



China Corporate Bulletin

Welcome to White & Case's monthly China Corporate Bulletin. This bulletin covers recent corporate regulatory developments and news in the PRC and Hong Kong, ensuring you stay up to date on the latest market issues.

Regulatory Developments

CSRC releases Guiding Opinions for Inspectors Supervising Qualified Foreign Institutional Investors

In order to provide guidance for the supervision of qualified foreign institutional investors, the China Securities Regulatory Commission ("CSRC") recently released the Guiding Opinions for Inspectors Supervising Qualified Foreign Institutional Investors (the "Guiding Opinions"), which took effect on October 20, 2008.

The Guiding Opinions provide that qualified foreign institutional investors should appoint qualified persons to be their inspectors in accordance with the Guiding Opinions. Inspectors are responsible for oversight of the operations of such qualified foreign institutional investors, with duties to include making regular as well as random inspections of their transaction activities, as well as supervising the disclosure activities of such qualified foreign institutional investor, with respect to its domestic securities investments. Inspectors are required to submit reports regarding the relevant qualified foreign institutional investors to the CSRC annually.

For more information, please refer to http://www.gov.cn/gzdt/2008-10/19/content_1124939.htm. Please note this link is to a Chinese-language website.

Supplementary Provisions on Share Repurchase through Centralised Price Competition by Listed Companies released

In order to further regulate the repurchase of shares by listed companies by means of centralized price competition, CSRC on October 9, 2008 promulgated the *Supplementary Provisions on Share Repurchase through Centralised Price Competition by Listed Companies* (the "Supplementary Provisions"). The Supplementary Provisions took effect on the same day.

The Supplementary Provisions provide that where a listed company intends to repurchase its shares by means of centralised price competition, its board of directors shall submit the relevant resolution to the general meeting for approval. The independent directors of the listed company shall, on the basis of their full knowledge of the relevant information, express independent opinions regarding such share repurchase. The relevant resolution is to be approved by more than two-thirds of the shareholders attending the meeting.

No listed company shall proceed with any share repurchase order during the opening call auction, within 30 minutes before closing, or where no price limit is imposed on the share price. No listed company shall repurchase its shares within 10 trading days prior to the disclosure of its regular reports or results or from a date when any material event which may exert substantial influence on the trading price of its shares or in the course of decision-making until two trading days after such disclosure according to law. In addition,

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no listed company shall issue shares to raise funds during the share repurchase period.

The Supplementary Provisions also stipulate that the stock exchanges shall formulate relevant business rules on share repurchase by listed companies and strengthen the compliance regulations on information disclosure in relation to share repurchase by listed companies and protection of the legitimate rights and interests of creditors.

For the full text of the Supplementary Provisions, please refer to <http://www.csrc.gov.cn/n575458/n575667/n4231514/n4231533/n4696680/10930850.html>. Please note this link is to a Chinese-language website.

In accordance with the Supplementary Provisions, the Shanghai Securities Exchange (“SSE”) has also released guidance in relation to the implementation of the Supplementary Provisions in the SSE.

CSRC releases Administrative Measures for the Business of Sponsoring the Listing and Issuance of Securities

On October 17, 2008, CSRC released the *Administrative Measures for the Business of Sponsoring the Listing and Issuance of Securities* (the “**Administrative Measures**”). The Administrative Measures will come into effect on December 1, 2008.

According to the Administrative Measures, issuers should engage securities firms qualified to conduct sponsoring duties to act as sponsor in an initial public offering, issuance of new shares or exchangeable corporate bonds by a listed company, or other situations specified by the CSRC. Securities firms carrying out such sponsor activities should apply for sponsoring qualification with the CSRC. Amongst other criteria, in order to be qualified to act as a sponsor, a securities firm should have a registered capital of not less than RMB 100 million and net assets of not less than RMB 50 million.

According to the Administrative Measures, the sponsor should act in the interests of the issuer. The representatives of the sponsor and their spouses are not allowed to hold shares of the issuer. The issuance and listing of securities issued in the same transaction should be sponsored by the same sponsor. A securities issuance which meets the specified threshold can be jointly sponsored, but no more than two sponsors can be involved in such joint sponsoring.

