瀚一律師事務所
HAN YI LAW OFFICES

www.hanyilaw.com

上海办公室
上海市中山西路 2020 号华宜大厦 1 座 1801 室
邮政编码: 200235
电话: (86-21) 6083-9800
传真: (86-21) 6083-9811

北京办公室
北京市燕莎中心写字楼 C203-5A 室
邮政编码: 100125
电话: (86-10) 6410-5322
传真: (86-10) 6410-5322

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致： Han Yi Clients and Friends

关于/ RE：中国法律视角下的员工股权激励计划概述 / EMPLOYEE STOCK OWNERSHIP PLAN: AN OVERVIEW FROM PRC LAW PERSPECTIVE

员工股权激励计划（“股权激励计划”）是指以公司股权、股票或与此相关的权益为标的，对公司的董事、监事、高管及/或其他公司员工实施的一种与公司中长期的业绩相挂钩的员工薪酬待遇激励方案。股权激励计划的实施期限通常在一年以上，是现代公司薪酬和福利制度的重要组成部分。

股权激励计划的制定和实施是一项涉及多方面因素的综合性工程，其内容和实施的程序既需要遵守相关法律法规的规定，又要综合考虑计划实施的目的、条件、实施对象的范围和计划实施的财务和税务成本等因素。根据普华永道近年来对中国企业股权激励计划进行调研的结果以及我们参与相关业务的经验，法律法规的限制和税收负担通常是企业设计和实施股权激励计划时需要关注的重点。本备忘录将主要从中国（仅为本备忘录之目的，不包括香港、澳门和台湾）法律的角度，[1]对中国境内上市公司、境内非上市公司以及境外上市公司[2]制定和实施股权激励计划所涉及的相关中国法律和实践进行简要的介绍，供有兴趣的读者参考。

I. 员工股权激励计划概览

设计及实施一项股权激励计划涉及到多方面的因素。尽管所需考虑的员工激励计划的重点因素在很大程度上是一致的，但具体内容则可能会根据企业是否已上市、规模大小、发展阶段等而各有不同（*相对于非上市公司而言，上市公司在考虑其拟实施的员工股权激励计划的相关要素时受到的限制会更多*）。以下为一项典型员工股权激励计划涉及的关键要素：

- 激励工具：员工股权激励计划的具体激励工具种类广泛、不拘一格，主要包括

[1] 对于企业实施股权激励计划涉及的财务和税务问题，本备忘录将暂不对该等问题进行详细的讨论。

[2] 本备忘录所讨论的境外上市公司的员工股权激励计划，主要是指在中国境外注册成立、并在中国境外相关股票交易市场上市的公司，针对其中国员工或其中国境内关联机构的员工实施的员工股权激励计划。

股票期权、股票增值权、限制性股票、业绩股票、虚拟股票等，其中尤其以股票期权和限制性股票最受欢迎。

- 激励对象：董事、高管、中层管理人员和核心技术或业务人员及其他企业认为应受激励的员工。

- 股票来源：老股东转让股权/股份/股票，公司从老股东处回购的股份/股票，或公司增资/发行新股。

- 激励计划规模：受到企业类型、规模、股本机构等因素的影响，通常占公司总股本的 5-20%。

- 行权指标：包括公司业绩指标、个人业绩指标、市场条件等因素。

目前，中国法律[3]对员工股权激励计划的规范主要体现在如下几个方面：(i) 就境内注册的公司而言，主要是中国证监会和国务院国资委发布的针对境内上市公司及国有控股上市公司实施员工激励计划的系统性规范；(ii) 对于境内非上市公司而言，中国法律暂未提出特别的监管要求，其符合《公司法》中的一些基础性要求即可；(iii) 就境外注册的上市公司而言，主要是国家外汇管理局出台的针对境内个人参与境外上市公司股权激励计划外汇管理方面的规定；以及(iv) 由于缺少相应的外汇登记细则，境内个人理论上尚无法参与境外非上市公司的股权激励计划。

II. 境内公司股权激励计划

1. 境内上市公司之股权激励计划

中国法律对境内上市公司实施股权激励计划的监管以 2005 年启动的中国证券市场股权分置改革以及同年 12 月中国证监会发布的《上市公司股权激励管理办法》（试行）（“《管理办法》”）为分界点进行划分。在此之前，境内上市公司的员工激励计划处于早期探索阶段，以内部职工股、管理层收购等为代表，政策依据混杂、缺乏系统性，实施主体主要是国有企业。

《管理办法》的颁布、《公司法》和《证券法》的修改以及绝大多数上市公司完成股权分置改革，既为境内上市公司股权激励计划的制定提供了较为系统的法律依据，又为其实施扫清了股票流通障碍。证监会又于 2008 年发布了《股权激励有关事项备忘录》1 号、2 号、3 号（“备忘录”），为境内上市公司实施股权激励计划提供了进一步的操作指引；与此同时，与股权激励计划相关的国有资产管理、税收和财务处理等相关的配套规则也陆续颁布，境内上市公司的股权激励计划进入快速发展的时期。根据“证券时报网”数据显示，截止 2012 年 9 月，已有 379 家上市公司推出 433 个员工激励计划，其中 268 个激励计划已实际实施。

