

June 2014



## TABLE OF CONTENTS / 本期内容

### ANTI-TRUST / 反垄断

MOFCOM Publicly Announced First Simplified AML Filing / 2  
商务部公示首例经营者集中简易案件

### FOREIGN EXCHANGE / 外汇

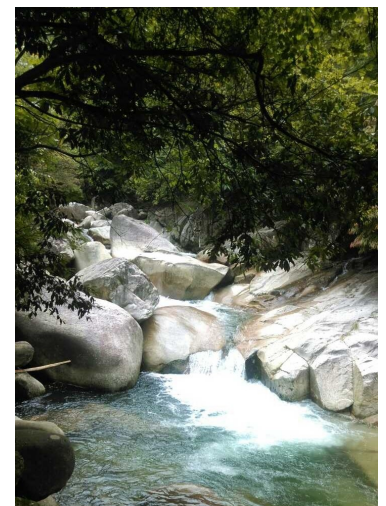
SAFE Introduced New Administrative Regime for Cross-Border 2  
Secured Interest / 外管局发布跨境担保外汇管理新政

### CAPITAL MARKET / 资本市场

CSRC Issued Administrative Measures for IPO and Re- 3  
Financing on GEM Board (or ChiNext) / 证监会发布创业板首发  
及再融资管理办法

### FOREIGN INVESTMENT / 外商投资

NDRC Issued New Rules to Streamline Approval and Filing 4  
Procedures for Foreign Investment Projects / 发改委颁布《外商  
投资项目核准和备案管理办法》



## ANTI-TRUST / 反垄断

### MOFCOM Publicly Announced First Simplified AML Filing 商务部公示首例经营者集中简易案件

Since the *Tentative Rules on Criteria Applicable to Simple Anti-Monopoly Cases* (the “*Tentative Rules*”; please refer to our March issue of *China Regulatory Updates* for more details) came into force this February, the Anti-Monopoly Bureau of the PRC Ministry of Commerce (the “AMB”) has recently publicized the first case of concentration of business undertakings based on simplified anti-monopoly filing procedures (“Simple AML Case”) to solicit public comments. According to the information disclosed, upon the completion of the proposed equity transfer, the target company, Rolls-Royce Power Systems Holding GmbH, jointly controlled by two existing shareholders, will become solely controlled by one of its existing shareholders, and which case on a *prima facie* basis would meet the criteria provided under the Tentative Rules.

In support of the implementation of the Tentative Rules, AMB issued the *Trial Guiding Opinions on the Filing for Simple Anti-Monopoly Cases* (the “*Guiding Opinions*”) on April 18, 2014 which provide detailed guides to the filing procedures and requirements for Simple AML Cases. Pursuant to the *Guiding Opinions*, after the filing application for a Simple AML Case has been formally accepted by AMB, the “*Form of the Public Disclosure of Simple AML Cases*” (which includes, among others, case name, brief

*introductions of the proposed transaction and each of the participants of the concentration, the reason for application as a simple case*) filled out by the applicant will be publicized on AMB’s official website and be subject to public comments (required to be submitted in writing) for a 10-day period. If no negative comment is received, AMB will start its substantive review of the case upon expiry of such 10-day period.

It is noted that the said mandatory public disclosure obligation may discourage the parties who are sensitive to transaction information to be disclosed from making a Simple AML Case filing. Instead, they may still choose to go through the procedures applicable to normal AML filings. In addition, the *Guiding Opinions* fail to spell out the timeline for AMB’s review of a Simple AML Case after the 10-day publication period, and the case will be ordered to be re-submitted as a normal case if AMB does not think it meet the criteria for Simple AML Cases. Based on the foregoing, the parties to an AML filing case will want to be more careful when deciding whether to go with a Simple AML Case process versus a normal one if they are highly timing sensitive and in the meantime not very sure about whether the case meets the criteria for Simple AML Cases.