The Administrative Measures also provide for continuous monitoring duties of the sponsor with respect to the issuer after the listing of the relevant securities. Such monitoring duties include ensuring the issuer implements effective systems to prevent the misappropriation of the issuer’s resources by controlling shareholders or other affiliated parties of the issuer, ensuring the issuer implements effective internal control to prevent the abuse of power by the directors and officers of the issuer, ensuring the issuer implements effective systems to ensure the fairness and legality of connected transactions by the issuer and opining on such connected transactions, and other duties as required by the CSRC and the stock exchanges and stipulated in the sponsorship agreement. Sponsors are responsible for such monitoring duties for a period of two accounting years after the listing of the securities in the case of an initial public offering, and for a period of one accounting year after the listing of the securities in the case of the issuance of new shares or exchangeable corporate bonds by a listed company.

For the full text of the Administrative Measures, please refer to <http://www.csrc.gov.cn/n575458/n575667/n4231514/n4231533/n4696680/10948423.html>. Please note this link is to a Chinese-language website.

Supplementary Provisions for Price-setting of Share Issuance by Listed Companies subject to Major Asset Reorganisations pending public feedback

On October 13, 2008, CSRC released the draft *Supplementary Provisions for Price-Setting of Share Issuance by Listed Companies Subject to Major Asset Reorganisations* (the “**Supplementary Provisions**”) for public commentary. The public commentary process ended on October 20, 2008.

The Supplementary Provisions provide that if a listed company subject to restructuring is granted approval by the people’s court to carry out major assets reorganisation and to issue new shares in order to purchase assets, the price of such issuance of shares shall be put forward for approval at a general meeting of the shareholders. Approval must be granted by two-thirds of the shareholders.

For additional details, please refer to <http://www.csrc.gov.cn/n575458/n575667/n818795/10938872.html>. Please note this link is to a Chinese-language website.

CSRC Urges Listed Firms to disclose their Non-recurring Profits and Losses

CSRC announced that beginning December 1, 2008, listed firms should disclose their non-recurring profits and losses in their annual financial report.

Non-recurring profits and losses refer to (i) profits and losses from transactions and items which have no direct relations with an enterprise's general business; or (ii) profits and losses that have some relation with the general business but possess special characteristics that influence report-users to make normal judgments on the enterprises' business performance and payoff capacity.

Listed firms should not only disclose the items and amounts of their non-recurring profits and losses, but add explanations on the significant non-recurring profit and loss items.

For a copy of the announcement, please refer to www.csrc.gov.cn/n575458/n575667/n4231514/n4231533/n4696680/10981166.html. Please note this link is to a Chinese-language website.

Prepayment Registration for Import Contracts

Beginning November 15, 2008, enterprises with new import contracts containing prepayment clauses should register in the trade credit registration management system on the State Administration of Foreign Exchange ("SAFE") online service platform.

In November 2008, SAFE released guidelines for prepayment registration in the trade credit registration management system. The guidelines stated that the limit for an enterprise's prepayment amounts should be determined according to the import payment status over the last 12 months, the circumstances of the prepayment registration and the industrial characteristics.

For full text of the guidelines, please refer to http://www.safe.gov.cn/model_safe/laws/law_detail.jsp?ID=8040200000000000,42&id=4. Please note this link is to a Chinese-language website.

The Stock Exchange of Hong Kong launches two new listing enforcement initiatives

The Stock Exchange of Hong Kong Limited (the "Exchange"), a wholly owned subsidiary of Hong Kong Exchanges and Clearing Ltd. ("HKEX") launched two initiatives in November 2008 to promote

transparency of its listing enforcement actions and to facilitate the discharge of its statutory duty.

The first initiative is a series of listing enforcement guidance letters, published as part of its ongoing efforts to provide more transparency in the decision making process relating to listing enforcement matters and the interpretation given to various provisions of the Listing Rules by the Listing Division. As a result, the listed issuers and their advisers will have better understanding of the application of the Listing Rules.

