debtors and secured by domestic entities can not be repatriated to onshore by way of equity infusion or extension of loans unless approved by SAFE. In addition to direct equity investment and lending to PRC entities, such restriction also applies to the following indirect ways: (i) refinancing existing loans proceeds of which was repatriated to PRC by equity investment or lending; and (ii) acquisition of an offshore company where more than 50% of its assets are located in the PRC.

Although the New Rules have helpfully clarified that violation of relevant foreign exchange administration requirements (like the above "no-flow back" restriction) contained in the New Rules will not result in the invalidity of the security agreement, SAFE may impose on the relevant PRC entity a penalty in the amount of 30% to 100% of the amount flowed back to PRC.

5. Cross-Border Security over Property

According to the New Rules, SAFE will not review the validity of a cross-border security over property, and the remittance or collection of proceeds arising out of the disposal of the secured property may be directly processed by banks without SAFE approval or verification.

More Structuring Options

1. Upstreaming Security for Inbound Secured Financing Becoming Permissible

Before the New Rules come into effect, when an offshore lender advances loans to an offshore borrower with main assets and operation in PRC, such offshore lender is structurally subordinated to the onshore lenders of the relevant PRC subsidiaries and has no access to the onshore asset collaterals held by the PRC onshore

operating entities. The reason for this subordination is that onshore companies may only be able to provide security for debts owed by their offshore investees (subject to case by case SAFE approval or annual quota management), but are not allowed to guarantee their offshore parents' debt borrowings.

With the implementation of the New Rules, the requirement that the offshore debtor must be the onshore security provider's investee has been removed and onshore companies may provide security for their offshore parents' debt borrowings without being subject to pre-approval, quota management and other qualification requirements. This movement means that (i) the offshore lender may now benefit from onshore asset pool/collateral package; (ii) onshore trapped cash may be transferred offshore by way of an upstreaming guarantee by onshore subsidiaries; (iii) in onshore/offshore two-tier financing, now onshore lenders and offshore lenders may share the same collateral package.

Given the above said "no flow-back" restriction (which has implication of 30% to 100% penalty to the relevant PRC companies), the application of this new structuring alternative will be limited to the situations where use of proceeds will not be deemed as a "flow-back".

2. Outbound acquisition financing could be implemented in a more efficient way

Before the New Rules come into effect, the onshore parent providing guarantee for its offshore subsidiary's acquisition financing is subject to case by case SAFE approval or outward security quota approval on an annual basis which, in some cases, may be difficult to obtain or time consuming. With the implementation of the New Rules, the onshore parent or other affiliates may be able to directly provide security for its offshore subsidiary's financing activities without being subject to SAFE approval, quota control or other qualification requirements.

3. Onshore financing may receive more credit enhancement from offshore sponsors – a new conduit for importing offshore capital?

As discussed above, a much wider range of onshore borrowers (not limited to FIEs) now can use Inward Security for Onshore Lending structure to obtain onshore loan facilities. More importantly, certain quantitative restrictions for Inward Security for Onshore Lending (to be discussed below) have also been lifted. For those offshore sponsors who either have difficulty to bring offshore capital onshore, or do not own a credit-worthiness onshore platform to obtain onshore financing, this new movement provides with more financing flexibilities.

Before the enactment of the New Rules, when the borrower is a foreign-invested company, if the secured amount exceeds its then-available foreign debt quota (being total investment amount minus registered capital) at the time of security enforcement, the borrower may not register the foreign debt owed by it to the offshore security provider and then the lending banks may not convert the security enforcement proceeds into RMB and pay off the onshore loan; if the borrower is a domestic-funded company, it shall apply for a quota from SAFE before using the Inward Security for Onshore Lending, while the approval of such quota is conditional upon a series of financial conditions and industry requirement and thus relatively difficult to obtain.

After the New Rules come into effect, the above quantitative restrictions hae been removed, and replaced with a new requirement that the outstanding principal debt owed by the onshore borrower to the offshore security provider shall not exceed the borrower's audited net assets for the last fiscal year (the excessive part will then occupy its foreign debt quota).

Pending Issues

The New Rules left some pending issues to be further clarified:

1. The New Rules allow a PRC individual to provide Outward Security for Offshore Lending, but are silent on whether a PRC individual can provide other types of cross-border security, especially the security for a debt owed by an onshore debtor to an offshore creditor.

2. It is uncertain whether the New Rules also apply to cross-border security denominated in RMB, so it is still pending that in the scenario of Outward Security for Offshore Lending, whether the offshore RMB loan proceeds are subject to the same “no flow-back” restriction.

