

March 2014



## TABLE OF CONTENTS / 本期内容

### GENERAL CORPORATE / 公司法

State Council Launched Corporate Capital Registration Reform / 国务院正式公布注册资本登记制度改革方案 2

### PRIVATE EQUITY / 私募股权投资

Beijing Court Ruled on a VAM Dispute to Support Failure of IPO as an Exit Event for PE Investors / 北京一中院审结一起私募投资对赌协议纠纷；以IPO作为对赌条件获得判例支持 2

### ANTI-MONOPOLY / 反垄断

MOFCOM Issued Criteria for Simple Anti-Monopoly Cases / 商务部正式公布经营者集中简易案件适用标准 2

### LABOR LAW / 劳动法

New Regulations on Labor Secondment Arrangement Took Effect / 《劳务派遣暂行规定》正式实施 3

### FOREIGN EXCHANGE / 外汇

SAFE Further Relaxed Regulations on Outbound Capital Flow / 外管局进一步放宽境内机构资本向境外机构流动外汇管理 3

### ADMINISTRATIVE APPROVAL / 行政审批

State Council Further Cancelled and Delegated Administrative Approval Authorities / 国务院进一步取消和下放行政审批 4



## GENERAL CORPORATE / 公司法

### State Council Launched Corporate Capital Registration Reform 国务院正式公布注册资本登记制度改革方案

On February 18, 2014, the PRC State Council officially promulgated the *Notice on the Reform Plan of the Registered Capital Registration System*, providing a series of measures to relax the registered capital system for corporate entities, which include, among others: (i) the paid-in registered capital system will be replaced by the registered capital subscription and registration system; (ii) except for companies engaged in certain special industries (such as financial institutions), all companies will be exempted from the minimum registered capital requirements and no capital verification report will be required for SAIC registrations; (iii) the annual inspection system will be replaced by annual filing and public reporting system; (iv) requirements for companies' registered addresses are to be relaxed; and (v) electronic business license and electronic registration administration system will be adopted.

In support of the aforesaid reforms, the *Company Law* and the corresponding

judiciary interpretations have been amended to become effective since March 1, 2014. Further, the State Council has also issued the *Decision on Repealing and Amending Certain Administrative Regulations* ("Decision") effective as of March 1, 2014, pursuant to which some two regulations on capital contribution involving foreign invested enterprises (or FIEs) were repealed while some eight regulations were amended to reflect the aforementioned reforms. State Administration for Industry and Commerce or SAIC has also amended the relevant rules and modified the format requirements under its various registration forms and other materials. Notably, regulations applicable to FIEs were also included in the Decision, which means that these reforms will also generally apply to FIEs.

国务院于2014年2月18日印发《国务院关于印发注册资本登记制度改革方案的通知》(“《方案》”),部署在全国范围内实施注册资本登记制度改革,主要涉及以下内容:(i)实行注册资本认缴登记制;(ii)除法律、行政法规以及国务

院决定另有规定外,取消公司注册资本最低限额,不再限制公司设立时股东(发起人)的首次出资比例和缴足出资的期限,公司登记无需提交验资报告;(iii)将企业年检制度改为年度报告公示制度;(iv)简化市场主体住所(经营场所)登记手续;以及(v)推行电子营业执照和全程电子化登记管理。

为落实上述改革方案,修订后的《中华人民共和国公司法》及相关司法解释于2014年3月1日起开始施行;国务院同时还公布了《国务院关于废止和修改部分行政法规的决定》,对《中外合资经营企业合营各方出资的若干规定》等2部涉及外商投资企业出资的规定予以废止,对《中华人民共和国公司登记管理条例》、《中华人民共和国企业法人登记管理条例》、《中外合资经营企业法实施条例》等8部行政法规中涉及上文提及的改革部分予以修改;另外国家工商行政管理总局也已对《外商投资合伙企业登记管理规定》等规章中的相关内容予以修订,并修改了外商投资企业登记材料和相关文书的规范。值得注意的是,此次修改包括了涉及外商投资企业的相关的行政法规和部门规章,这也意味着上述注册资本改革对外商投资企业也将同样适用。

## PRIVATE EQUITY / 私募股权投资

### Beijing Court Ruled on a VAM Dispute to Support Failure of IPO as an Exit Event for PE Investors 北京一中院审结一起私募投资对赌协议纠纷;以IPO作为对赌条件获得判例支持

Beijing No. 1 Intermediate People's Court ("Court") has recently rendered a verdict on a VAM dispute between a Beijing private equity investor ("Investor") and the beneficial controlling party (certain Mr. Cao) of a bio-tech company ("TargetCo"). The verdict upheld the VAM arrangement between the Investor and Mr. Cao according to which Mr. Cao is obligated to redeem the shares held by the Investor at a price equal to the original investment cost plus 6% annual interests if the TargetCo fails to accomplish an IPO within the agreed time period.