近日商务部反垄断局（“反垄断局”）在其官方网站公示了自今年2月份颁布

《关于经营者集中简易案件适用标准的暂行规定》（“《暂行规定》”）；相关内容请参见我所2014年3月刊 *China Regulatory Updates*）以来的首例经营者集中简易案件。在该起案件中，相关转股交易完成后，目标公司罗尔斯罗伊动力系统控股公司从被两名股东共同控制变更为被其中一名股东单独控制的状态，属于《暂行规定》界定的、适用简易案件的情形之一。

为配合《暂行规定》的实施，反垄断局于2014年4月18日发布了《关于经营者集中简易案件申报的指导意见（试行）》（“《指导意见》”），为申报经营者集中简易案件提供了操作指引。根据《指导意见》，在简易案件立案后，反垄断局将对申报人填写的《经营者集中简易案件公示表》（包括案件名称、交易概况、参与集中的经营者简介以及申报人认为拟进行的交易属于《暂行规定》界定的哪一种或哪几种简易案件情形等）在其网站上予以为期10天的公示，接受公众提出的书面意见。

鉴于适用简易程序案件的当事方需要在交易前履行相应的公示义务，对于交易内容比较敏感的交易而言，相关交易方可能会更倾向于将相关交易按照普通案件程序而不是简易案件程序进行经营者集中申报；此外，《指导意见》并未明确商务部审查经营者集中简易案件的具体时限，且规定经审查被认定为不符合简易案件申报条件的将需要按照普通案件重新申报，因此，对于交易时间比较敏感且对于是否可以完全适用简易程序具有一定不确定性的交易，当事方在决定以简易案件还是普通案件进行经营者集中申报时可能需要更加谨慎。

## FOREIGN EXCHANGE / 外汇

### SAFE Introduced New Administrative Regime for Cross-Border Secured Interest 外管局发布跨境担保外汇管理新政

Recently, the PRC State Administration of Foreign Exchange (“SAFE”) issued the *Foreign Exchange Administrative Provisions on Cross-Border Secured Interest* and its implementing guides (collectively, the “*New SAFE Provisions*”) with an aim to streamline the administration of and further facilitate various cross-border activities involving secured interest. The New SAFE Provisions became effective on June 1, 2014 and superseded all relevant previous rules. Some major highlights of the New SAFE Provisions include:

1. Scope of cross-border secured interest has been expanded and

clarified: The New SAFE Provisions have classified the cross-border secured interest into 3 categories, namely, the “*Outbound Security*” (i.e., *security provided by onshore entities for loans/debts between offshore entities*), the “*Inbound Security*” (i.e., *security provided by offshore entities for loans/debts between onshore entities*) and other security (i.e., *cross-border security other than the “Outbound Security” and “Inbound Security”*). The New SAFE Provisions will for the first time allow domestic individuals to provide “*Outbound Security*” by reference to the

approval and registration requirements applicable to non-bank institutions. In addition, the SAFE New Provisions have specifically excluded some practices (including, without limitation, the unenforceable “*letters of comfort*” which are typical in onshore companies’ financing activities through their offshore subsidiaries) from the scope of qualified cross-border security activities.

2. Most prior approval requirements have been lifted: Except for a few items (such as with respect to the “*Outbound Security*”, without the



approval by competent SAFE office, the underlying offshore funds shall not be remitted, directly or indirectly, back to China for onshore use), the New SAFE Provisions have lifted all prior approvals and quota requirements which used to be necessary for entering into and performance of cross-border secured interest, and shift to *ex post* registration and filing administration systems. It is noteworthy that pursuant to the SAFE New Provisions, domestic companies that are not foreign invested enterprises ("Non-FIEs") will no longer need to apply to local SAFE offices for foreign debt quotas before engaging in "Inbound Security" transactions, which were required previously in accordance with the *Administrative Measures on Foreign Debt Registration* issued by SAFE in 2013. However, the New SAFE Provisions are silent on whether the Non-FIEs still need to apply for foreign debt quota when entering into "Inbound Security" transactions, which point is expected to be soon further clarified by SAFE.

3. Validity of transaction documents for cross-board secured interest is no longer subject to SAFE approval: The New SAFE Provisions explicitly provide that the effectiveness of transaction documents for cross-border secured interest is not conditioned on the approval by, registration or filing with competent SAFE offices. However, the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Security Law of the People's*

*Republic of China*", which is currently effective, still provides that the transaction documents for cross-border secured interest provided by onshore entities should not take effect unless and until duly approved by competent government authorities. To further clarify the legal practice in this connection and be consistent with the SAFE New Provisions, it is expected that the Supreme People's Court will revise or amend the aforesaid interpretation accordingly at an appropriate time.