3. It remains uncertain how the “no flow-back” restriction will be interpreted and applied in practice where the use of offshore loan proceeds does not directly fall into the restricted scope as specified under the New Rules, e.g. the offshore loan are to refinance an existing acquisition loan for acquiring a target company where more than 50% of its assets are located in the PRC.

4. Though SAFE registration is no longer required for the perfection of cross-border security pursuant to the New Rules, the Judicial Interpretation of the Supreme People’s Court on Certain Issues Concerning the Security Law still stipulates that an outbound security agreement will be held invalid if it fails to obtain approval from or complete registration with relevant authorities. Since the above judicial interpretation will not be superseded by the New Rules, it is uncertain how such legislative inconsistency will affect judicial practice.

This Newsletter is jointly prepared by Banking and Finance Group and Outbound Investment Group.

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of Jun He.

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银行法热点问题

外管新规为跨境融资提供更多的担保选择

2014年5月19日，中华人民共和国国家外汇管理局(“外管局”)发布了《跨境担保外汇管理规定》(“《新规》”)。 在2014年6月1日生效后，《新规》根本性的改变了跨境担保管理制度并为跨境融资活动的融资方提供了更多的设计担保结构的选择。

主要变化

《新规》对于“跨境担保”作出了界定，其指可能产生资金跨境收付或资产所有权跨境转移的担保行为，包括：(1) 境内担保人为境外债务人欠付境外债权人的债务提供的担保(“内保外贷”); (2) 境外担保人为境内债务人欠付境内债权人的债务提供的担保(“外保内贷”); 以及(3)其他形式的跨境担保。

《新规》大幅简化了外管局对跨境担保的监管:

1. 资质要求

对于内保外贷，外管局取消了事前审批、额度管理、对相关当事人财务条件的要求(例如债务人的盈利能力)，对担保方和被担保方的股权关系的要求以及其他资质要求。下文将展开详细分析。

就外保内贷而言，在《新规》生效之前，只有外商投资企业以及从外管局获得特别额度的内资企业才可以使用外保内贷方式获得国内贷款。《新规》生效之后，各类型的境内注册的非金融机构均可以从境内注册的金融机构处以外保内贷方式获得贷款。但是，《新规》没有就金融机构给出定义，一般认为金融监管机关（例如银监会）授予金融牌照的金融机构才是合格贷款人，这意味着境内公司间借贷(包括委托贷款)或个人借贷甚至于商务部批准的融资租赁公司或者保理公司仍然不可以获得境外担保。

《新规》规定，境内个人提供内保外贷参照境内机构提供内保外贷的办法管理，而不再像之前那样要求，境内个人应当连同国内的关联机构一起才方能为境外被投资企业的融资提供担保。

2. 登记要求

(除其他适用的外管局规定外)设立跨境担保无需在外管局进行登记或审批；但内保外贷和外保内贷仍需事后登记。对于内保外贷，应在相关担保文件签署后的15个工作日内在外管局进行该等登记。对于外保内贷，境内金融机构应当将有关的交易数据向外管局报告。

但请注意，根据以上规定，将跨境担保在外管局登记已经不再是一个担保设立的“完善”要求。《新规》进一步明确，跨境担保合同的效力不会因未在外汇局进行核准、登记或备案而受到影响。

在遵守其他适用的外管局规定的前提下，《新规》还删除了外管局对于其他形式的跨境担保(例如国内实体为自身外债或其他国内实体的外债提供的担保)的审批或登记要求。

3. 履约

对跨境担保的履约原则上无需外管局的事先核准，而商业银行即可办理跨境担保的履约所需的外汇的汇兑手续。

对于内保外贷，如果担保人属于非银行机构，则在境外债务人完全履行其因现有的内保外贷履约而对担保人负有的债务之前，担保人不得提供新的外保内贷；另外； 对于外保内贷，在境内债务人完全履行其因现有的外保内贷履约而对境外担保人负有的债务之前，境内债务人不得接受新的外保内贷。

4. 贷款用途 - “不得调回境内”的限制

根据《新规》，“不得调回境内”的限制对于内保外贷仍然适用，也就是说，除非得到外管局的批准,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。除了直接股权投资和借贷给境内企业外，该等限制对于下列情形同样适用：(i)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;（ii）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。

虽然《新规》言明违反有关外汇管理规定（我们理解包括上述资金“不得调回境内”的限制）不会导致有关担保协议无效，但是《新规》也指出外管局有权对于违反规定将外汇调入境内的机构处以违规金额30%到100%的罚金处罚。