《管理办法》及上述三个备忘录是目前境内上市公司实施员工激励计划的最主要法律依据，其主要从保护中小投资者利益、维护资本市场稳定的角度对境内上市公司

[3] 如上文所述，此处的相关法律法规不包括与税收、财务处理相关的法律法规；与之相关的内容，请咨询专业的财务和税务顾问，本备忘录中暂不做详细介绍。

员工股权激励计划的相关要素及实施程序进行了规范。

(a) 对股权激励计划相关要素的规范

《管理办法》下的股权激励是指上市公司以本公司股票为标的，对其董事、高级管理人员及其他员工进行的长期性激励，包括以限制性股票、股票期权及法律、行政法规允许的其他工具[4]实行的股权激励计划。以下为《管理办法》以及三个备忘录下，境内上市公司实施股权激励计划各主要要素需要满足的基本条件：

事项	具体内容
上市公司资质	➢ 上市公司存在以下情况之一的，不得实施员工激励计划： • 最近一个会计年度财务会计报告被注册会计师出具否定意见或者无法表示意见的审计报告； • 最近一年内因重大违法违规行为被中国证监会予以行政处罚；或 • 存在中国证监会认定的其他情形。
激励对象	➢ 可以为董事（独立董事除外）、高管、核心技术（业务）人员及/或其他应受激励的员工（但不包括监事），但激励对象不得存在最近 3 年内被证券交易所公开谴责或宣布为不适当人选、或因重大违法违规行为被证监会予以行政处罚、或存在《公司法》规定的不得担任公司董事、监事、高级管理人员情形的情况。
激励工具	➢ 限制性股票、股票期权及法律、行政法规允许的其他工具。
股票来源	➢ 回购本公司股票或向激励对象发行新股（实践中，绝大多数上市公司都采取了向激励对象发行股份的方式）。[5]
资金来源	➢ 上市公司不得为激励对象依照股权激励计划获取有关权益提供贷款或其他任何财务资助（如为激励对象的贷款提供担保等）。
授予股票上限	➢ 标的股票总额累计不得超过公司股本总额的 10%（其中回购股份的总额不得超过公司股本总额的 5%，且必须在 1 年内授予激励

[4] 《管理办法》和三个备忘录仅对以限制性股票和股票期权方式实施的股权激励计划的相关内容（包括但不限于行权价格、计划有效期、行权有效期等）进行了规定。我们理解，由于缺少详细的指导性意见，如境内上市公司拟采用限制性股票和股票期权以外的其他形式设置其股权激励计划的，监管部门通常会参照适应于限制性股票和股票期权的规定，对该等计划的具体内容予以个案审查。

限制性股票是指公司按照预先确定的条件授予激励对象一定数量的本公司股票，激励对象只有在工作年限或业绩目标符合股权激励计划规定条件的，才可出售限制性股票并从中获益。可出售所授予的股票期间，称之为解锁期。

股票期权是指上市公司授予激励对象在未来一定期限内以预先确定的价格和条件购买本公司一定数量股份的权利。激励对象根据其获得的股票期权购买本公司股票的过程被称为行权。在规定的期限（称为行权有效期间）内，激励对象可以选择以预先确定的价格和条件购买上市公司一定数量的股份，也可以放弃该种权利。

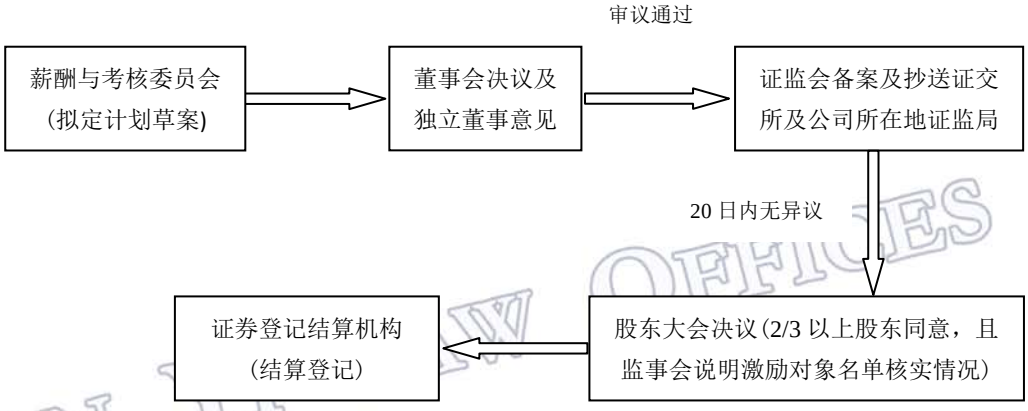
[5] 根据 2 号备忘录，股东不得直接向激励对象赠予或转让股份。股东拟提供股份的，应当先将股份赠予或转让给上市公司，并视为上市公司以零价格或特定价格向这部分股东定向回购股份。

