

漢坤律師事務所

HAN KUN LAW OFFICES

Unit 906, 9F, Office Tower C1, Oriental Plaza, 1 East Chang An Avenue, Beijing 100738, P. R. China

TEL: (86 10) 8525-5500; FAX: (86 10) 8525-5511/ 5522

M E M O R A N D U M

备忘录

To: Our Friends and Clients

致: 我们的朋友和客户

From: Han Kun Law Offices

自: 汉坤律师事务所

Date: July 14, 2014

日期: 2014年7月14日

Re: SAFE Issues Circular 37, Which Repeals and Supersedes Circular 75

关于: 外管局下发37号文新规, 75号文被废止

On July 14, 2014, the State Administration of Foreign Exchange (“SAFE”) published on its website the *Circular on Relevant Issues Relating to Domestic Residents’ Investment and Financing and Roundtrip Investment through Special Purpose Vehicles* (Hui Fa [2014] No. 37) (“**Circular 37**”) and its appendixes, including the *Operating Rules for Businesses with respect to the Regulation of Foreign Exchange in Roundtrip Investments* (the “**Operating Rules**”) and the *Form of Application for Foreign Exchange Businesses with respect to Direct Investments under the Capital Account*. According to Circular 37, Circular 75,¹ which significantly impacted offshore investments, financings and listings that used the variable interest entity (“**VIE**”) structure, is repealed and superseded by Circular 37 with immediate effect. In addition, the operating instructions for foreign exchange in roundtrip investments in Circular 59,² are repealed and superseded by the Operating Rules with immediate effect.

2014年7月14日, 国家外汇管理局在其官方网站发布了《关于境内居民通过特殊目的公司境外投融资及返程投资外汇管理有关问题的通知》(汇发[2014]37号) (“**37号文**”)及其附件《返程投资外汇管理所涉业务操作指引》(“《**操作指引**》”)和《资本项目直接投资外汇业务申请表》。根据37号文, 对境内企业通过VIE

¹ *Circular of the State Administration of Foreign Exchange on Relevant Issues Relating to Domestic Residents’ Financing and Roundtrip Investment through Special Purpose Vehicles* (Hui Fa [2005] No. 75)

² *Circular of the State Administration of Foreign Exchange on Further Improving and Adjusting Direct Investment Foreign Exchange Administrative Policies* (Hui Fa [2012] No. 59) and Appendix 1 the *Operating Rules for Foreign Exchange Businesses with respect to Direct Investments under the Capital Account*

CONFIDENTIALITY. This document contains confidential information which may also be privileged. Unless you are the addressee (or authorized to receive for the addressee), you may not copy, use, or distribute it. If you have received it in error, please advise Han Kun Law Offices immediately by telephone or facsimile and return it promptly by mail. Thanks.

架构进行境外融资及上市产生重要影响的 75 号文¹同时废止, 59 号文中涉及返程投资外汇管理的《操作规程》²也相应被《操作指引》取代。

Circular 37 explicitly states that its purpose is to “support the implementation of the ‘Going Out’ strategy, to fully utilize onshore and offshore resources and markets and to further simplify and facilitate cross-border capital transactions arising from domestic residents’ involvement in investment and financing via offshore special purpose vehicles.” Compared to Circular 75, Circular 37 contains many material adjustments that are expected to pave the way for and have a significantly positive and practical effect on, offshore investment and financing and roundtrip investment by domestic residents.

37 号文开篇即提出“为支持国家“走出去”战略的实施, 充分利用国际国内两种资源、两个市场, 进一步简化和便利境内居民通过特殊目的公司从事投融资活动所涉及的跨境资本交易”的目的。37 号文与 75 号文相比, 有诸多较大的调整, 有望为境内居民境外投融资和返程投资打开多扇窗口, 其积极意义与实践效果, 值得期待。

Compared to Circular 75, Circular 37 contains material amendments to the following: i) definitions, ii) scope of special purpose vehicles (“SPV”), iii) offshore investments, financings and roundtrip investments by domestic residents, iv) registration of employee stock option plans (“ESOP”), and v) procedures for registration, and the basis for and content of punishments.