This case echoes and reaffirms the principles established by the Supreme People's Court in the "First VAM

Case" (see our January 2013 issue of *China Regulatory Updates* for more details), i.e., VAM arrangements among shareholders are generally legitimate and enforceable, while those with the investee companies will not be legally supported.

近日,北京市第一中级人民法院(“一中院”)审结了北京某投资中心诉曹某某股权转让纠纷一案。在该案件中,曹某某作为某生物技术有限公司(“目标公司”)的实际控制人、大股东,以首次上市公开发行股票为业绩目标向某投资中心等私募基金进行融资。该投资中心投资入股后,由于目标公司IPO目标无法实现,各方签署退股协议,约定曹某某于协议签订之日起三十个工作日内,按照年6%的溢价回购某投资中心所持有目标公司的股份。到期后,曹某

某未依约履行回购义务,投资中心起诉至一中院。一中院经审理认为,各方当事人签订的《股权转让协议》等均系真实意思表示,不违反法律、行政法规的强制性规定,应属合法有效,因此依法判决曹某某给付投资中心股权转让款5,135.4万元及相应的利息损失。

本案遵循并进一步确定了最高人民法院审理的甘肃世恒有色资源再利用有限公司“对赌协议第一案”(具体内容请见本所2013年1月刊*China Regulatory Updates*)的判决精神,即对赌协议无效情形仅限于以目标公司为主体的回购和补偿条款,而对于股东与投资方签订的补偿承诺,不违反法律法规的禁止性规定,是当事人的真实意思表示,应属有效。

## ANTI-MONOPOLY / 反垄断

### MOFCOM Issued Criteria for Simple Anti-Monopoly Cases 商务部正式公布经营者集中简易案件适用标准

The PRC Ministry of Commerce or MOFCOM has issued the *Tentative Rules of Criteria Applicable to Simple Anti-Monopoly Cases* (“Tentative Rules”) on February 11, 2014. Pursuant to the Tentative Rules, in absence of any other adverse circumstances, a business concentration subject to MOFCOM’s anti-monopoly review could be treated as a simple case, if the concentration meets one of the following criteria: (i) the total market share of all parties involved in the concentration is less than 15% in the market concerned; (ii) with respect to the parties who have vertical market relationships, the market share of each party in each of the upstream and downstream markets is less than 25%; (iii) with respect to the parties who are neither active in the same market concerned nor having vertical market relationships, the market share of each

party is less than 25% in any market concerned; (iv) joint ventures set up offshore that will not be engaged in any economic activities within China; (v) with respect to equity or asset acquisitions of an offshore target, the offshore target is not engaged in any economic activities within China; and (vi) where a joint venture is jointly controlled by two or more parties, the concentration would cause the joint venture to be controlled by one or more of the surviving parties.

The Tentative Rules does not include provisions on such aspects as the application process, the review procedures, and the timing applicable to simple anti-monopoly cases which presumably will be formulated and issued by MOFCOM separately soon.

商务部于2014年2月11日公布了《关于经营者集中简易案件适用标准的暂

行规定》（“《暂行规定》”），根据《暂行规定》，如不存在可能产生不利影响的其他情形，下列经营者集中案件可作为简易案件处理：(i)在同一相关市场，所有参与集中的经营者所占的市场份额之和小于15%；(ii)存在上下游关系的参与集中的经营者，在上下游市场所占的份额均小于25%；(iii)不在同一相关市场、也不存在上下游关系的参与集中的经营者，在与交易有关的每个市场所占的份额均小于25%；(iv)参与集中的经营者在中国境外设立合营企业，合营企业不在中国境内从事经济活动；(v)参与集中的经营者收购境外企业股权或资产的，该境外企业不在中国境内从事经济活动；或者(vi)由两个以上经营者共同控制的合营企业，通过集中被其中一个或一个以上经营者控制。

但《暂行规定》并未对简易案件的申请、受理和审查的程序及时限等作出规定，因此经营者集中案件适用简易程序在实践中的具体操作还有待相应配套文件的进一步出台。

## LABOR LAW / 劳动法

### New Regulations on Labor Secondment Arrangement Took Effect 《劳务派遣暂行规定》正式实施

*Provisional Regulations on Labor Secondment* has taken effect on March 1, 2014. The regulation is intended to streamline the labor secondment practice and has clarified the rights and obligations of the parties involved. It is noteworthy that, pursuant to this regulation, the number of all seconded workers shall not exceed 10% of the total workforce of

the secondment receiving party. Meanwhile, if a company providing labor secondment services operates its businesses in multiple cities, it shall make social insurance fund contributions for the seconded workers in the cities where the secondment receiving companies are located.