In light of the depth and width of the changes brought about by the New SAFE Provisions, we have only highlighted a fraction of the major reforms above. We will be happy to share more observations of the New SAFE Provisions if requested by our interested readers.

日前, 国家外汇管理局 ("外管局") 出台了《跨境担保外汇管理规定》及《跨境担保外汇管理操作指引》(合称为"外汇新规"), 通过大幅简政放权实现跨境担保外汇管理的改革, 便利跨境担保活动。外汇新规于2014年6月1日起生效, 与此同时, 《国家外汇管理局关于境内机构对外担保管理问题的通知》等一批相关的外汇监管法规被废止。外汇新规带来的改革及值得注意的问题主要有:

1. 扩大并明确了跨境担保范围: 外汇新规将跨境担保划分为三类: "内保外贷" (即担保人注册地在境内、债务人和债权人注册地均在境外)、"外保内贷" (即担保人注册地在境外、债务人和债权人注册地均在境内) 以及其他形式的担保 (即除"内保外贷"和"外保内贷"之外的形式)。外汇新规明确了境内个人可作为担保人办理"内保外贷"业务 (参照非银行机构办

理), 且明确排除了若干情形的适用 (包括但不限于境内母公司向境外贷款人出具的不具有契约性质或不受法律约束力的安慰函等), 明确了跨境担保的范围。

2. 取消了事前审批: 除少数事项 (如"内保外贷"的资金直接或间接调回境内使用仍需得到相关外管局的批准) 外, 外汇新规基本取消了所有跨境担保签约和履约的事前审批和核准事项和额度管理, 转为事后登记或备案管理。值得注意的是, 根据外管局于2013年发布的《外债登记管理办法》, 境内中资企业办理"外保内贷"业务之前需要向地方外管局申请外债额度; 但是外汇新规对于境内企业"外保内贷"不再实行额度管理, 而是笼统地规定了境内债务人发生跨境担保履约时对外负债余额不得超过一定数额 (其上年度未经审计的净资产数额), 否则将占用其外债额度, 但境内中资企业在"外保内贷"业务中适用的外债额度仍有待外管局进一步明确。
3. 将外汇管理与跨境担保交易合同的有效性判定脱钩: 外汇新规明确了外管局对跨境担保合同的核准、登记或备案不构成跨境担保合同的生效要件。但是, 由于目前依然有效的《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》中要求对外担保合同需经主管部门的审批登记方可生效, 因此, 为保持与外汇新规的一致性, 最高人民法院可能需要对前述解释做出进一步的修改或修订。

鉴于本次外汇新规带来的改革力度较大、内容较广, 我们在上文列仅列出了外汇新规的部分重要改革内容, 对于外汇新规中的其他内容及其在实践中对跨境担保活动的影响, 我们将视情形向感兴趣的读者提供更加全面的专题介绍和分析。

## CAPITAL MARKET / 资本市场

### CSRC Issued Administrative Measures for IPO and Re-Financing on GEM Board (or ChiNext)

#### 证监会发布创业板首发及再融资管理办法

On May 14, 2014, CSRC publicized and implemented the *Administrative Measures for the IPO of Shares and Listing on the GEM Board* (the "GEM IPO Measures") and the *Interim Administrative Measures on the Issuance of Securities by the Companies Listed on the GEM Board* (the "GEM Re-Financing Measures").

Compared with the previous interim measures governing the IPO on the Growth Enterprise Market ("GEM") Board, key highlights of the GEM IPO Measures include: (i) cancellation of the *Guidance on Further Improving the Recommendation of Companies to be*

*Listed on the GEM Board* (the "Guidance on Recommendation") issued by CSRC in 2010, and as a result, the applicants eligible for GEM Board IPOs are no longer limited to those in some 9 key industries (including among others, new energy, new material, information, biology and new pharmaceuticals) that used to be particularly recommended by the Guidance on Recommendation; and (ii) relaxation of financial access requirements and cancellation of the requirement for continuous growth for the applicant (to be specific, (A) an applicant shall be profit-making for the

*most recent two years with an accumulative net profits of no less than RMB10 million, but it is no longer required to have a continuous profit growth; or (B) the applicant shall be profit-making in the most recent year with a turnover of no less than RMB50, but it is no longer required to have a net profit no less than RMB5 million and a growth rate in terms of its turnover no lower than 30% in each of the most recent years*), among others. However, the widely-expected "green hallway" for some promising but loss-making Internet enterprises to realize an IPO on the GEM Board is not

endorsed by CSRC.