相比于 75 号文, 37 号文在定义、特殊目的公司范围、境内居民境外投资、融资以及返程投资、股权激励计划登记、各项登记程序、处罚依据与措施等方面均进行了较大的调整, 主要包括如下几个方面:

I Material Adjustments of Definitions 定义的重大调整

Circular 37 materially adjust the definitions of “SPV”, “Roundtrip Investment”, and “Domestic Resident”. Under Circular 37, 根据 37 号文, “特殊目的公司”、“返程投资”及“境内居民”的定义都做了较大的调整。

“SPVs” means offshore enterprises directly established or indirectly controlled by domestic residents (including domestic institutions and domestic individuals) for the purposes of offshore investment and financing with their legally owned assets or interests in domestic enterprises, or their legally owned offshore assets or interests. Compared to Circular 75, under Circular 37, (a) the purpose for establishing SPVs is not limited to offshore financings, but has been broadened to include both financings

¹ 《国家外汇管理局关于境内居民通过特殊目的公司融资及返程投资外汇管理有关问题的通知》(汇发[2005]75号)

² 《国家外汇管理局关于进一步改进和调整直接投资外汇管理政策的通知》(汇发[2012]59号)及其附件一《资本项目直接投资外汇业务操作规程》

and investments and (b) domestic residents can form SPVs not only with their assets or interests in the domestic enterprise, but also with their legally owned offshore assets or interests.

“特殊目的公司”是指境内居民(含境内机构和境内居民个人)以投融资为目的,以其合法持有的境内企业资产或权益,或者以其合法持有的境外资产或权益,在境外直接设立或间接控制的境外企业。相比于 75 号文,特殊目的公司:

(1) 不再局限于“境外融资”为目的,而拓宽为以“投融资”为目的,增加了“投资”;(2) 不再局限于“境内企业资产或权益”,而拓宽增加了“境外资产或权益”。

“**Roundtrip Investment**” means direct investment carried out within the territory of China by domestic residents directly or indirectly via SPVs (i.e., establishing a wholly foreign owned enterprise or project (“**WFOE**”) in the PRC by forming a new entity, through merger or acquisition or other ways, and obtaining ownership, control, operation and management and other rights and interests in a domestic PRC entity). Compared to Circular 75, Circular 37 simplifies and defines what constitutes direct investment.

“返程投资”,是指境内居民直接或间接通过特殊目的公司对境内开展的直接投资活动,即通过新设、并购等方式在境内设立外商投资企业或项目(以下简称外商投资企业),并取得所有权、控制权、经营管理权等权益的行为。相比于 75 号文,简化并明确直接投资的方式为通过“新设、并购等方式”设立外商投资企业,并取得所有权、控制权、经营管理权等权益。

“**Domestic Residents**” means domestic institutions and domestic individuals. A domestic individual means either a Chinese citizen with a Chinese ID card, military ID card or armed police ID card or a foreign individual, who, while not having any legal identity within the territory of China, nevertheless habitually resides within the territory of China due to business interests / relations.

“境内居民”定义区分为“境内机构”和“境内居民个人”,而“境内居民个人”则包括持有中国境内居民身份证、军人身份证件、武装警察身份证件的“中国公民”,以及虽无中国境内合法身份证件、但因经济利益关系在中国境内习惯性居住的“境外个人”。

II Broadening the Scope of “SPVs” 拓宽了“特殊目的公司”的范围

Circular 37 broadens the scope of “SPVs” in the following ways:

根据 37 号文对于“特殊目的公司”的定义,特殊目的公司的范围进一步扩大,主要体现在:

1. SPVs are not only for financing purposes, but also for investment purposes.
特殊目的公司既可以用于融资,亦可以用于投资

According to Circular 75, the purpose of a SPV is limited to offshore

financings. However, according to Circular 37 the purpose of a SPV is not only for offshore equity financing purposes, but also for offshore investment purposes.