事项	具体内容
	对象）；非经股东大会特别决议批准，任何一名激励对象获授的股票累计不得超过公司股本总额的 1%。
行权指标	➢ 行权指标须考虑公司的业绩情况，原则上股权激励实施后公司的业绩指标（如：每股收益、加权净资产收益率和净利润增长率等）不低于历史水平。此外，鼓励公司同时采用市值指标和行业比较指标。
授予/行权价格	➢ 限制性股票：如果股票来源是定向增发，应符合定向增发股票的定价规定，即发行价格不得低于定价基准日前 20 个交易日公司股票均价的 50%；如股票来源为从二级市场回购取得的存量股票，则在定价上无特殊的限制。 ➢ 股票期权：行权价格不应低于股权激励计划草案摘要公布前一个交易日的公司股票收盘价和前 30 个交易日内的公司股票平均收盘价中的较高者。
所持股票的法定锁定期	➢ 如果股票来源是定向增发，应符合定向增发股票的规定，即自取得相关股票之日起 12 个月内不得转让，激励对象为控股股东、实际控制人的，自取得相关股票之日起 36 个月内不得转让。 ➢ 如股票来源为从二级市场回购取得的存量股票，则在锁定期上无特殊的限制，符合《公司法》有关董事、高管的锁定期要求即可。
激励计划的有效期	➢ 以股票期权为激励工具的股权激励计划的有效期：每期期权自授权日至行权终止日不得超过 10 年（在实践中，大多数公司股票期权的有效期在 4－6 年之间）；而授权日至获授股票期权首次可以行权日之间不得短于 1 年。 ➢ 以限定性股票为激励工具的股权激励计划无有效期的限制。

对于国有控股境内上市公司而言，其拟实施的员工激励计划除了需满足前述各项规定之外，还需符合《国有控股上市公司（境内）实施股权激励试行办法》等有关国有资产监管方面（主要是在主体资格、授予股票上限、激励对象、授权数量、实际收益和行权指标等方面做出了更加严格的限制，以达到对国有资产有效监督、防止国有资产流失的目的）的法律法规。由于篇幅有限，我们将不在本备忘录中详述适用于国有上市公司的特殊限制性规定。

(b) 境内上市公司股权激励计划的审批程序

境内上市公司的股权激励计划须经公司董事会批准（包括独立董事出具意见）、证监会备案无异议后，提交给股东大会特别决议批准（即经出席会议的股东所持表决权的 2/3 以上通过）。同时，上市公司还需持续、及时地履行相关信息披露义务。以下为境内上市公司制定和实施股权激励计划涉及的主要内部和外部审批流程：



国有控股的上市公司除需履行上述内外部程序之外，其国有控股股东还需在上市公司董事会审议通过相关激励计划草案后、报送证监会备案之前，将计划草案报相关国有资产管理部门审核或备案。此外，在股权激励计划正式实施后，国有控股股东还应定期将计划的实施进展及年度行权情况及时报相关国有资产管理部门备案。

2. 境内未上市公司的股权激励计划

对于境内未上市公司而言，中国法律暂未对其制定和实施股权激励计划作出专门的规定。相关公司制定和实施员工激励计划通常符合《公司法》有关股权转让、增资（如适用）等基础性规定以及公司内部审批程序即可。

值得注意的是，对于在股权激励计划有效期内有境内上市计划的公司（“拟上市公司”）而言，在其制定和实施相应的股权激励计划时，还应特别注意拟实施的激励计划应以不对其未来上市产生不利影响为前提。根据目前的相关实践，拟上市公司在制定和实施相关股权激励计划时，需要特别注意如下几个方面：

(a) 上市前的股权激励计划应在提交上市申请前实施完毕或终止执行。作为境内上市的一项基本要求，发行人应当股权清晰，不存在影响控股股东以及受控股股东、实际控制人支配的股东持有的发行人股份权属的因素。因此，实践中，证监会一般会要求拟上市公司在上市前制定的股权激励计划已经在该等公司提交上市申请前实施完毕或终止执行。在公司上市后，公司可依照相关法律法规制定适用于上市公司的股权激励计划。

(b) 已实施的股权激励方案在所有重大方面应不存在违法相关法律法规和相关公司章程和内部制度的情形，包括但不限于股权激励计划获得了适当内部批准、不存在股份代持的情形、员工用于购买企业股份的资金来源合法等。

(c) 股份（股权）来源符合相关法律规定。原则上，境内未上市公司不得通过回购本公司股份的形式实施股权激励计划，但对于未上市的股份公司而言，在符合以下规定的前提下，可以通过回购本公司股份的方式实施股权激励计划：(i) 经