Compared with the relevant laws and regulations governing the re-financing on the Main Board and SME Board, the GEM Re-Financing Measures provide a special procedure for issuance of additional shares by GEM board listed enterprises through private placement. To be specific, firstly, the general shareholders meeting of a GEM Board-listed company is entitled to authorize its board of directors to make decisions on the issuance of shares through private placement pursuant to the company's articles of association as long as the total re-financing amount will not exceed 10% of the net asset value of the company as of the end of the most recent year. Secondly, if the aforesaid re-financing amount is no more than RMB50 million, CSRC will review such re-financing in a summary procedure and grant its approval within 15 working days. Thirdly, if the private placement is eligible for a summary procedure, it is not necessarily to be sponsored by a securities sponsor, and if the private placement further meets some other conditions, the

GEM Board-listed companies may sell the new shares by themselves instead of engaging a securities firm as their underwriter. All the aforesaid measures will to some extent help to save some time and costs for the GEM Board-listed companies initiating re-financing on GEM Board.

The GEM IPO Measures and GEM Re-Financing Measures have generally paved the way for a more convenient and smooth exit by PE and VC funds from their investment portfolios on the GEM Board.

证监会于2014年5月14日公布并实施了《首次公开发行股票并在创业板上市管理办法》（“《创业板首发办法》”）和《创业板上市公司证券发行管理暂行办法》（“《创业板再融资办法》”）。

与此前适用于创业板首发的相关暂行办法相比，《创业板首发办法》的亮点包括(i)废止了证监会于2010年发布的《关于进一步做好创业板推荐工作的指引》（“《推荐工作指引》”），因此创业板申报企业将不再限于《推荐工作指引》中要求保荐机构重点推荐的九大行业（包括新能源、新材料、信息、生物与新医药等）；以及(ii)适当放宽了财务

准入指标，取消了包括持续增长（具体来说，申请人最近两年盈利且净利润累计达到人民币1,000万元，但不再要求持续增长；或者最近1年盈利且营业收入达到人民币5,000万元，但不再要求净利润达到人民币500万元及最近两年营业收入增长率均不低于30%）等方面的要求。但对于此前热议的关于允许部分仍未盈利的互联网行业企业在创业板进行首发上市的建议，证监会未予采纳。

与在主板和中小板上市的公司再融资相关的法规相比，《创业板再融资办法》推出了针对非公开发行股票融资可选用的特殊程序：首先，上市公司股东大会可以根据章程的规定授权董事会决定相关非公开发行事宜（融资总额需不超过最近1年末净资产的10%）；其次，如果前述非公开发行的融资额不超过人民币5,000万元，证监会将采用简易程序进行核准，时限为受理之日起15个工作日；再次，适用简易程序的项目可以由保荐人推荐，非公开发行满足一定条件时也可以不由券商承销而自行销售。上述举措都有助于降低创业板上市公司再融资的时间成本和发行成本。

上述管理办法的发布，总体上来说为PE/VC通过其所投资的企业实现在创业板的退出创造了良好的条件。

## FOREIGN INVESTMENT / 外商投资

### NDRC Issued New Rules to Streamline Approval and Filing Procedures for Foreign Investment Projects 发改委颁布《外商投资项目核准和备案管理办法》

On May 17, 2014, the PRC National Development and Reform Commission (“NDRC”) issued the *Administrative Measures for Examination and Approval and Filing of Foreign Investment Projects* (the “Administrative Measures”), according to which the administration of foreign investment projects will be changed from a single system of approvals to a combined system of approvals and filings. The Administrative Measures further delegate and clarified the limit of approving authorities of government agencies at different levels and simplified the approval procedures. The Administrative Measures will come into effect on June 17, 2014 and the currently effective *Interim Administrative Measures for Examination and Approval of Foreign Investment Projects* will be revoked at the same time.