根据 75 号文, 特殊目的公司成立的目的仅限于在“境外进行股权融资”, 而 37 号文规定的特殊目的公司则不仅限于在境外进行股权融资, 还可以在境外进行投资。

This minor wording adjustment materially alters what qualifies as a SPV, and establishes the principles by which a domestic resident, especially a domestic individual, is permitted to invest offshore via SPVs for the reasons stated below.

这一看似简单的调整, 却极大地丰富了特殊目的公司的内涵, 从根本上确立了境内居民, 尤其是境内居民个人通过特殊目的公司进行境外投资的原则。

The definition of outbound "investment" by domestic institutions is already provided for in the *Measures for the Administration of Overseas Investments* by the Ministry of Commerce in 2009 and other related regulations. However, prior to Circular 37, except for those regulations under Circular 75 and the principle provisions of the *Administrative Measures for Personal Foreign Exchange* and its implementing rules, there were no specific and practical rules for outbound "investment" by domestic individuals. Therefore, it was uncertain for a long time whether such investments were permitted, and to the extent that they were, the scope of such permitted outbound investment. The definition of SPV and other related provisions in Circular 37 may provide a formal legal avenue for domestic individuals to make outbound investments for the purposes of implementing China's "Going Out" strategy." Still, the specific effect of Circular 37 in this regard requires further examination and clarification.

境内机构境外投资, 此前已有商务部 2009 年发布的《境外投资管理办法》以及其他相关法规的规定。但对于境内居民个人, 除了之前的 75 号文规定, 以及《个人外汇管理办法》及其实施细则的原则性规定外, 境内居民个人的境外投资一直未能有特别明确或可具操作性的规定或指引, 导致境内居民个人的境外投资合法性长期处于不确定状态。37 号文关于“特殊目的公司”的定义及相关规定, 可能将为境内居民个人境外投资打开一条合法通路, 在“走出去”的国家战略大环境下, 使得境内居民个人可以合法实现其境外投资, 具体的效果则有待 37 号文实际执行的检验。

2. Domestic residents can establish a SPV not only with their legally owned assets or interests in domestic enterprises, but also with their legally owned offshore assets or interests.

境内居民既可以其持有的境内企业资产或权益, 亦可以其持有的境外资产或权益出资设立特殊目的公司

Under Circular 75, domestic residents could only establish a SPV with their legally owned assets or interests in domestic enterprises. Under Circular 37, domestic residents can also establish a SPV with their legally owned offshore assets or interests.

根据 75 号文，境内居民仅能以其合法持有的境内资产或权益设立特殊目的公司，而 37 号文则拓宽为允许境内居民以其合法持有的境外资产或权益设立特殊目的公司。

Under Circular 75, the SPV could only be established for offshore financing purposes, and the interests in domestic enterprises had to be injected into the SPV. Practically speaking, this meant that domestic residents were required to own assets or interests in domestic enterprises before establishing a SPV. Now, under Circular 37, SPVs can be established for the purposes of offshore investments without the need to inject any interests in domestic enterprises into the SPV. Therefore, we understand that a domestic resident can establish a SPV and complete registration under Circular 37 as long as he/she/it holds legal interests or assets offshore. In this case, the domestic resident does not need to establish a domestic enterprise or hold equities in a domestic enterprise in order to establish the SPV.

受限于 75 号文关于特殊目的公司仅用于境外融资的目的，且境内权益需要注入特殊目的公司的安排，实践中，外汇管理部门要求境内居民必须先持有境内权益，方可设立特殊目的公司并进行融资。但是如上所述，37 号文下的特殊目的公司可直接用于在境外投资（无须要求境内企业权益注入），因此，我们理解，只要境内居民在境外有合法权益或资产，也可以设立特殊目的公司，并完成 37 号文下的外汇登记，而无须首先在境内设立/持股一家企业。

Compared with Circular 75, the definition of SPV and roundtrip investment under Circular 37 may therefore represent a breakthrough for the registration of SPVs who do not aim to secure financing and may efficiently address the SAFE registration issue for roundtrip investments made by "offshore companies for non-financing purposes." Still, the operational practices of Circular 37 in this regard require further examination and clarification.

