Provisions on Foreign Exchange Administration of Outbound Investment, Financing and Round-Trip Investment by Domestic Residents through Special Purpose Vehicles

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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To the branches and foreign exchange administration departments of the State Administration of Foreign Exchange in all provinces, autonomous regions, and municipalities directly under the Central Government; the branches in Shenzhen, Dalian, Qingdao, Xiamen, and Ningbo; and all designated Chinese-funded foreign exchange banks:

In order to give full play to the decisive role of the market in the allocation of resources, support the implementation of the national "going global" strategy, make full use of both international and domestic resources and both markets, further simplify and facilitate the cross-border capital transactions involved in the investment and financing activities conducted by domestic residents through special purpose companies, effectively serve the development of the real economy, and steadily enhance the convertibility of cross-border capital and financial transactions, in accordance with the Foreign Exchange Administration Regulations of the People's Republic of China and other provisions, the relevant issues concerning the foreign exchange administration of overseas investment and financing and round-trip investment by domestic residents through special purpose companies are hereby notified as follows:

1. — For the purposes of this Notice, a "special purpose company" means an overseas enterprise that is directly established or indirectly controlled overseas by a domestic resident (including domestic institutions and domestic resident individuals) for the purpose of investment and financing, using his, her or its lawfully held assets or equity interests of domestic enterprises, or lawfully held overseas assets or equity interests.

For the purposes of this Notice, "round-trip investment" means direct investment activities conducted by domestic residents in China directly or indirectly through special purpose companies, that is, the act of establishing foreign-invested enterprises or projects within China (hereinafter referred to as "foreign-invested enterprises") through new establishment, merger and acquisition, or other means, and acquiring rights and interests such as ownership, control, and operational management rights.

For the purposes of this Notice, "domestic institution" means an enterprise or public-institution legal person or other economic organization lawfully established within China; "domestic resident individual" means a Chinese citizen holding a Chinese resident identity card, military identity document, or armed police identity document, and an overseas individual who, although not holding a lawful identity document within China, habitually resides in China by reason of economic interest.

For the purposes of this Notice, "control" means that a domestic resident acquires the operational rights, income rights, or decision-making rights of a special purpose company through acquisition, trust, nominee holding, voting rights, buyback, convertible bonds, or other means.

2. — The State Administration of Foreign Exchange and its branches (hereinafter referred to as the "foreign exchange administration") shall administer, by way of registration, the establishment of special purpose companies by domestic residents. The registration of special purpose companies established by domestic resident individuals and the related foreign exchange administration shall be governed by this Notice. The registration of special purpose companies established by domestic institutions and the related foreign exchange administration shall be governed by the current provisions and this Notice.

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3. — Before contributing domestic or overseas lawful assets or equity interests to a special purpose company, a domestic resident shall apply to the foreign exchange administration for the foreign exchange registration of overseas investment. Where a domestic resident makes the contribution with domestic lawful assets or equity interests, he or she shall apply for registration with the foreign exchange administration at the place of registration or at the place where the assets or equity interests of the domestic enterprise are located; where a domestic resident makes the contribution with overseas lawful assets or equity interests, he or she shall apply for registration with the foreign exchange administration at the place of registration or at the place of household registration.

A domestic resident individual shall submit the following authenticity certification materials when handling the foreign exchange registration of overseas investment:

(1) a written application and the Foreign Exchange Registration Form for Overseas Investment by Domestic Resident Individuals;

(2) personal identity certification documents;

(3) the registration documents of the special purpose company and the documents certifying its shareholders or actual controller (such as the register of shareholders and the register of subscribers);

(4) the resolution of the authority of the domestic or overseas enterprise approving the overseas investment and financing (where the enterprise has not yet been established, a written statement of the owner of the equity interests approving the overseas investment and financing);

(5) documents certifying the assets or equity interests of the domestic enterprise intended for overseas investment and financing that are directly or indirectly held by the domestic resident individual, or the lawfully held overseas assets or equity interests; and

(6) supplementary materials required where the foregoing materials cannot adequately demonstrate the authenticity of the transaction or the consistency of the application materials.

Domestic institutions shall handle the foreign exchange registration of overseas investment in accordance with the Notice of the State Administration of Foreign Exchange on Issuing the Provisions on the Foreign Exchange Administration of Overseas Direct Investment by Domestic Institutions (Huifa [2009] No. 30) and other relevant provisions.

A domestic resident may handle subsequent business only after completing the foreign exchange registration of overseas investment.

4. — Domestic residents and the special purpose companies established by them shall not endanger the national sovereignty, security, and social and public interests of China; shall not violate the laws and regulations of China; shall not impair China's relations with the relevant countries (regions); shall not violate the international treaties concluded by China; and shall not involve technologies or products the export of which is prohibited by China.

The registration of an overseas special purpose company shall not have the effect of certifying that its investment and financing activities have satisfied the lawful and compliant requirements of the competent industry authorities.

5. — Where a registered overseas special purpose company undergoes a change in basic information such as its domestic resident individual shareholders, name, or business term, or where an important matter such as capital increase, capital reduction, equity transfer or exchange, merger, or division involving domestic resident individuals occurs, the relevant parties shall promptly handle the procedures for the change registration of overseas investment foreign exchange with the foreign exchange administration.

Subsequent business (including the repatriation of profits and dividends) may be handled only after the completion of the change registration of overseas investment foreign exchange by the domestic resident.