股东大会 2/3 有效表决权通过；(ii) 前述股份总额不得超过本公司已发行股份总额的 5%；以及(iii)用于收购的资金应当从公司的税后利润中支出，所收购的股份也应当在一年内转让给其员工。

(d) 股权/股份持有方式应兼顾拟上市公司及激励对象的利益。与境内上市公司的员工激励计划一般由员工直接持股不同，拟上市公司实施股权激励计划时，既可以设计成由员工直接持股的方式，也可以设计成由员工通过特殊目的公司或合伙企业间接持有激励股份的方式；但需从员工的税收负担、公司股权的稳定性等角度综合考量。

值得注意的是，不论是直接持股还是通过特殊目的实体间接持股，根据证监会的相关实践，拟上市公司的股东人数（包括所有通过股权激励计划间接取得公司股份的员工）均不得超过 200 人。

(e) 授予/行权价格不会对拟上市公司在报告其内的财务状况产生不利影响。按照证监会的相关要求，对于拟在主板和中小板上市的公司，如果其员工通过股权激励计划获得公司相关股权/股份的价格低于该等股权/股份的公允价格，则拟上市公司需按照股份支付准则之规定将员工取得相关股权/股份的价格和公允价格之间的差额记入当期管理费用。如相关股权激励计划在拟上市公司的报告期内予以实施，则股份支付准则的适用很可能会对拟上市公司在上市报告期内的业绩表现造成不利影响；因此，拟上市公司在报告期内制定及/或实施股权激励计划时应充分考虑股份支付原则可能对其财务数据造成的影响。

(f) 未上市国有控股企业的股权激励计划还需符合一些特殊规定。比如，国有控股拟上市公司的管理层持股总量不得达到控股或相对控股数量，同时国有企业主业企业的管理层也不得持有辅业企业股权。在审批程序上，对于国有控股公司拟实施的股权激励计划而言，该等计划在进行内部审批之前，应首先获得相关国有资产管理部门的批准。

III. 境外企业股权激励计划涉及的中国法律监管

中国境内居民参与境外公司股权激励计划主要受到外汇和税收两方面的监管（由于篇幅有限，本备忘录中将暂不讨论与股权激励计划有关的税收事宜）。

(a) 外汇登记手续

根据中国相关法律法规和实践，境内个人通过参与境外公司的股权激励计划持有境外公司的股权及/或获得收益，属于境内个人对外投资的一种形式，原则上应当办理相应的外汇登记手续。

根据《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，“7 号文”），就参与境外上市公司股权激励计划的境内员工个人而言，其应通过所属境内公司集中委托一家境内代理机构办理相关手续。

就境内个人参与境外未上市公司股权激励计划而言，如前所述，鉴于中国相关监管机构并未制定相应的外汇登记细则，境内个人理论上尚不能参与境外未上

市公司的股权激励计划。我们注意到，虽然存在法规上的限制，实践中却有境内个人参与境外未上市公司股权激励计划的案例。在前述情形下，境内个人参与境外公司股权激励计划的行为可能会对该境外公司的海外上市计划造成一定的不利影响。此外，相关境内个人亦存在因违反中国相关外汇管理规定而遭受处罚的风险。

(b) 事后合规性监管

根据 7 号文，如果境外上市公司股权激励计划发生重大变更（如原计划关键条款的修订及增加新计划，境外上市公司或境内公司并购重组等重大事项导致原计划发生变化等），境内代理机构应在该等变更发生后的 3 个月内持规定材料，到所在地外汇局办理变更登记。

因股权激励计划到期，或因境外上市公司在境外证券市场退市、境内公司并购重组等重大事项导致股权激励计划终止的，境内代理机构应在计划终止后的 20 个工作日内，持规定材料到所在地外汇局办理股权激励计划外汇登记注销。

以上是我们根据目前中国有关员工股权激励计划的主要法律法规和实践的概括性介绍和分析，希望对阁下有所帮助。需注意的是，由于篇幅所限，本备忘录并未涉及国有上市公司参与激励计划以及参与激励计划的企业和个人在税收/财务处理方面的内容。本备忘录仅供阁下用作一般性参考，并不能视为我们就相关事项出具的任何形式的法律意见。

如阁下对于本备忘录所述之内容有任何疑问，敬请随时与敝所联系（inquiry@hanyilaw.com）。

2012 年 10 月 24 日

RE: EMPLOYEE STOCK OWNERSHIP PLAN:
AN OVERVIEW FROM PRC LAW PERSPECTIVE

Employee Stock Ownership Plan ("ESOP") refers to a stock-based remuneration incentive program adopted by a company for its directors, supervisors, senior management personnel and/or other employees on the basis of the company's medium-and-long term performance. Nowadays, ESOP has become a critical part of the modern remuneration and welfare mechanism.