Previously, the foreign investment projects were classified only by reference to the *Catalogue of the Guidance for Foreign Investment Industries* (the “Guidance Catalogue”), and competent NDRC offices would examine and approve a foreign investment project based on its total investment amount and the category in

which such project falls (*i.e., encouraged, permitted or restricted*). In addition to the Guidance Catalogue, the Administrative Measures have also made reference to the *Catalogue of Investment Projects Subject to Government Examination and Approval (2013 Edition)* (the “Catalogue of Approval”) that was issued by the State Council in 2013 with an aim to offer national treatment to foreign investment projects so far as market access is concerned. Pursuant to the Administrative Measures, the previously adopted universal approval requirement is replaced by the combination of approvals for limited cases and filings for most cases. To be more specific, unless a foreign investment project falls into (i) restricted industry (*based on the Guidance Catalogue*); (ii) encouraged industry (*based on the Guidance Catalogue*) with a restriction that the project should be controlled (*including relatively controlled*) by the Chinese party; or (iii) industries provided in any of the Sections 1 through 11 of the Catalogue of Approval, in which case the project shall be subject to approvals by competent NDRC offices, the project will only need to be filed with the appropriate NDRC office. In

addition, all real estate projects that are in the restricted industries (*based on the Guidance Catalogue*) will only need to be approved by competent provincial NDRC offices regardless of their investment size.

With respect to the newly introduced filing system, the Administrative Measures has listed out the application documents necessary for the filing and requested the competent local government authority to provide written reasons for any rejected application within 7 working days. In addition, the Administrative Measures has further specified that investments by foreign invested enterprises or foreign investors with qualified Renminbi funds should also be subject to the approval or filing requirements provided thereunder, as applicable.

国家发展和改革委员会（“发改委”）于2014年5月17日颁布了《外商投资项目核准和备案管理办法》（“《管理办法》”），《管理办法》将对外商投资项目的审批分为核准和备案两种方式，进一步下放和明确了外商投资项目的审批权限、并简化了审批手续。《管理办法》将于2014年6月17日起正式施行，届时目前适用的《外商投资项目核准暂行管理办法》将同时废止。

与此前仅依据《外商投资产业指导目录》（“《产业指导目录》”）的划分（鼓励类、允许类和限制类）对外商投资项目按照总投资额进行分级核准不同的是，《管理办法》还引入了国务院在2013年年底发布并生效的《政府核准的投资项目目录（2013年本）》（“《核准目录》”）作为外商投资项目类别划分的标准，在准入管理上对外商投资项目探索试行国民待遇。《管理办法》将

项目全面核准改为有限核准和普遍备案相结合的管理方式，其中，除《产业指导目录》中限制类项目和有中方控股（含相对控股）要求的鼓励类项目，以及属于《核准目录》第一至十一项所列的外商投资项目实行核准制外，其余外商投资项目实行备案制；而所有《产业指导目录》限制类中的房地产项目将不分总投资额统一由省级发改委核准。

对于本次新引入的备案制度，《管理办

法》明确了需要提供的信息和提交的材料且要求地方政府投资主管部门对不予备案的项目应在7个工作日内出具书面意见并说明理由。《管理办法》进一步明确，外商投资企业再投资项目以及外国投资者以人民币在境内投资的项目同样应按照该法的规定进行相应的核准或备案。

*These updates are intended for information purpose only and are not a legal advice or a substitute for legal consultation for any particular case or circumstance. © Han Yi Law Offices All rights reserved.*

*For further information, please write us at [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com).*

---

## CONTACT US

### Shanghai Office

Suite 1801, Tower I, Huayi Plaza  
2020 West Zhongshan Road  
Shanghai 200235, China  
Tel: (86-21) 6083-9800  
Fax: (86-21) 6083-9811

### Beijing Office

Unit B039, 12/F South Tower  
8 East Guanghua Dongli  
Beijing 100020, China  
Tel: (86-10) 5989-2212  
Fax: (86-10) 5989-2296

---