



漢坤律師事務所  
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# Newsletter

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## **NDRC Issues Circular on Further Promoting the Administration on Record-filing of Equity Investment Enterprises (Authors: Evan ZHANG, Feiya WANG)**

Following the issuance of the *Circular on Promoting the Standardized Development of Equity Investment Enterprises* (“**Document No. 2864**”) and the *Circular of the General Office of the National Development and Reform Commission on Printing and Distributing the Summary of National Working Conference on Record-filing Management of Equity Investment Enterprises and Directive on/Standard Text for Record-filing Documents of Equity Investment Enterprises* (Fa Gai Ban Cai Jin [2012] No. 1595), the National Development and Reform Commission (the “**NDRC**”) announced the *Circular on Further Promoting the Administration of Record-filing of Equity Investment Enterprises* (Fa Gai Ban Cai Jin [2013] No. 694, the “**Circular**”) on March 18, 2013, to further enhance the administration on record-filing of equity investment enterprises. The major issues regarding the Circular are as follows:

### **Issue local record-filing management rules as soon as possible**

The Circular requires that local institutions shall promptly implement local record-filing management rules for equity investment enterprises, and shall by no later than the end of June 2013 issue the rules in the form of local government or departmental regulations.

### **Ensure "all required record-filings are filed" regarding equity investment enterprises**

The Circular stipulates that "all required record-filings [regarding equity investment enterprises] are [to be] filed", and urges those enterprises pursuing equity investments as their main businesses to start record-filing as soon as possible in accordance with the relevant regulations. The specific requirements promulgated in the Circular include the following:

- (a) Equity investment enterprises are required to go through the proper formalities for record-filing within the prescribed time limit. The Circular emphasizes that in accordance with the relevant provisions of Document No. 2864, if the scale thereof is more than CNY100 million but less than CNY500 million, record-filing shall be made with the record-filing management department at the provincial level, or if the scale thereof is more than CNY500 million, record-filing materials shall be submitted to the record-filing management department at the provincial level, who shall then submit it to the NDRC.
- (b) Equity investment enterprises that are not being operated as required are ordered to make the necessary rectifications within a prescribed time limit. Those failing to make the necessary rectifications as required shall be listed as “equity investment enterprises not operating in the proper legal ways as required” , and shall be announced on the website of

the relevant record-filing management department at the state or provincial level.

- (c) The investment operations of equity investment enterprises and equity investment management institutions shall be regulated by the relevant record-filing management departments of the state or provincial level. The Circular specifies that those found to be participating in the launch or management of publicly offered or privately offered securities investment funds, investing in financial derivatives, or granting loans, shall be notified to make the necessary rectifications within a prescribed time limit. Those equity investment enterprises and equity investment management institutions that fail to make the necessary rectifications as required shall be listed as “equity investment enterprises or entrusted management institutions not operating in the proper legal ways as required”, and shall be announced on the website of the relevant record-filing management department at the state or provincial level.
- (d) Equity investment enterprises that fail to submit the relevant record-filing application materials, and after several written notices still fail to go through proper formalities for record-filing, shall be listed as “regulation-circumventing equity investment enterprises”, and shall be announced on the website of the NDRC.

### **Miscellaneous**

In addition to the above mentioned requirements, the Circular further promulgates that the NDRC will choose and recommend to the market a group of professional credit bureaus suitable for collecting the credit records of equity investment fund corporations and legal representatives thereof. It is on this basis that the group of professional credit bureaus will carry out such credit record collections. Besides, the NDRC requires state or provincial management departments to strengthen organizational system construction, information system construction and information disclosure for record-filing management, in order to prepare for the establishment of local equity and venture investment associations and to perfect record-filing management services.

## Legal Updates

### 1. MOFCOM Conditionally Approves Glencore's Acquisition of Xstrata (Authors: Joyce LI, Kaiying WU)

On April 16, 2013, the Ministry of Commerce of the PRC (“**MOFCOM**”) released an announcement (the “**Announcement**”), stating that MOFCOM decided to conditionally approve Glencore International plc (“**Glencore**”)’s Acquisition of Xstrata plc (“**Xstrata**”) (the “**Proposed Acquisition**”), and such Announcement shall take effect from the date of release. The main contents of the Announcement are as follows:

#### **Examination process**

On April 1, 2012, MOFCOM received an anti-monopoly application for concentration of undertakings regarding the Proposed Acquisition, on May 17, MOFCOM confirmed that the application documents and supplementary materials were in line with Article 23 of the PRC Anti-Monopoly Law, and it placed this concentration of undertakings on file and started a preliminary examination. On June 15, MOFCOM decided to conduct a further examination on the same. After further examination, MOFCOM considered that this concentration of undertakings may have an adverse effect of excluding or restricting competition in the market of copper concentrate, zinc concentrate and lead concentrate. On September 14, with the consent of the applicant, MOFCOM decided to extend the further examination period to November 13. During the examination period, the applicant submitted two rounds of solutions regarding the competition issues raised by MOFCOM. However, based on MOFCOM’s review, neither of the solutions could solve the perceived competition problem. On November 6, the applicant requested to withdraw its application, and re-submitted the application on November 23. MOFCOM again placed this application for concentration of undertakings on file on November 29. On December 28, MOFCOM decided to conduct a further examination on this concentration of undertakings. On March 29, 2013, with the consent of the applicant, MOFCOM decided to extend the examination period.

During the examination process, MOFCOM examined and verified the authenticity, integrity and accuracy of the application documents, solicited opinions from relevant government agencies, industry associations, downstream clients, industry competitors, convened several forums, and verified the relevant data information.

#### **Analysis for competition**

##### (a) Proposed Acquisition

The acquirer, Glencore, is the world's largest non-ferrous metals and mineral products supplier, with mature experience in global operations and marketing networks, has a strong control over the third-party trade market in the global copper concentrate, zinc concentrate and lead concentrate. The acquiree, Xstrata, is the world's fifth-largest diversified mining group and metals companies, as well as the world's fourth largest copper producer. Glencore currently holds a 33.65% shares in Xstrata, and will acquire through the Proposed Acquisition all the issued and outstanding shares of Xstrata currently not held by Glencore. After the completion of the Proposed Acquisition, Glencore shall hold 100% of the shares of Xstrata.

(b) Relevant Market

Based on MOFCOM's opinion, since the Chinese market is the largest market for minerals products of both Glencore and Xstrata, this concentration of undertakings will have a major impact on the Chinese market. Regarding the commodities involved in this concentration of undertakings: 1) China is a major importer of copper concentrate, lead concentrate and zinc concentrate, its import proportion of the total supply for the above three commodities is respectively high, the two parties involved in this concentration of undertakings have occupied a large proportion in both the global and Chinese product and supply market of the above three commodities, 2) the import proportion of the total supply of the Chinese market for other commodities are respectively small, while the two parties involved in this concentration of undertakings have occupied a respectively small proportion of relevant market. Therefore, MOFCOM shall focus on examining the impact on the market of copper concentrate, lead concentrate and zinc concentrate of this concentration of undertakings.

(c) Examination Conclusion

Through its examination, MOFCOM came to the following conclusions: this concentration of undertakings shall: 1) eliminate Xstrata, the key competitor or potential competitor of Glencore in the Chinese market of copper concentrate, zinc concentrate and lead concentrate, 2) significantly increase the corresponding mineral resources controlled by Glencore, 3) further strengthen the degree of vertical integration of Glencore in the relative industries and 4) improve Glencore's level of control over the commodities market of copper concentrate, zinc concentrate and lead concentrate. Therefore, this concentration of undertakings may have an adverse effect of excluding or restricting competition in the market of copper concentrate, zinc concentrate and lead concentrate.

**Negotiations on restrictive conditions**

During the examination process, MOFCOM pointed out to the applicant that this concentration of undertakings may have an adverse effect of excluding or restricting competition, and held several rounds of negotiations regarding how to eliminate or reduce the adverse effect on competition brought by this concentration of undertakings. Glencore responded by submitting several resolutions. After assessing these solutions, MOFCOM came to the decision that the Transaction Relief Commitment Plan for Glencore's Acquisition of Xstrata submitted to MOFCOM on April 12,

2013 may reduce the adverse effect of excluding or restricting competition brought by this concentration of undertakings.

### **Examination decision**

After the examination, MOFCOM believed that Glencore's Acquisition of Xstrata may have an adverse effect of excluding or restricting competition on the Chinese market of copper concentrate, zinc concentrate and lead concentrate, and decided to approve this concentration of undertakings with additional restrictive conditions based on the commitments of Glencore's final relief plan. Under these restrictive conditions, Glencore and Xstrata shall perform the following obligations: 1) regarding the market of copper concentrate, Glencore shall divest all the interests held by Xstrata in the Las Bambas (a copper mine project in Peru) and close the divestment deal prior to June 30, 2015; and during the period from 2013 to the end of 2020 keep the same deal conditions with its PRC customers as negotiated prior to the Proposed Acquisition; 2) regarding the market of lead concentrate/zinc concentrate, Glencore shall during the period from 2013 to the end of 2020, continue to provide long-term contracts and spot contract offers relating to lead concentrate/zinc concentrate to its PRC customers and , the conditions (including the price related conditions) of those offers subject to certain specific circumstances shall be fair and reasonable in accordance with the then effective international market terms.