Formulating and implementing an ESOP is a comprehensive project involving several factors. For a successful and satisfactory ESOP, it needs not only to comply with various requirements under applicable laws and regulations, but also to balance such key factors as its purpose, validity term, conditions for exercise and target grantees that affecting its implementation costs and effects. Based on the surveys conducted by PricewaterhouseCoopers (or PwC) in the recent years on ESOPs adopted by PRC (*solely for the purpose of this memorandum, excluding Hong Kong SAR, Macau SAR and Taiwan*) companies and our related deal experiences, legal restrictions/requirements and tax burdens constitute the key concerns of the PRC companies when formulating ESOPs. For your general reference, we have prepared this memorandum to provide a general introduction of applicable PRC laws and practices[1] on the adoption and implementation of ESOPs by onshore listed and unlisted companies as well as offshore listed companies.[2]

I. General Introduction of ESOPs

Multiple factors are needed to be considered when formulating and implementing ESOPs. Key factors of all kinds of ESOPs are generally the same while the details are of course subject to the companies' listing venue, business scale, development phase and etc. (*compared with the unlisted companies, listed companies are subject to more restrictions as for as ESOPs are concerned*). Set forth below is a summary of the key factors of a typical ESOP:

- **Incentive tools**: a variety of incentive tools could be adopted for ESOPs, which include without limitation, stock options, stock appreciation rights ("SARs"), restricted stocks, performance shares, and phantom stocks.

- **Target grantees**: normally include directors, senior and middle-level management personnel, key technical engineers, business personnel and/or other employees.

- **Source of stocks**: shares transferred by existing shareholders, redeemed/repurchased by the company from existing shareholders, or new shares issued by the company.

- **Size of the stock/option pool**: normally in the range from 5% to 20% of a company's total capital stock depending on the company's development stage, business scale, shareholding structure and etc.

[1] Please note that this memorandum is not intended to introduce and/or analyze any accounting or tax related issues with respect to ESOPs. On such topics, please consult relevant accounting or tax experts if needed.

[2] ESOPs of offshore listed companies discussed in this memorandum only include the ESOPs that are adopted by the companies incorporated and listed out of China and offered (or will be offered) to such companies' PRC employees or the employees of their PRC affiliates.

- **Conditions for exercise**: including, among others, company performance target, grantees' performance levels and market conditions.

From the legislation perspective,[3] PRC government authorities regulate ESOPs mainly from the following aspects: (i) for companies incorporated and listed domestically, the provisions promulgated by CSRC and the State-Owned Assets Supervision and Administration Commission ("SASAC") applicable to ESOPs of domestic listed companies (including SOEs) shall be primarily referred to; (ii) for domestic unlisted companies, since no specific regulatory requirement is provided by PRC laws, compliance with the basic requirements set out in the *PRC Company Law* would be required; (iii) for companies incorporated and listed overseas, foreign exchange (or Forex) related regulations issued by the State Administration of Foreign Exchange ("SAFE") with respect to the participations by Chinese individuals in ESOPs of the offshore listed companies are running the show; and (iv) for offshore unlisted companies, theoretically speaking, Chinese individuals are unable to participate in their ESOPs due to the absence of detailed rules on Forex registration procedures applicable to this case.

II. ESOPs of Domestic Companies

1. ESOPs of Domestically Listed Companies

As a dividing line in the history of PRC ESOP legislation and practices, CSRC launched the reform of non-tradable shares of listed companies in 2005 and issued the *Trial Measures for Administration of Equity Incentives of Listed Companies* (the "Administrative Measures", *which is the first legislation specially governing ESOPs in China*) in December of the same year. Before then, ESOPs adopted by domestic listed companies were in their early exploratory stages, featured with employee stock purchase plans, management buy-out programs, and etc., of which the policy bases are ambiguous and far from streamlined, and the companies concerned are mainly SOEs.

The promulgation of the Administrative Measures, the revisions of the *Company Law* and the *Securities Law*, as well as the completion of the reform of non-tradable shares of listed companies, have not only provided systematic legal basis for implementing ESOPs by domestic listed companies, but also eliminate trading barriers for the stocks concerned. CSRC issued *Memorandums #1, #2 and #3 on Issues Concerning the Equity Incentives* (the "Memorandums") in 2008 with a view to provide further guidelines on ESOPs of domestic listed companies. Meanwhile, corresponding rules on the administration of state-owned assets, taxation and financials that are associated with ESOPs were released one after another, which all together helped ESOPs of domestic listed companies to step into a rapid development phase ever since. According to statistics quoted from Securities Times' website, as of September of 2012, 433 ESOPs have been adopted by 379 PRC domestic listed companies, among which, 268 ESOPs have already been implemented.

ESOPs of domestic listed companies are primarily revolving around the Administrative Measures and three Memorandums, which regulate the key factors and implementing procedures of such ESOPs with an aim to protect the interests of medium and small investors and maintain the stability of capital market.