另外，结合“特殊目的公司”及“返程投资”的定义，对于 75 号文下的“非特殊目的公司”的登记亦可能造成突破，可能有效解决此前“非融资目的”的境外公司“返程投资”的登记问题，具体尚待外汇管理部门进一步解释和实践检验。

Notwithstanding the above, given China's long-standing control of foreign exchange, we will need explanations and statements from SAFE defining offshore assets and interests and its legality so we may further understand the scope of these reforms. In this regard, we will also need to sufficiently communicate and confirm these points with SAFE.

当然，鉴于我国长期以来的外汇管制，对于境外资产或权益的界定以及

持有的合法性，则有赖于外汇管理部门的解释及说明，需要与外汇管理部门进行充分的沟通及确认。

III Domestic Residents Allowed to Fund SPVs 允许境内居民对特殊目的公司提供资金支持

Under Circular 37, domestic residents are permitted to fund SPVs. Specifically, domestic residents can i) contribute capital to SPVs with legally owned onshore and offshore assets and interests; ii) advance loans to its registered SPVs via domestic enterprises controlled directly or indirectly by them based on real and reasonable demands in compliance with existing regulations; iii) purchase foreign exchange and remit the foreign exchange out of China for the purposes of establishing SPVs, for share repurchases or for delisting based on true and legitimate demands. If these provisions are implemented in accordance with their terms, it will significantly influence outbound investments made by domestic individuals.

根据 37 号文：（1）境内居民“可以境内外合法资产或权益向特殊目的公司出资”，（2）境内居民“可以直接或间接控制的境内企业，可在真实、合理需求的基础上按现行规定向其已登记的特殊目的公司放款”，（3）境内居民“可在真实、合理需求的基础上购汇汇出资金用于特殊目的公司设立、股份回购或退市等”。前述规定，若得到有效执行，则对于境内居民个人境外投资之意义将尤为重要。

Circular 37 solves the issue of SPVs' demand for offshore funding by permitting such funding to occur in certain circumstances, more specifically in the following ways. 而 37 号文的出台将在很大程度上解决特殊目的公司境外资金需求的问题，使得特殊目的公司获得所需的资金支持：

1. Allowing domestic individuals to directly contribute capital to SPVs 允许境内居民个人直接向特殊目的公司出资

According to Circular 37, domestic individuals can contribute capital to SPVs with their legally owned onshore and offshore assets or interests (including but not limited to currency, negotiable securities, intellectual property or techniques, equity and creditor's rights). These SPVs can then make offshore investments with funds remitted out of China. We need to communicate with SAFE to confirm the specifics of these directives and to understand how non-currency contributions are to be made.

根据 37 号文，在特殊目的公司设立之后，境内居民个人可以其境内外合法资产或权益（包括但不限于货币、有价证券、知识产权或技术、股权、债权等）向特殊目的公司出资。特殊目的公司可凭借境内汇出的资金直接在境外进行投资。但是，对于以非货币出资的价值如何确认，是否需要进行评估等其他具体细节，仍有待于与外汇管理部门进行进一步沟通确认。

2. Allowing domestic residents to advance loans to SPVs via the enterprises in China controlled by them
允许境内居民通过其控制的境内企业向特殊目的公司放款

In addition to being able to directly contribute capital to SPVs, according to Circular 37, domestic individuals can also advance loans to its registered SPVs via domestic enterprises controlled directly or indirectly by them based on real and reasonable demands in accordance with the *Circular of the State Administration of Foreign Exchange on Foreign Exchange Control Issues Concerning Overseas Lending by Domestic Enterprises* and other relevant regulations.

根据 37 号文, 除可直接向特殊目的公司出资外, 境内居民个人亦可通过其直接或间接控制的境内企业, 在真实、合理需求的基础上按照《国家外汇管理局关于境内企业境外放款外汇管理有关问题的通知》等规定向已经登记的特殊目的公司放款。

3. Allowing domestic residents to purchase foreign exchange and remit the foreign exchange out of China for the purposes of establishing SPVs, for share repurchases or for delisting
允许境内居民购汇汇出资金用于特殊目的公司设立、股份回购或退市等

According to Circular 37, domestic individuals can fund SPVs not only for outbound investments, but also for the purposes of establishing SPVs, for share repurchases or for delisting.

