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September 23, 2009

Memorandum to: Our Clients and Friends

Re: PRC Law and Practice on Foreign Related Guarantees

For various reasons, offshore financing has become an increasingly popular channel for many foreign invested enterprises (the “FIEs”) and their foreign shareholders to raise funds and capitalize their China operations. In order to ensure the performance of the credit agreements, foreign lenders often desire the underlying repayment obligations to be secured by certain collateral provided by domestic borrowers or the relevant third parties. Based on the currently effective PRC laws and regulations and our practical experience and for your general reference purpose only, we have prepared this memorandum to briefly summarize and address the main regulatory procedures and legal issues with respect to foreign related guarantees provided by Chinese entities. *(Solely for the purpose of this memorandum, “China” or the “PRC” refers to the People’s Republic of China, excluding Hong Kong SAR, Macau SAR and Taiwan, unless otherwise expressly specified herein.)*

I. Overview of Foreign Related Guarantees

1. Definition of Foreign Related Guarantees

The term “foreign related guarantee” as used herein refers to security interest provided by an onshore Chinese company (the “Guarantor”, excluding foreign invested financial institutions incorporated in China (the “FIFIs”)) in the form of surety, mortgage and/or pledge in favor of a foreign lender or a FIFI (the “Beneficiary” or the “Creditor”) to ensure that, if the debtor fails to perform its obligations under the credit agreement, the Guarantor will perform the underlying repayment obligation instead, or the Creditor may satisfy its claim on a priority basis through an offset based on a value of the pledged/mortgaged assets that is mutually agreed by the Guarantor and the Beneficiary, a sale or an auction sale of the pledged/mortgaged assets. In practice, foreign related guarantee is commonly used to secure the following debts:

- (a) Foreign currency denominated debts extended by foreign entities or FIFIs to onshore Chinese companies;¹

¹ According to the Foreign Related Guarantee Laws, the RMB-denominated debts extended to onshore entities by foreign-invested banks approved to engage in RMB business should not be treated as foreign debts and are therefore subject to no approval or registration procedures. Therefore, the security interest provided for such RMB-denominated debts should be neither treated as foreign related guarantee nor subject to any prior approval or registration

- (b) Foreign debts borrowed by offshore subsidiaries of onshore Chinese companies (the “Offshore Subsidiaries”).

Please note that, foreign related guarantee may be recognized and protected by PRC laws only if it has been duly approved by and/or registered with competent governmental authorities.

2. Legal Framework for Foreign Related Guarantees

The currently effective PRC laws and regulations governing foreign related guarantee mainly include the following (collectively, the “Foreign Related Guarantee Laws”):

- ✓ General laws and regulations in respect of foreign related guarantees (such as the *PRC Guarantee Law* and the *PRC Property Rights Law*)
- ✓ *Administrative Measures on Foreign Related Guarantees Provided by Domestic Entities* (effective as of October 1, 1996)
- ✓ *Implementing Rules for the Administrative Measures on Foreign Related Guarantees Provided by Domestic Entities* (effective as of January 1, 1998)
- ✓ Various circulars and official replies issued by the State Administration of Foreign Exchange (“SAFE”) from time to time and provisions applicable to foreign related guarantee stipulated in relevant judicial interpretations issued by the PRC Supreme People’s Court

II. Qualified Parties to and Form of Foreign Related Guarantees

1. Qualified Parties under Foreign Related Guarantee

Parties to foreign related guarantee include the Guarantor, the Guarantee (as defined below) and the Beneficiary. Parties to an effectively established foreign related guarantee should meet the following requirements pursuant to the Foreign Related Guarantee Laws:

(a) Guarantors

Except for FIFIs, almost all onshore Chinese companies are permitted to act as qualified Guarantors under foreign related guarantee, which include, without limitation, domestically funded enterprises (the “DFEs”), domestically funded financial institutions and FIEs (including Sino-foreign equity joint ventures and Sino-foreign cooperative joint ventures (collectively, the “JVs”) and wholly foreign-owned enterprises (the “WFOEs”).

(b) Guarantees

The qualified guarantees under foreign related guarantee include DFEs, FIEs and their respective Offshore Subsidiaries (the “Guarantees”), provided that:

- (i) They are not running in the red; and
- (ii) If the Guarantee is an Offshore Subsidiary, its net asset/total asset ratio should be in principle no less than 10% (for trading enterprises) or 15% (for non-trading enterprises).

procedures.

We noted that in practice, some local SAFE offices have allowed the registration of certain foreign related guarantees provided by FIEs for their foreign shareholders or offshore sister companies. Nevertheless, most local SAFE offices still refuse to register such foreign related guarantee as they believe that offshore companies other than the Offshore Subsidiaries are not qualified Guarantees as a matter of PRC Foreign Related Guarantee Laws.