(a) Restrictions on Key Factors

[3] As mentioned above, laws and regulations governing the accounting and taxation aspects of ESOPs are not intended to be covered under this memorandum. Please consult relevant experts for such matters if needed.

According to the Administrative Measures, ESOPs refer to the long-term stock-based incentives granted by listed companies to their directors, senior management personnel and other employees via such incentive tools as restricted stocks, stock options or others means[4] as permitted by applicable laws and regulations. Set forth below is a brief summary of the major requirements/restrictions with respect to the key factors of a qualified ESOP under the Administrative Measures and three associated Memorandums:

Factors	**Major Requirements/Restrictions**
Qualifications for the company	➢ A listed company is not permitted to implement ESOPs upon the occurrence of any of the followings: • registered certified public accountants have issued adverse opinions or refuse to issue relevant opinions on its financial and accounting report for the preceding fiscal year; • it has been punished or penalized by CSRC due to serious violation of laws and regulations during the preceding year; or • other circumstances prescribed by CSRC.
Permitted grantee	➢ Directors, senior management personnel, key technical engineers and/or other employees (excluding independent directors and supervisors), provided, however, that the potential grantees shall not (i) have been condemned publicly or announced as an unqualified candidate by the relevant stock exchange during the past three years; (ii) have been given administrative penalties by CSRC due to material violation of the laws and regulations during the past three years; or (iii) be the person unqualified to hold the positions of director, supervisor or senior management personnel pursuant to the *Company law.*
Incentive tools	➢ Restricted stocks, stock options and other tools

[4] Administrative Measures and three associated Memorandums only set out detailed guidance on two specific incentive tools (i.e., restricted stocks and stock options) in terms of exercise price, validity and vesting period, and etc. We understand that due to the absence of detailed implementing rules, if a domestic listed company proposes to adopt incentive tools other than restricted stocks and stock options for its ESOP, PRC regulatory authorities will review such ESOP on a case-by-case basis by reference to the provisions applicable to restricted stocks and stock options.

"*Restricted stocks*" refer to the stocks granted by a company to the target grantees on certain pre-determined conditions, and the grantees may not sell out such stocks for profit unless and until the years of their service or performance meets the conditions as set forth in ESOPs. The time period during which the granted stocks could be sold by the grantees is called unlocking-period.

"*Stock options*" refer to the right granted to the target grantees to purchase a certain amount of stocks of the granting company within a specified time period in the future at a pre-determined price and under pre-determined conditions. The purchase of the stocks concerned by the grantees according to the stock options granted is defined as *exercise*. During the specified period of time (which is referred to as *exercising period*), the grantees may elect to either purchase the stocks concerned at the pre-determined price, or waive such purchase right at their sole discretions.

Factors	Major Requirements/Restrictions
	permitted by applicable laws and regulations.
Source of stocks	➢ Stocks purchased from existing shareholders by the company or those newly issued through private placement (*in practice, most listed companies elected the latter approach*).[5]
Source of fund	➢ Listed companies are forbidden from funding the grantees for participating in ESOPs or providing other financial aids (*including, among others, providing guarantees for the grantees*).
Size of the stock/option pool	➢ The size of the stock/option pool of a list company shall be limited to 10% of its total issued shares, in which the stocks purchased by the company from its existing shareholders shall not exceed 5% and shall be awarded to the target grantees within 1 year. Unless approved by a special resolution of the general shareholders meeting, the aggregate stocks granted to a single grantee shall not exceed 1% of the total shares of the company.
Exercise criteria	➢ The companies' business and financial performance shall be taken into account when evaluating the exercise criteria, and as a principle, the performance indicator (*such as earnings per share, rate of return on the net assets, growth rate of net profits and etc.*) shall not be worse than the previous record. In addition, it is encouraged that listed companies adopt both market value indicator and industry comparative indicators.
Granting/Exercise price	➢ For restricted stocks: if the underlying stocks come from private placement, the price offered to the grantees shall be consistent with the pricing requirement applicable to private placement (i.e., *the price shall not be lower than 50% of the average price of the company's stocks during the 20 trading days immediately prior to the pricing date*); if the underlying stocks come from shares repurchased from the existing shareholders in the market, there is no specific restrictions on the pricing. ➢ For stock options: exercise price shall not be lower than the higher of the followings: (i) the closing price of the underlying stocks on the trading day immediately prior to the publication date of the ESOP abstract; and (ii) the average of the closing prices of the underlying stocks during the 30 trading days immediately prior to the publication date of the