《劳务派遣暂行规定》（“《规定》”）将于2014年3月1日起施行，

该《规定》进一步规范了劳务派遣用工行为，并明确了劳务派遣单位、用工单位和被派遣劳动者三方的权利义务。其中，《规定》明确要求用工单位使用的被派遣劳动者数量不得超过其用工总量的10%；同时，劳务派遣单位如开展跨地区派遣业务，应当在用工单位所在地为被派遣劳动者参加社会保险。

## FOREIGN EXCHANGE / 外汇

### SAFE Further Relaxed Regulations on Outbound Capital Flow 外管局进一步放宽境内机构资本向境外机构流动外汇管理

The PRC State Administration of Foreign Exchange or SAFE issued the *Notice on Further Promotion and Adjustment of Foreign Exchange Administration Policies for Capital Account* (the “Notice”) on January 24, 2014, which relaxed the administration of upfront expenses for outbound investment purposes and overseas loans provided by domestic PRC entities, and simplified the approval of profit remittance to overseas investors by foreign invested enterprise or FIEs. As stipulated under the Notice, for upfront expenses not exceeding USD3 million and less than 15% of the proposed total outbound investment, the Chinese investors can purchase and remit the relevant foreign exchanges out of China through

relevant banks directly without obtaining prior registrations with local SAFE offices. In addition, domestic enterprises may extend loans to their offshore affiliates with which they have direct or indirect shareholding relationships, and the restrictive two-year validity period previously applicable to overseas lending quotas will no longer be enforced. Furthermore, the restriction that the total amount of profits remitted out of China by FIEs in the current year shall as a matter of principle generally not exceed the sum of “dividend payable” and “undistributed profit” due to foreign investors as indicated in the latest audit reports has also been lifted.

为进一步深化资本项目外汇管理改革，国家外汇管理局于2014年1月24日发布了《国家外汇管理局关于进一步改进和调整资本项目外汇管理政策的通知》（“《通知》”），进一步放宽境内机构境外直接投资前期费用管理和境外放款管理，同时简化了境内机构利润汇出审核。根据《通知》的规定，凡不超过300万美元且不超过中方投资总额15%的前期费用，境内机构到所在地外管局凭营业执照和组织机构代码证即可办理相关业务；境内企业可向与其具有直接或间接持股关系的境外关联企业放款，境外放款额度2年有效使用期限限制将不再适用；同时企业本年度处置利润金额原则上不得超过最近一期财务审计报告中属于外方股东“应付股利”和“未分配利润”合计金额的要求也已被取消。

**ADMINISTRATIVE APPROVAL / 行政审批****State Council Further Cancelled and Delegated Administrative Approval Authorities  
国务院进一步取消和下放行政审批**

The PRC State Council issued the *Decision to Cancel and Delegate a Batch of Administrative Approval Items* on January 28, 2014, further canceling and delegating to local government authorities some 64 administrative approval items and 18 sub-items. This is the current administration's 5<sup>th</sup> time to cancel administrative approval items and delegate approval authorities to local governments, which includes, among others, removal of the filing and

verification process for business permits applicable to basic telecommunications and trans-regional value-added telecommunications services; elimination of the prior review of Sino-foreign cooperative projects on exploration and exploitation of mining resources, and abolishment of the verification approval for choice and application of special tax treatment for equity transfers by non-resident companies.

2014年1月28日，国务院发布《国务院关于取消和下放一批行政审批项目的决定》（国发[2014]5号），再次取消和下放64项行政审批事项和18个子项。这是本届中央政府第五批取消和下放行政审批等事项，涉及的内容包括取消基础电信和跨地区增值电信业务经营许可证备案核准、取消中外合作勘查、开采矿产资源前置性审查、取消非居民企业股权转让选择特殊性税务处理核准等。

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*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