根据 37 号文, 境内居民个人除了可向特殊目的公司提供资金用于境外投资外, 亦可用于特殊目的公司的股份回购或已上市特殊目的公司的退市等。

The provisions in Circular 37 permitting domestic individuals to fund SPVs represent a significant breakthrough and are of great significance. By removing the limitations set forth by Circular 75, these provisions in Circular 37 simplify the procedures for outbound investments made by domestic individuals.

37 号文关于允许境内居民个人向特殊目的公司提供资金支持的规定, 极大地突破了 75 号的限制, 有效地简化了境内居民个人进行境外投资的程序, 具有重大意义。

IV Foreign Exchange Registration of ESOP Interests Made by Non-Listed SPVs to Directors, Supervisors, Senior Officers and Employees Allowed
允许境内企业的董监高及员工就非上市特殊目的公司的股权激励计划办理外汇登记

According to Circular 37, when a non-listed SPV grants equity incentives to the directors, supervisors, senior officers and employees of enterprises in China that it

controls, directly or indirectly, through equity or option holdings, **these domestic individuals can apply for foreign exchange registration with respect to its interests in the SPV before they exercise their rights.**

根据 37 号文，非上市特殊目的公司以本企业股权或期权等为标的，对其直接或间接控制的境内企业董事、监事、高级管理人员及其他与公司具有雇佣或劳动关系的员工进行权益激励的，**相关境内居民个人在行权前可申请办理特殊目的公司外汇登记手续。**

Circular 37 is the first law that specifies the procedures for and detailed implementation rules of foreign exchange registration of ESOP grants made by non-listed SPVs to directors, supervisors, senior officers and employees, which may reflect the fact that regulators have closely monitored the development of offshore financings and capital markets. Circular 37's concrete provisions will assist in eliminating confusion over the registration and exercise of ESOP interests made by many non-listed SPVs who have a VIE structure. Chinese holders of ESOP interests in non-listed companies using the VIE structure no longer face uncertainty over whether offshore ESOP interests can be exercised prior to the company's listing. Instead, these employees will have the choice to hold interests in the non-listed SPV when appropriate. This reform, and the removal of prior uncertainty over ESOP grants made by non-listed SPVs to Chinese employees, may positively contribute to the ability of non-listed SPVs to retain and encourage its employees.

37 号文第一次明确非上市特殊目的公司实施的针对境内企业董监高与员工的股权激励计划（“ESOP”）可以办理外汇登记并出台了办理的细则，体现了监管机构对于境外融资及境外资本市场发展的密切关注。此项规定将可能有效解决众多非上市 VIE 架构公司的 ESOP 的登记与行权困惑，使得这些公司在上市之前，其推行的 ESOP 对于大多数员工而言不再是不确定状态，而可能实现员工在适当的时候选择在境外直接持股，对于公司留住和激励员工也将起到积极的推动作用。

However, there are a number of implementation issues that will need to be addressed, given the complexity of ESOP administration and the fact that ESOP grants may be subject to amendment. First, SAFE may face more administrative burdens stemming from increases in the number of registrations. Second, enterprises have to consider when it would be appropriate to assist their employees in applying for the registration of their ESOP interests and how to handle equity interests that are exercised after employees depart. Third, option holders may have to assume some burdens with respect to the completion of the required SAFE registration for their ESOP interests.

不过，考虑到 ESOP 本身的复杂性及实施的持续性及可调整性，推行此项规定亦可能对外汇管理部门、公司及员工均产生一定的影响。首先，可能使得外汇管理部门面临较大的登记工作压力；其次，对于公司而言，既需要考虑选择合适的时机协助员工办理登记，同时也需要考虑若员工离职，已行权股份如何处理；第三，对于员工而言，其作为登记义务人，将履行相应的登记手续，也可能产生一定的负担。

It should be noted that Circular 37 does not specify that domestic residents who hold

ESOP interests **are required to** apply for foreign registration, but rather that they **may** do so according to Circular 37. If we were to interpret this provision strictly, it would appear that the foreign exchange registration of an ESOP grants by a non-listed SPV is not a legal obligation of any one person or entity, but rather provides a choice for option holders or companies to complete the registration. We will require further communication and confirmation with SAFE with respect to the interpretation of these provisions.