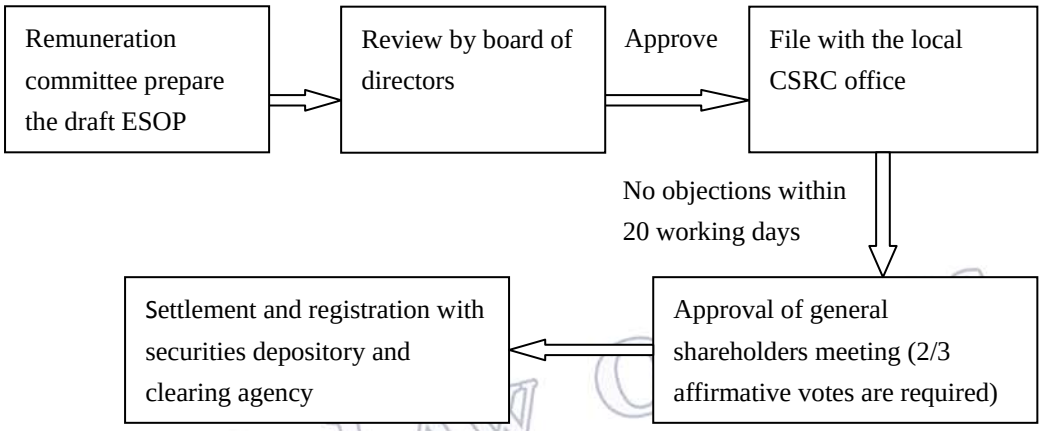
[5] Pursuant to the Memorandum #2, existing shareholders of a listed company shall not grant (or transfer) stocks to the grantees directly for the purpose of implementing the company's ESOP. If the stocks to be granted under an ESOP will come from those held by the existing shareholders of the granting company, the existing shareholders should first transfer such stocks to the granting company for free or at a pre-agreed price before the company grants the same to the grantees.

Factors	Major Requirements/Restrictions
	ESOP abstract.
Statutory lock-up period for stocks involved	➢ If the underlying stocks come from private placement, such stocks should not be transferred within 36 months if the grantee is the controlling shareholder or 12 months otherwise. ➢ If the underlying stocks are purchased by the company from shareholders through secondary market, except for the lock-up period provided under the *PRC Company Law* applicable to the directors and senior management personnel, there is no other specific restriction.
Validity period	➢ For stock options: the time period from the granting date to the expiry date of the exercising period shall not exceed 10 years (*which is typically around 4-6 years in practice*), and the vesting period shall not be less than 1 year. ➢ For restricted stocks: N/A.

When it comes to the domestically listed SOEs, the proposed ESOPs shall be additionally subject to the *Trial Measures for the Implementation of Equity Incentives by State-holding Listed Companies (Domestic)* and other laws and regulations governing the supervision and administration of state-owned assets (*which provide stricter requirements in terms of the granting companies' qualifications, size of the stock/option pool, target grantees, and indicators for exercise, with a view to effectively supervise the state-owned assets and prevent any loss thereof*). To be more focused, we will not discuss in details any restrictive provisions particularly applicable to listed SOEs in this memorandum.

(b) Approval Procedures

ESOP of a domestic listed company should firstly be approved by its board of directors (including independent director's opinion) and filed with the local CSRC office. If local CSRC office does not raise any objection to the filed ESOP within 20 working days, the ESOP then could be submitted to the general shareholders meeting of the listed company for final approval. Additionally, listed companies shall fulfill relevant information disclosure obligations with respect to their adoption and implementation of ESOPs. Set forth below is a summary of the primary internal and external approvals necessary for the adoption of ESOP by a domestic listed company:



In addition to the above-mentioned approval procedures, a listed SOE shall also submit the draft ESOP to competent SASAC offices for their review after the same has been approved by its board of directors and before it is submitted to local CSRC office. Moreover, after the ESOPs are officially adopted by the listed SOEs, the shareholders holding the state-owned shares shall report the progress of the implementation and annual exercise of such ESOPs to the competent SASAC offices periodically.

2. ESOPs of Unlisted Domestic Companies

PRC laws do not set out any specific provisions governing ESOPs adopted or to be adopted by unlisted domestic companies for the time being. Generally speaking, ESOPs of unlisted domestic companies only need to comply with such basic requirements under the *PRC Company Law* with respect to equity/share transfer and/or capital increase as well as the companies' internal approval procedures.

Note that if a domestic unlisted company intends to go public within the validity period of its ESOP, it will need to make sure that the adoption and implementation of an ESOP would not have any adverse impact on its proposed IPO schedule. Based on the prevailing practices, the following aspects are specifically noteworthy for pre-IPO companies to formulate their ESOPs:

(a) All rights granted under an ESOP should either have been exercised off or terminated prior to submission of an IPO application. As one of the basic IPO requirements, the issuer shall have a clear-cut and stable shareholding structure and there exists no factor that may cause defect to the ownership of stocks held by the controlling shareholders and/or any person controlled by the controlling shareholders. Therefore, as a general principle, CSRC requires pre-IPO companies to accomplish or to terminate their existing ESOPs before submitting IPO applications. After being listed, the companies may adopt new ESOPs in accordance with the laws and regulations introduced under Section II.2 above.