(c) Beneficiary: offshore business entities and FIFIs in general.

2. Form and Collaterals of Foreign Related Guarantee

According to the Foreign Related Guarantee Laws, except for the forms of lien and deposit (advance payment under the trading account is not deemed as deposit hereunder), Guarantors may provide foreign related guarantee in the forms of surety, mortgage and pledge, among which:

- (a) Surety may be provided in the forms of a letter of guarantee, a standby letter of credit, a promissory note, a bill of exchange or other instruments.
- (b) Mortgage may be created on assets that are not prohibited by applicable PRC laws from being mortgaged, which include, among others: (i) real properties and other attachments to land; (ii) land use right of construction lands; (iii) land use right of wasteland (such as barren hills, gullies, mounds and beaches) on which the Guarantors have a contractual right provided that the party awarding such contract has consented to the creation of such mortgage; and (iv) machines and transportation vehicles.
- (c) Pledge may be created on personal properties whose titles are not prohibited from being transferred under PRC laws as well as property rights that can be lawfully pledged, including, without limitation: (i) bills of exchange, cheques, promissory notes; (ii) bonds, certificates of deposit, warehouse receipts, bills of lading; (iii) transferable shares, equity; and (iv) transferable exclusive use rights of registered trademarks, property rights of patent rights and copyrights and other intellectual property rights.²

For mortgage and pledge, the Guarantors should have the ownership or property rights over the collaterals so mortgaged or pledged.

III. Supervision over Foreign Related Guarantees

Under PRC law and practice, foreign related guarantee is subject to SAFE offices' supervision since China is still a country with foreign exchange control and onshore Chinese companies, once becoming Guarantors under foreign related guarantee, will potentially be held liable for debts denominated in foreign currencies.

1. Classified Supervision and Basic Requirements

Generally speaking, SAFE offices' administration and supervision over foreign related guarantee is focused on such aspects as the requirements for provision of foreign related guarantee, the permitted amount of foreign related guarantee, the scope of qualified Guarantees (together with the types of the underlying debts), the scope of approval authorities for foreign related guarantee and the extent of

² Currently, certain local SAFE offices refuse to approve or register foreign related guarantee created on contractual land operation rights or account receivables. Therefore, it is advisable for investors to make further inquiry with the competent SAFE offices when engaging in specific projects.

strictness thereof. Further, SAFE offices are imposing quite different requirements on Guarantors based on their different natures. Generally speaking, DFEs are subject to SAFE offices' most stringent scrutiny, while WFOEs are only under minimal level of supervision. For a comparison analysis of SAFE supervisions in this connection, you may refer to Appendix I attached hereto.

2. SAFE Offices' Supervision Mechanism

Practically speaking, the management and supervision of SAFE offices over foreign related guarantee can be classified into two parts:

(a) Supervision on Establishment of Foreign Related Guarantees

All foreign related guarantee related agreements are required to be duly registered with SAFE offices within a legally prescribed period (usually 15 days after execution thereof) (the "SAFE Registration"), some of which are required to be approved by SAFE offices first (the "SAFE Approval").

No SAFE Approval is required for: (i) foreign related guarantee provided by WFOEs; (ii) foreign related guarantee provided by DFEs or JVs with their own assets against their own debts; and (iii) certain types of foreign related guarantee provided by domestically funded financial institutions.

(b) Supervision on Enforcement of Foreign Related Guarantee

The enforcement of foreign related guarantee (which will mainly involve purchase and remittance of foreign exchange by Guarantors in order to fulfill their security obligations) should be approved by the competent SAFE office. No foreign related guarantee can be enforced without prior approval from the competent SAFE office.

In addition, pursuant to the Foreign Related Guarantee Laws, a prior consent from the Guarantor³ and an approval from the competent SAFE office should be obtained if (i) any amendment is made to the major provisions of the underlying credit agreement that will result in a change of the secured obligations under foreign related guarantee; or (ii) the Beneficiary has transferred its rights under relevant foreign related guarantee. Otherwise, the Guarantor will be released automatically from its security obligations. However, for foreign related guarantee whose establishment is not subject to SAFE Approval, such approval mentioned in the preceding sentences will not apply.

3. Legal Consequences of Non-Compliance

According to the Foreign Related Guarantee Laws, a foreign related guarantee contract may be deemed null and void if the applicable SAFE Approval and/or SAFE Registration are not effectuated.