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6. — Where an unlisted special purpose company, using its own equity or options as the subject matter, grants equity incentives to the directors, supervisors, senior management personnel, and other employees who have an employment or labor relationship with the company of the domestic enterprises directly or indirectly controlled by it, the relevant domestic resident individuals may, before exercising their rights, submit the following materials to the foreign exchange administration to apply for the foreign exchange registration of the special purpose company:

(1) a written application and the Foreign Exchange Registration Form for Overseas Investment by Domestic Resident Individuals;

(2) the overseas investment foreign exchange business registration certificate of the registered special purpose company;

(3) materials issued by the relevant domestic enterprise certifying the employment or labor relationship between the individual and the enterprise;

(4) materials issued by the special purpose company or its actual controller capable of certifying the authenticity of the equity incentive concerned; and

(5) supplementary materials required where the foregoing materials cannot adequately demonstrate the authenticity of the transaction or the consistency of the application materials.

Participation by domestic resident individuals in equity incentive plans of overseas listed companies shall be handled in accordance with the relevant foreign exchange administration provisions.

7. — Where, after a special purpose company completes overseas financing, the financing funds are repatriated to China for use, the relevant provisions of China on foreign investment and external debt administration shall be observed. Foreign-invested enterprises established through round-trip investment shall handle the relevant foreign exchange registration procedures in accordance with the current provisions on the foreign exchange administration of foreign direct investment, and shall truthfully disclose information such as the actual controllers of their shareholders.

8. — Where profits and dividends obtained by domestic residents from special purpose companies are repatriated to China, they shall be handled in accordance with the provisions on foreign exchange administration under the current account; where foreign exchange income from capital changes is repatriated to China, it shall be handled in accordance with the provisions on foreign exchange administration under the capital account.

9. — Where, by reason of equity transfer, bankruptcy, dissolution, liquidation, expiration of the business term, change of identity, or other causes, a domestic resident no longer holds the equity interests of a registered special purpose company, or no longer falls within the scope of those required to undergo special purpose company registration, the relevant authenticity certification materials shall be submitted and the procedures for change or cancellation registration shall be handled with the foreign exchange administration in a timely manner.

10. — Domestic enterprises directly or indirectly controlled by domestic residents may, on the basis of genuine and reasonable needs, lend funds to their registered special purpose companies in accordance with the current provisions.

11. — Domestic residents may, on the basis of genuine and reasonable needs, purchase foreign exchange and remit funds overseas for the establishment of special purpose companies, share buybacks, delisting, or other purposes.

12. — Where, before the implementation of this Notice, a domestic resident has contributed domestic or overseas lawful assets or equity interests to a special purpose company but has not undergone the foreign exchange registration of overseas investment as required, the domestic resident shall issue an explanatory

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letter to the foreign exchange administration stating the reasons. The foreign exchange administration shall handle supplementary registration in accordance with the principles of legality and reasonableness, and shall impose administrative penalties according to law on those suspected of violating the foreign exchange administration provisions.

13. — Cross-border receipts and payments between domestic residents and overseas special purpose companies shall be subject to balance-of-payments statistical reporting in accordance with the current provisions.

14. — The foreign exchange administration shall periodically analyze the overall situation of overseas investment and financing and round-trip investment by domestic residents through special purpose companies, closely monitor its impact on the balance of payments, and strengthen the ongoing and ex post supervision of overseas investment and financing and round-trip investment by domestic residents through special purpose companies.

15. — Where a domestic resident or a domestic enterprise directly or indirectly controlled by him or her remits funds overseas for a special purpose company through false or fabricated transactions, the foreign exchange administration shall impose penalties in accordance with Article 39 of the Foreign Exchange Administration Regulations of the People's Republic of China.

Where a domestic resident fails to handle the relevant foreign exchange registration as required, fails to truthfully disclose the information on the actual controller of the round-trip investment enterprise, or makes false undertakings, the foreign exchange administration shall impose penalties in accordance with item (5) of Article 48 of the Foreign Exchange Administration Regulations of the People's Republic of China.

Where a domestic resident fails to handle the relevant foreign exchange registration as required, fails to truthfully disclose the information on the actual controller of the round-trip investment enterprise, or makes false undertakings, if an outflow of funds occurs, the foreign exchange administration shall impose penalties in accordance with Article 39 of the Foreign Exchange Administration Regulations of the People's Republic of China; if an inflow of funds or foreign exchange settlement occurs, penalties shall be imposed in accordance with Article 41 of the Foreign Exchange Administration Regulations of the People's Republic of China.

Where the cross-border receipts and payments between domestic residents and special purpose companies are not subject to balance-of-payments statistical reporting as required, the foreign exchange administration shall impose penalties in accordance with item (1) of Article 48 of the Foreign Exchange Administration Regulations of the People's Republic of China.

16. — This Notice shall be implemented as of the date of issuance. The Notice of the State Administration of Foreign Exchange on Relevant Issues concerning the Foreign Exchange Administration of Financing and Round-Trip Investment by Domestic Residents through Overseas Special Purpose Companies (Huifa [2005] No. 75) shall be repealed simultaneously. Where any prior relevant provisions are inconsistent with this Notice, this Notice shall prevail.

After receiving this Notice, the branches and foreign exchange administration departments of the State Administration of Foreign Exchange shall promptly forward it to the central sub-branches, sub-branches, urban commercial banks, rural commercial banks, foreign-funded banks, and rural cooperative banks under their jurisdiction; after receiving this Notice, all Chinese-funded banks shall promptly forward it to their branches and sub-branches. Any issues encountered in implementation shall be reported to the Capital Account Management Department of the State Administration of Foreign Exchange in a timely manner.

Annexes: 1. Operational Guidelines for Business Involved in the Foreign Exchange Administration of Round-Trip Investment; 2. Application Form for Foreign Exchange Business of Direct Investment under the Capital Account.

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