5. 物权的跨境担保

根据《新规》，外汇局不对设定的跨境担保物权的合法性进行审查。另外，银行可以直接办理对处置担保物所得的收益汇兑而不需外管局的批准或核准。

更多的融资结构选择

1. 境外贷款人将可改变结构性从属的地位

在《新规》生效前，当境外贷款人为一个主要资产和运营在境内的境外借款人发放贷款，其并不能获得借款人的境内子公司提供的任何担保，从而其境外贷款的偿还顺序从结构上而言是从属于境内子公司的其他境内债权人的。这一结构性从属的原因是，境内公司只能为其境外投资的子公司所承担的债务提供担保(且其受到外管局个案审批或年度配额管理的限制)， 而不得为其境外的母公司所欠债务提供担保。

随着《新规》的施行，境外债务人必须是国内担保人投资或参股的企业这一要求已经被取消，境内公司可以为其境外母公司的债务提供担保，而不再受制于下列因素：事前审批，额度管理以及其他资质要求。这一变化意味着(i)境外贷款人可以从境外借款人的国内资产/担保组合获得支持；(ii) 境外借款人国内沉淀的现金流也可以通过境内子公司提供“上行担保”的方式转移到境外；(iii) 在境内/境外存在两组平行贷款的情况下，境内外贷款人现在可以分享同一个担保组合。

由于前述“资金不得调回境内”的限制，上述新结构将只能应用于一些有限的情形（即当境外贷款资金不会被视同调回境内的情况下方能使用）。

2. 境外收购融资的担保安排将更加便利

在《新规》生效前，境内母公司为其境外子公司的收购融资提供担保受制于外管局的个案审批限制或者对外担保额度，而在某些案件中，其很难获得。随着《新规》的施行，境内母公司或其他关联公司可以直接为其境外子公司的融资活动提供担保，而不再受制于外管局的批准、 额度管理或者其他资质要求。

3. 外保内贷的操作灵活性提升 – 境外资本向境内转移的隐形通道？

如上文所述，《新规》生效之后更多类型的国内借款人（将不仅局限于外资企业和获得额度的境内企业）将可以进行外保内贷。更为重要的是，关于外保内贷的一些数量限制（下文讨论）也取消了。境外企业如果面临将境外资本转移到境内的困难，

或者其在国内没有一个资信良好的实体可以获得国内融资，那么新的外保内贷政策将给他们带来更为灵活的融资选择。

在《新规》生效前，外保内贷受制于一系列的数量限制。如果借款人是外商投资企业，如果被担保金额超过其在担保履约之时可使用的投注差(即投资总额减去注册资本)，则借款人将无法将其在担保履约之后欠付境外担保人的债务在外管局完成外债登记，而贷款人相应地就无法顺利的将担保收益结汇用于还款。如果借款人是内资企业，在进行外保内贷前，其应当向外管局申请额度，但该等额度的审批将根据一系列财务条件和行业要求确定，因而获得该等额度的难度相对较大。

在《新规》生效后，上述数量限制均已经取消，取而代之的是在境外担保提供方根据担保进行了付款之后，境内债务人因此形成的对外负债的未偿本金余额不得超过其上年度末经审计的净资产数额(超过的部分将占用其外债额度)。这无疑大大的提升了外保内贷的操作空间。

待澄清问题

《新规》仍然留有一些问题尚待澄清:

1. 《新规》允许境内个人提供内保外贷，但对于境内个人是否可以提供其他类型的跨境担保，特别是对于境内债务人欠付境外债权人的债务提供担保，并没有进行规定。

2. 《新规》没有明确是否适用于人民币跨境担保，因此对于内保外贷的情况，境外人民币贷款收益是否同样受限于“不得调回境内”的限制尚不确定。

3. 资金“不得调回境内”的限制如何进行解释或者在实践中应用尚不清楚，尤其是当境外贷款收益不属于《新规》明确限制调回境内的领域。 例如，存在一笔现有并购贷款已经用于并购一家有超过50%的资产位于中国境内的公司，那么一笔新的境外贷款是否可以对于该笔现有的并购贷款进行再融资？

4. 尽管根据《新规》，跨境担保的完善不再需要在外管局进行登记，但最高人民法院关于适用《中华人民共和国担保法》若干问题的解释仍规定如果对外担保合同没有获取相关机关的批准或者完成相关机关的登记手续，则该对外担保合同无效。由于前述司法解释不会被《新规》所取代，尚无法确定该等立法冲突会对司法实践产生何种影响。

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