It is worth noting that even if the foreign related guarantee agreement becomes null and void, the Guarantor under the invalidated foreign related guarantee contract should still be held liable for certain responsibilities in accordance with the following principles: (i) if any judgment or arbitration award has been rendered by the competent court or arbitration tribunal, the Guarantor should undertake responsibilities prescribed in such judgment or award; (ii) if no judgment or arbitration award has been rendered but the parties have reached an agreement through consultation, the responsibility to be borne by the Guarantor

³ With respect to the assignment of Beneficiary's rights, no consent of the Guarantor will be required if the foreign related guarantee contract so provides.

should be determined as follows: (A) if the underlying credit agreement is valid but the foreign related guarantee contract is otherwise void, the portion of liability to be borne by the Guarantor should not exceed half of the portion that the debtor is unable to discharge; and (B) if the foreign related guarantee contract becomes void due to the invalidity of the underlying credit agreement and the Guarantor is at fault, the portion of liability to be borne by the Guarantor should not exceed one-third (1/3) of the portion that the debtor is unable to discharge.

IV. Other Approval and Registration Procedures

In addition to the aforesaid SAFE Approval and SAFE Registration, the following government approval, registration or filing procedures should also be fulfilled in certain circumstances.

1. Pledge of Equity/Shares in An FIE is Subject to Approval by the Competent Office of the Ministry of Commerce (“MOFCOM”)

According to applicable PRC laws and regulations, pledge of equity/shares in an FIE will not be effectively established until it is duly approved by the MOFCOM office originally approving its establishment and registered with the competent office of the State Administration for Industry and Commerce (“SAIC”).

Please also note that based on our practical experience, equity pledge by FIEs of their equity interest in onshore subsidiaries is required by some local MOFCOM offices to be approved and registered with reference to the above-mentioned procedures as well.

2. Certain Onshore Collaterals are Subject to Registration Formalities

Certain onshore collaterals are required by PRC law to be registered with competent government authorities after the relevant foreign related guarantee is duly approved and/or registered with competent SAFE offices (e.g., the mortgage of land use right and real property should be registered with competent land administration authority and the mortgage of equipment should be registered with competent SAIC offices). Otherwise, foreign related guarantee created on such kind of collaterals may still be deemed not validly established even if it is approved by and/or registered with SAFE offices. According to our knowledge, however, a few local land administration authorities may refuse to register mortgage of land use right and real property. Therefore, to be safe, it is advisable for the relevant parties to make due inquiries with competent local land administration authorities before entering into any foreign related guarantee arrangement.

3. Foreign Mortgages Created on WFOE’s Assets or Interests are Subject to Approval by Competent MOFCOM Offices

Foreign related guarantee provided by a WFOE through mortgage of its own assets or interests is required by applicable PRC law to be approved by the competent MOFCOM office and registered with the competent SAIC office. We noted, however, that in practice many local MOFCOM offices are no longer requiring such mortgages to be subject to their approvals.

V. Other Notable Issues

1. Governing Law of Foreign Related Guarantee Contracts

In practice, many parties prefer to choose laws of jurisdictions other than China as governing laws for their foreign related guarantee contracts. Note however

that the validity of such choice is still controversial amid PRC judicial authorities. Most Chinese courts believe that foreign related guarantee contracts should only be governed by PRC laws, so the choice of governing law of any jurisdiction other than China is null and void. Some Chinese courts, however, would like to recognize the validity of such choice so long as the relevant foreign related guarantee contracts are in compliance with mandatory PRC law provisions governing security. In this connection, no matter which law of jurisdiction is chosen for the foreign related guarantee contract, the relevant parties should always manage to comply with all mandatory PRC law provisions governing foreign related guarantee (such as those related to SAFE Approval and SAFE Registration).

Based on the foregoing, in order to ensure the valid establishment of foreign related guarantee, the Beneficiaries need to pay due attention to the effectuation of relevant PRC approval and/or registration procedures even if the foreign related guarantee contract is not governed by PRC law as agreed by the parties thereto.

2. Validity of Undertaking Letters

We noted that, during the course of offshore financing by onshore borrowers, a letter of undertaking will be customarily issued to offshore creditors by their onshore parent companies or relevant PRC local governments, which normally states that: “Our government/company is willing to urge the debtor to make timely repayment of the principal and interest accrued thereon to the creditor within the agreed time period. Should the debtor commit any default, our government/company will be liable to resolve the dispute and prevent your company from suffering any economic loss”. In practice, there are cases where offshore creditors request the competent courts to order the relevant local government or onshore entities issuing the undertaking letters to bear the corresponding security obligations.