(b) The adopted ESOP should comply with all applicable laws and regulations, the company's articles of association and other internal rules in all material aspects (including, without limitation, all necessary internal and external approvals have been obtained; there is no nominal shareholding arrangement and the source of fund for purchasing shares under the ESOP is legitimate).

(c) The source of stocks for ESOPs should abide by relevant laws and regulations. In principle, a domestic unlisted company is prohibited from purchasing stocks from its existing shareholders for implementing an ESOP,

unless it is a joint stock company and the following requirements are satisfied: (i) the purchase has been approved by its general shareholders meeting with more than 2/3 affirmative votes; (ii) the aggregate number of stocks so purchased shall not exceed 5% of its total shares; and (iii) the fund for the purchase should stem from the companies' after-tax profits and the underlying stocks should be awarded to eligible employees within one year.

(d) The interests of both the pre-IPO companies and the target grantees will need to be well balanced when structuring stock holding plans. Unlike ESOPs of listed companies, under which the underlying stocks are typically held by the grantees directly, a pre-IPO company may choose to have the underlying stocks held by the employees directly or indirectly through special purpose entities by taking into consideration such factors as the tax burdens to the employees, stability of the company's direct shareholding structure as well as the potential impact of such stock holding structure to the company's IPO plan.

It is noteworthy that the aggregate number of shareholders of a pre-IPO joint stock company (including all employees holding shares through an ESOP, regardless whether they hold such shares directly or through a special purpose entity) shall not exceed 200.

(e) Granting/exercise price should not invite adverse impact to the companies' financial data or performance within the IPO report period. According to CSRC's interpretations and requirements, in practice, for companies intending to list on the Main Board or the SME Board, if the considerations paid by employees for shares under ESOPs are significantly lower than such shares' fair market value, the price difference shall be booked as the current management costs of the company in accordance with the accounting standards for share-based payments ("Standards for Share-Based Payments"). As a result, a company's financial performance during the IPO report period will most probably be adversely affected if its ESOP is adopted and/or implemented during such period. Thus it is suggested that the pre-IPO companies take into full considerations the potential influences of application of the Standards for Share-Based Payments on its financial data when formulating and implementing ESOPs during its IPO report period.

(f) ESOPs of unlisted SOEs are subject to special restrictions and requirements (*which including but not limited to that an ESOP should not enable the management personnel of a pre-IPO SOE to become the controlling shareholders of such SOE or to hold shares of the group companies engaged in sideline businesses*). On the approval procedures, SOEs shall obtain approvals from competent SASAC offices on their proposed ESOPs before going through internal approval process.

III. PRC Laws and Regulations on ESOPs of Offshore Companies

PRC domestic individuals participating in ESOPs of offshore companies are mainly subject to laws and regulations on foreign exchange and taxation (*as mentioned above, to be more focused, taxation matters concerning ESOPs will not be discussed herein*).

(a) Foreign Exchange Registration

According to applicable PRC laws and regulations and prevailing practices, holding stocks of offshore companies and/or obtaining incomes through participation in ESOPs of offshore companies by Chinese individuals is a type of out-bound investments, which should subject such individuals to

relevant foreign exchange registration requirements.

According to the *Circular on Foreign Exchange Administration of Domestic Individual Participating in Foreign Listed Companies' Share Incentive Plans* (Hui Fa [2012] No.7; "Circular 7"), domestic individuals participating in offshore listed companies' ESOPs shall go through relevant foreign exchange registrations with competent SAFE offices through onshore domestic agent.

Given the fact that the relevant PRC government authorities have not promulgated detailed Forex registration rules applicable for domestic individuals to participate in ESOPs of offshore unlisted companies, theoretically speaking, domestic individuals are unable to participate in the ESOPs of offshore unlisted companies yet. In practice, domestic individuals participating in ESOPs of offshore unlisted companies without going through any SAFE registrations may subject such domestic individuals to administrative penalties and may adversely affect the future IPO plans of the underlying offshore companies.

(b) Requirements for On-going Compliance

Pursuant to Circular 7, if there is any material changes to a filed ESOP of an offshore listed company (*such as the key terms of the original plan are amended, any new ESOP is adopted, original ESOP is changed due to the merger, acquisition or restructuring involving the offshore listed company or its onshore affiliates, and etc.*), the onshore domestic agent should file such changes for domestic employees with the competent SAFE offices within 3 months.

In the case of the termination of an ESOP due to the delisting of the underlying offshore listed company, merger, acquisition or restructuring of such company's domestic affiliates, or occurrence of other significant events, the onshore domestic agent shall, within 20 business days upon such termination, go through the relevant Forex deregistration procedures for such ESOP with the competent SAFE office.

* * *

The above is a brief introduction of ESOPs based on the currently effective PRC laws and prevailing practice. While it is not intended to be comprehensive, we hope this memorandum would serve as a useful general reference. In any event, this memorandum should not be relied upon as any PRC legal opinion.

If you have any questions, please feel free to contact us at inquiry@hanyilaw.com.