Cases referred to the Exchange for possible enforcement action may have features which carry wider regulatory implications. While no disciplinary action may be appropriate on the facts of the case, it may be that the communication of the Exchange's interpretation or expectations as to an issuer's conduct in the circumstances which were the subject of investigation may be the proper regulatory action. Therefore it benefits not only the issuer in question but also the market as a whole.

The Listing Enforcement Guidance Letters is available at http://www.hkex.com.hk/listing/staffint/le_guidance.htm.

The second initiative is to facilitate the Exchange's pursuit of enquiries and enable the Exchange to discharge its statutory duty. A posting Request for Assistance Announcements ("RFA Announcements") is now available on the HKEX website. An RFA Announcement informs the market that the Exchange has an interest in contacting the named individuals where the individuals were not contactable whether through deliberate avoidance of the Exchange's enquiries or simply not aware that their responses were being sought by the Exchange.

For the RFA Announcements page, please refer to <http://www.hkex.com.hk/listing/enforcement/rfaa.htm>.

For a copy of the Hong Kong Exchange newsletter, dated November 17, 2008, please refer to <http://www.hkex.com.hk/news/hkexnews/081117news.htm>.

Circular to Licensed Corporations regarding Mandatory Electronic Submission of Financial Returns

The Hong Kong Securities and Futures Commission ("SFC") issued a circular announcing that effective November 1, 2008, all licensed corporations are required to submit their Financial Resources Return ("FRR") electronically. The returns can be signed digitally by using a SFC e-Certificate or a Hong Kong Post e-Cert (Organisational) Certificate. Any licensed corporations that have not yet applied for either certificate should do so as soon as possible.

The e-FRR System is accessible through the SFC website (<http://www.sfc.hk>).

For industry testing, corporations may access the testing version of the e-FRR System at http://www.sfc.hk/sfc/html/EN/intermediaries/supervision/efrr_trial/efrr_trial.html. A valid e-certificate will be needed for the industry testing.

For a copy of the SFC Circular, dated November 5, 2008, please refer to <http://www.sfc.hk/sfcRegulatoryHandbook/EN/displayFileServlet?docno=H528>.

Corporate Governance under scrutiny

SFC announced the start of three separate proceedings in the High Court seeking orders against nine current and former company directors for alleged misconduct. Under section 214 of the *Securities and Futures Ordinance*, the court is provided with the ability to:

1. Disqualify a person from being a company director or being directly or indirectly involved in the management of any corporation for up to 15 years;
2. Ordering a company to bring proceedings in its own name against any person specified; and
3. Making any order it deems appropriate.

In each of the three cases, the SFC will argue that the directors were wholly or partly responsible for the companies' affairs being conducted in a manner involving defalcation, fraud or other misconduct. For the first time ever, the SFC will ask the court to make orders that the responsible directors pay compensation to the respective company for the losses caused by their breaches of duty. The SFC is focusing on cases where alleged misconduct and bad faith by the directors has led to shareholder loss.

For SFC's Enforcement Bulletin, please refer to <http://www.sfc.hk/sfc/html/EN/speeches/public/enforcement/enforcement.html>.

General offer trigger and creeper under Takeover Code upheld

The SFC has noted recent suggestions from some market participants that, in light of the current market conditions, the 30% general offer trigger and the 2% creeper under the Code on Takeovers and Mergers should be relaxed temporarily. Rule 26.1 of the Takeover Code provides that a person and persons acting in concert will trigger a general offer obligation if they acquired voting rights to or in excess of 30% of a public company. For those holding voting rights between 30% and 50%, a general offer will be required if they acquire more than 2% within a 12 month period.