我们也注意到，根据 37 号文的表述，37 号文并没有要求参与 ESOP 的境内居民 **必须** 办理相应外汇登记，而是 **可以** 申请办理。如果严格按照字面解释，则非上市特殊目的公司的 ESOP 涉及的外汇登记并非法定义务，应有提请公司与员工审慎考虑与选择之意。当然，关于条文的具体解释仍然需要与外汇管理部门进行沟通和确认。

V Foreign Exchange Registration Procedures for SPVs Adjusted 特殊目的公司外汇登记程序的调整

Circular 37 and its Operating Rules materially adjust the foreign exchange registration procedures of SPVs in the following ways:

37 号文及其《操作指引》对于特殊目的公司外汇登记的程序进行了较大的调整，主要体现在：

1. Adjustment of the Initial Registration 初始登记相关的调整

According to Circular 37 and its Operating Rules, domestic residents shall apply with SAFE for foreign exchange registration of their offshore investment of their legally owned onshore or offshore assets or interests into SPVs (the "**Initial Registration**"). Domestic individuals are permitted to establish SPVs before conducting the Initial Registration, but prior to the completion of the Initial Registration, they cannot fund the SPVs except for paying for registration costs.

根据 37 号文及其《操作指引》，境内居民以境内外合法资产或权益向特殊目的公司出资前，应向外汇管理局申请办理境外投资外汇登记手续（“**初始登记**”）。在办理初始登记之前，境内居民个人可在境外先行设立特殊目的公司；在初始登记办理完成前，境内居民个人不得对特殊目的公司发生除支付注册费用外的其他出资。

Compared with Circular 75 and its operating rules, Circular 37 and its Operating Rules contain the following uncertainties: (a) Circular 37 and its Operating Rules do not specify whether offshore financings, equity transfers, roundtrip investments or other substantial adjustments of the SPV's assets or equity are allowed to occur prior to the completion of the Initial Registration. Presently we do not know whether offshore financings or other assets or equity adjustments can be completed prior to the completion of Initial

Registration. (b) Circular 37 and its Operating Rules specify that domestic individuals only have to apply for foreign exchange registration of the parent SPV established or controlled directly by them. Presently, we do not know whether domestic individuals have to apply for foreign exchange registration of other SPVs apart from the parent SPVs established or controlled indirectly by them. For example, in a typical VIE structure, the offshore entities would consist of a financing vehicle in the Cayman Islands / British Virgin Islands, which is the 100% owner of a Hong Kong entity. In this scenario, would foreign exchange registration be required for both entities or only for the Cayman Islands / British Virgin Islands entity. We have to communicate and confirm with SAFE about how these rules are implemented in practice.

相比于 75 号文及其《操作规程》，37 号文及其《操作指引》：（1）并没有明确在初始登记完成前，该特殊目的公司不得发生境外融资、股权变动或返程投资等实质性资本或股权变动，是否意味着在初始登记前可进行境外融资或其他股权变动行为？（2）明确境内居民个人只为直接设立或控制的（第一层）特殊目的公司办理登记，是否意味着境内居民个人间接控制的其他层特殊目的公司（如常见的融资主体开曼公司以及下属的香港公司）则不需要进行登记？这些尚待实践中与外汇管理部门进一步沟通和确认。

2. Adjustment of Amended Registrations 变更登记相关的调整

According to Circular 37 and its Operating Rules, domestic residents are required to amend their registrations with SAFE (a) when the domestic individual shareholder, the name, the operation period or other basic information of the registered SPV changes or (b) when the capital contributed by domestic individuals increases or is reduced, or when there is a share transfer or exchange, merger, division or other material event (the “**Amended Registration**”).