In addition, regarding the implementation of the above restrictive conditions, MOFCOM required that: Glencore shall entrust an independent monitoring trustee to supervise its performance of the Announcement obligations and commitments. Glencore shall from the date the Announcement released, within 15 days after the end of each quarter, submit a written report to MOFCOM and the monitoring trustee the status of its performance of the Las Bambas divestment obligation. Glencore shall also from the date the Announcement released, within 45 days after the end of each calendar year, submit a written report to MOFCOM and the monitoring trustee the status of its performance of the long-term supply obligations.

## **2. CSRC and CBRC Release New Measures to Supervise Securities Investment Fund Custody Business (Authors: Evan ZHANG, Xiangwei Cui)**

On April 2, 2013, the China Securities Regulatory Commission (the “**CSRC**”) and the China Banking Regulatory Commission (the “**CBRC**”) jointly released the *Administrative Measures for Securities Investment Funds Custody Business* (the “**2013 Measures**”), effective as of April 2, 2013. The *Procedures for the Granting of Securities Investment Fund Custodian Status* (the “2004 Procedures”) issued on November 29, 2004 will be repealed simultaneously. Compared to the provisions of the 2004 Procedures, the 2013 Measures have raised the standards of fund custodian qualifications, broadened the scope of fund custodians, developed the services of fund custodians and

strengthened the supervision on fund custody businesses. The details are as follows:

### **Allowing foreign commercial banks and other financial institutions to qualify as fund custodians**

The 2004 Procedures only allowed Chinese commercial banks to qualify as fund custodians. However, the 2013 Measures now allow corporate commercial banks and other legally established financial institutions to qualify as fund custodians.

The 2013 Measures stipulate that the application conditions and procedures for non-bank financial institutions to qualify as fund custodians shall be separately specified by the CSRC. On March 15, 2013, the CSRC released the *Interim Provisions on Non-bank Financial Institutions Operating Custody Businesses of Securities Investment Funds*. These provisions specify the application conditions and procedures for non-bank financial institutions to qualify as fund custodians.

### **Raising the standards of fund custodian qualifications**

Under the 2013 Measures, the applicant for fund custody shall now have at least eight (8) practitioners engaged in fund liquidation, accounting, investment supervision, information disclosure, and internal audit and control, whereas the 2004 Procedures only required five (5) practitioners. Moreover, the employees engaged in core business activities such as accounting and supervision shall have a working experience of more than two (2) years.

In addition to the above requirements, the 2013 Measures also require the applicant to ensure the fund property in custody is complete and independent.

### **Strengthening the internal control systems of fund custody business**

According to the 2013 Measures, the fund custodian shall, from the perspective of protecting fund shareholders, evaluate the terms of fund documents relating to investment scope, investment restrictions, fund fees, revenue distributions, accounting valuations, information disclosure, etc., as well as ensure compliance and clearness of the relevant provisions, full disclosure of risks and rationality and fairness of accounting valuations. The fund custodian shall also separately open cash accounts and security accounts for the fund in custody, establish the reconciliation system with fund managers and keep confidential the investment information of fund property and relevant documents.

The fund custodian shall establish a rational, strict and efficient internal control system for fund custody business, conduct examinations and evaluations, establish a contingency plan and improve the management system of employees, thereby maintaining independence between the fund custody business and other businesses.



### **Encouraging fund custodians to expand their services content**

The 2013 Measures explicitly approve and encourage fund custodians to perform the statutory duties as well as develop other value-added services including fund services outsourcing. However, the 2013 Measures require fund custodians to set up a specific team and business system that could ensure the necessary separation from the original fund custodian team in order to prevent a potential conflict of interest.

### **Keeping the fund custodian qualifications under strict supervision**

The 2013 Measures has set up punitive measures on illegally applying to qualify as a fund custodian and illegally engaging in fund custody business, as well as a reporting system that requires fund custodians to report to the CSRC on a regular basis. The 2013 Measures state that custodian banks that do not engage in fund custody business on a long-term basis or seriously violate the relevant regulations will be disqualified.

In addition, the 2013 Measures will not impose procedures where regulators are required to conduct on-site inspections of the applicant. If necessary, fund custodians can entrust foreign asset custodians to perform foreign asset custody business, but shall be required to conduct due diligence investigations and set up the relevant selection criteria and procedures.



## **Important Announcement**

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