At the request of the Takeover Executive, the Takeovers Panel had met to give its view of whether the trigger and the creeper provisions should be relaxed and, by a substantial majority, opposed any relaxation on the following grounds:

1. The proposals ran counter to the General Principle which requires equal treatment for all shareholders;
2. No jurisdiction that had a similar regulatory framework as Hong Kong had proposed equivalent temporary waivers;
3. The proposals, if implemented may reflect poorly on Hong Kong as an international finance centre;
4. Whilst the stock market had experienced substantial declines, there was no suggestion that the market was not functioning properly;
5. The proposals were opportunistic as they appeared to be motivated more by the interests of major or controlling shareholders, favoring them at the expense of minority shareholders; and
6. There was no evidence to indicate that the support for the proposals were widespread.

For more information from the SFC's Takeovers Bulletin, please refer to http://www.sfc.hk/sfc/html/EN/cfd/mergers/takeovers_bulletin/bulletin.html.

Non-statutory guidelines on Director's Duties

In September 2008, the Companies Registry issued non-statutory guidelines on directors' duties. It sets out 11 principles, which are not meant to be exhaustive, which aim to outline the general principles for a director in the performance of his functions and the exercise of his powers. As directors' duties in Hong Kong are based on case law, as opposed to being enshrined in the Companies Ordinance, it will be interesting to see to whether these guidelines would have any persuasive effect in determining whether a director has breached its duties to a company.

For a copy of the guidelines, please refer to <http://www.sfc.hk/sfcRegulatoryHandbook/EN/displayFileServlet?docno=H523>.

News

PRC Enterprises' State-owned Assets Law Issued

The *Enterprises' State-owned Assets Law* ("**State-owned Assets Law**") was approved by the Standing Committee of the National People's Congress of PRC on October 28, 2008 and will become effective on May 1, 2009.

The State-owned Assets Law defines State-owned assets as rights and benefits that come from all kinds of investments by the State. That is, as an investor, the State has the right as a shareholder to gain capital income, participate in decision-making process on significant matters and choose managers in State-invested enterprises. However, it does not refer to real estate or movable property such as plants or equipment. This also implies that the State-owned Assets Law will apply to all kinds of State-invested enterprises, including financial enterprises. However, State-owned Assets Law states that where laws and administrative rules have other provisions on the supervision and management of state-owned assets for financial enterprises, those provisions will apply.

The State-owned Assets Law stipulates that the responsibility of the investment institution is, among others, to represent the government to gain capital income, participate in the decision-making process on significant matters, and choose managers. Shareholder representatives appointed by the institutions responsible shall (i) attend general meetings of shareholders in the State-owned assets holding enterprises and State-invested enterprises, (ii) act according to the appointed body's directives to put forward proposals, express their views, and exercise their rights to vote, and (iii) report to the appointed body promptly on how they have performed their duties and the accompanying results.

State-owned Assets Law specifies that, as representatives of the government, authorised State-owned Assets Supervision and Administrative Organisations, as well as other relevant departments and institutions, are responsible to perform their duties as investors on behalf of the State. Meanwhile, State-owned Assets Law also emphasises that these institutions shall not interfere with the operations of enterprises aside from carrying out their responsibilities as investors.

The board members and senior managers of the State-owned asset holding companies and the State-invested enterprises are not allowed to hold posts in other competing companies without permission by the board of shareholders and general shareholders' meeting.

Another point worth mentioning is that the section on Operation Budget in the State-owned Assets Law stipulates that the dividends derived from the enterprise by the State shall go to the State-owned assets operation budget.

For more information, please refer to http://www.gov.cn/fifg/2008-10/28/content_1134207.htm.

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- One of the Top Ten Law Firms for Global M&A 2007—*Thomson Financial/Bloomberg*
- Business Services sector M&A law firm of the year 2007—Financial Times and Mergermarket M&A Awards
- One of the Top Ten Capital Markets Practices 2007—*Bloomberg*

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- Firm of the Year 2007—*Asian Counsel*
- Top International Law Firm 2008 Vault Guide to the—*Top 100 Law Firms*
- International Arbitration Team of the Year 2007—*Chambers USA*
- One of the Top Ten Antitrust Law Firms 2007—*Global Competition Review*
- Ranked Top in Global Bankruptcy 2007—*The Deal*
- Project Finance Team of the Year 2008—*Legal Business*
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