根据 37 号文及其《操作指引》，已登记的境外特殊目的公司发生境内居民个人股东、名称、经营期限等基本信息变更，或发生境内居民个人增资、减资、股权转让或置换、合并或分立等重要事项变更后，应及时到外汇管理局办理（“**变更登记**”）。

Compared with Circular 75 and its operating rules, Circular 37 and its Operating Rules make the following adjustments: (a) not specifying financings or equity transfers relating to the SPV as events that trigger an Amended Registration, (b) abolishing the 30-day time period requirement to complete an Amended Registration, starting from the occurrence of the triggering event, and (c) abolishing the requirement that domestic residents’ profits, dividends and foreign exchange income from capital variation gains of SPVs be transferred back to China within 180 days following the acquisition of such profits, dividends and foreign exchange income.

相比于 75 号文及其《操作规程》，37 号文及其《操作指引》：（1）没有将特殊目的公司（若严格依照《操作指引》规定的“第一层”特殊目的公司）的融资、股权变动等明确列为变更登记事项；（2）取消了变更事项发生之日起 30 个工作日内申请办理登记的时效要求；（3）取消了境内居民从特殊目的公司获取的利润、红利及资本变动收入应于获得之日起 180 日内调回境内的时效要求。

3. Further specifying “Supplement Registrations”
进一步明确可以“补登记”

Circular 37 provides that domestic residents who, prior to the effectiveness of Circular 37, funded SPVs with legally owned onshore or offshore assets or interests but who failed to apply for foreign exchange registration of its offshore investment, shall issue a cover letter explaining such non-compliance to SAFE. SAFE will then provide a “Supplemental Registration” in accordance with law and reasonableness, while administrative punishments are imposed on the activities that breach prior SAFE provisions. Considering China’s “Going Out” policy, the “Supplemental Registration” may be effective to remedy legacy non-compliance issues at a time when such prior conduct is now legal.

37 号文规定，在 37 号文实施前，境内居民以境内外合法资产或权益已向特殊目的公司出资但未按规定办理境外投资外汇登记的，境内居民应向外汇局出具说明函说明理由。外汇局根据合法性、合理性等原则办理补登记，对涉嫌违反外汇管理规定的，依法进行行政处罚。在国家“走出去”政策的大环境下，对于之前已经设立“特殊目的公司”但面临在 75 号文下补登记的难度，此项规定，可能将有效解决一些历史遗留问题，使得这些“特殊目的公司”合法化。

Due to the operational issues surrounding foreign exchange registration procedures for SPVs, we need to communicate and confirm the details of these procedures with SAFE.

如上述分析，鉴于特殊目的公司外汇登记的程序操作性较强，调整后仍有部分细节待与外汇管理部门进行沟通和确认。

VI Concrete Bases for Punishment and Penalties

明确了具体处罚依据和措施

Unlike Circular 75, Circular 37 specifies the concrete bases for punishment and penalties, which target unlawful acts that arise in practice. Circular 37 incorporates provisions from the *Regulations on Foreign Exchange Control*, as follows:

不同于 75 号文，37 号文针对具体的违规情形，明确了具体的惩罚依据及措施，包括：

1. Domestic residents or enterprises directly or in directly controlled by them remit funds out of China into SPVs via false or fabricated transactions.
境内居民或其直接、间接控制的境内企业通过虚假或构造交易汇出资金用于特殊目的公司

According to Article 39 of the *Regulations on Foreign Exchange Control*, SAFE shall order the offending party to repatriate the involved foreign exchange back to China within a specified time limit and shall impose a fine of not more than 30% of the involved foreign exchange. In serious cases, the SAFE shall impose a fine of more than 30% and not more than the total amount of involved foreign exchange. The offending party shall also be subject to criminal liability according to law if the act constitutes a criminal offence.

根据《外汇管理条例》第三十九条规定，由外汇管理机关责令限期调回外汇，处逃汇金额 30% 以下的罚款；情节严重的，处逃汇金额 30% 以上等值以下的罚款；构成犯罪的，依法追究刑事责任。

2. Domestic residents fail to apply for the required foreign exchange registrations, fail to truthfully disclose information on who actually controls the roundtrip investment enterprises or make fictitious promises.
境内居民未按规定办理相关外汇登记，未如实披露返程投资企业实际控制人信息，存在虚假承诺等行为

According to Article 48, Paragraph 5 of the *Regulations on Foreign Exchange Control*, SAFE shall order the offending institution or individual to remediate the non-compliance, issue a warning, and impose a fine of not more than RMB 300,000 in the case of an institution or not more than RMB 50,000 in the case of an individual.

根据《外汇管理条例》第四十八条第（五）项规定，由外汇管理机关责令改正，给予警告，对机构可以处 30 万元以下的罚款，对个人可以处 5 万元以下的罚款。

3. Funds are remitted out of China when domestic residents fail to apply for the required foreign exchange registrations, fail to truthfully disclose information on who actually controls the roundtrip investment enterprises or make fictitious promises.
在境内居民未按规定办理相关外汇登记，未如实披露返程投资企业实际控制人信息或虚假承诺的情况下，发生资金流出

According to Article 39 of the *Regulations on Foreign Exchange Control*, SAFE shall order the offending party to repatriate the involved foreign exchange back to China within a specified time limit and shall impose a fine of not more than 30% of the amount of the involved foreign exchange. In serious cases, the SAFE shall impose a fine of more than 30% and not more

than the total amount of the involved foreign exchange. The offending party shall also be subject to criminal liability according to law if the act constitutes a criminal offence.

根据《外汇管理条例》第三十九条规定，由外汇管理机关责令限期调回外汇，处逃汇金额 30% 以下的罚款；情节严重的，处逃汇金额 30% 以上等值以下的罚款；构成犯罪的，依法追究刑事责任。

4. Funds are remitted into China or foreign exchange is settled when domestic residents fail to apply for the required foreign exchange registrations, fail to truthfully disclose information on who actually controls the roundtrip investment enterprises or make fictitious promises.

在境内居民未按规定办理相关外汇登记，未如实披露返程投资企业实际控制人信息或虚假承诺的情况下，发生资金流入或结汇

According to Article 41 of the *Regulations on Foreign Exchange Control*, if anyone remits foreign exchange into China in violation of relevant law, SAFE shall order the offending party to remediate the non-compliance and shall impose a fine of not more than 30% of the illegal remittance amount. In serious cases, the SAFE shall impose a fine of more than 30% and not more than the total illegal remittance amount. If anyone illegally settles foreign exchange, SAFE shall order the offending party to convert the funds from the illegal settlement and shall impose a fine of not more than 30% of the illegal foreign exchange settlement amount.

根据《外汇管理条例》第四十一条规定，违反规定将外汇汇入境内的，由外汇管理机关责令改正，处违法金额 30% 以下的罚款；情节严重的，处违法金额 30% 以上等值以下的罚款；非法结汇的，由外汇管理机关责令对非法结汇资金予以回兑，处违法金额 30% 以下的罚款。

5. Where cross-border balance of payments occurs between domestic residents and SPVs, domestic residents fail to declare the international receipts and payments or conduct statistics registration according to law.

境内居民与特殊目的公司相关跨境收支未按规定办理国际收支统计

According to Article 48, Paragraph 1 of the *Regulations on Foreign Exchange Control*, SAFE shall order the institution or individual to remediate the non-compliance, issue a warning and impose a fine of not more than RMB 300,000 in the case of an institution or not more than RMB 50,000 in the case of an individual.

根据《外汇管理条例》第四十八条第（一）项规定，由外汇管理机关责令改正，给予警告，对机构可以处 30 万元以下的罚款，对个人可以处 5 万元以下的罚款。

Please note that this memorandum is for reference only and nothing contained herein constitutes any legal advice. We hope that this memorandum will be helpful to you. If you have any further questions or instructions, please feel free to contact us.

敬请注意，本备忘录仅供参考，不构成我们的法律意见。希望本备忘录对您有所帮助。若您有任何进一步的问题或指示，请随时与我们联系。

汉坤/Han Kun