It is worth noting that not all letters of undertaking are in nature legally binding security instruments. The PRC Supreme People’s Court has pointed out in its trial guidelines that, when it comes to determining whether a “letter of undertaking” constitutes a surety as defined in the *PRC Security Law*, the local courts should take into consideration the background and content of the undertaking letter as well as other relevant facts. Thus, the PRC courts tend to ascertain the validity of undertaking letters on a case-by-case basis. If an undertaking letter is ruled by the competent people’s court as constituting a comfort letter rather than foreign related guarantee, the issuer of such letter of undertaking will not need to bear the security obligations accordingly.

3. Enforcement of Foreign Related Guarantee

If the Guarantor of foreign related guarantee fails to perform its obligations thereunder, the Beneficiary may seek remedy by filing a lawsuit before the competent court or submitting the dispute for arbitration. The Beneficiary may, upon receipt of the effective judgment or arbitration award, apply to the competent court for compulsory enforcement of such judgment or award.

* * *

The above is our brief summary with respect to foreign related guarantee provided by onshore Chinese companies and the approval, registration and/or filing procedures applicable to the establishment of foreign related guarantee based on the currently effective PRC laws and our experience. Since the laws and regulations may be

interpreted and applied differently at different locations in China and the PRC foreign exchange administration system will change and develop from time and time to address newly emerged issues, this memorandum is for your general reference only and shall not be relied on as any formal PRC legal opinion with respect to any specific matter. If there is any discrepancy between our discussions herein and any rule or official interpretation to be issued by the relevant PRC government authorities, such new rule or interpretation shall prevail.

If you have any questions about this memorandum, please do not hesitate to contact us.

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Appendix I

According to the Foreign Related Guarantee Laws, we have set forth below the specific requirements for and supervisions over foreign related guarantee provided by Guarantors in terms of their corporate types for your reference purpose only. Please note that, the specific cases in practice need to be dealt with in accordance with the very procedural requirements and practices adopted by the competent local SAFE offices.

➤ Restrictive Provisions:

	DFEs	JVs	WFOEs
Permitted Amount of Foreign Related Guarantee	Neither exceeding 50% of the net asset nor the foreign exchange revenue of the Guarantor in the immediately preceding year.		
Requirements for Guarantors	Trading Enterprise: Net Assets/Total Assets \geq 15%; Non-Trading Enterprise: Net Assets/Total Assets \geq 30%		Foreign mortgage should meet the following requirements: (i) The Guarantor's registered capital has been duly paid up by its shareholder; and (ii) The expiry date of the mortgage term should occur on or prior to the expiry of the operation term of the Guarantor.
Restrictions on the Secured Debts	No foreign related guarantee may be extended for FIE shareholders' obligation of registered capital contribution.		
	DFEs can only provide foreign related guarantee for their immediate subsidiaries or against the portion of debts pro rata to the Chinese party's shareholding in their partially owned companies; ⁴ When DFEs provide foreign related guarantee against the portion of debts pro rata to the Chinese party's shareholding in an FIE, the portion of debts pro rata to the foreign party's shareholding should have already been duly secured by security interest.		

⁴ According to applicable PRC law, where the Guarantee is an FIE listed offshore by means of, among others, issuing B shares or H shares, DFEs may provide foreign related guarantee against its total amount of debts. However, since many local SAFE offices are not quite familiar with the aforesaid cases as they are rarely seen in practice, it is advisable for investors to make further inquiry with the competent SAFE office when engaging in specific projects.

➤ SAFE Supervision over Foreign Related Guarantee:

		DFE	JV	WFOE
SAFE Approval (valid for 6 months)	Approval Levels	<p><u>Local SAFE office in the place where the Guarantor is located:</u> Foreign related guarantee provided for DFEs; Foreign related guarantee provided for FIEs with a term of up to one year (including one year); foreign related guarantee provided for Offshore Subsidiaries.</p> <p><u>SAFE:</u> Foreign related guarantee provided for FIEs with a term of more than one year; and foreign related guarantee provided by DFEs directly administered by the central government and FIEs duly registered with SAIC (excluding WFOEs).</p>		N/A
	Approval Admin.	Provision of foreign related guarantee should be subject to SAFE Approval on a deal-by-deal basis except for foreign mortgages or pledges provided by DFEs and JVs with their own assets against their own debts.		No SAFE Approval is required.
SAFE Registration		Deal-by-deal registration: the foreign related guarantee contract should be registered with the SAFE office in the place where the Guarantor is located within 15 days after the execution thereof.		
Approval for Enforcement		The enforcement of foreign related guarantee should be approved by the SAFE office in the place where the Guarantor is located.		

关于：中国境内企业对外担保的主要法律规定与实践

境外融资是许多外商投资企业及其境外股东筹集资金的方式。为确保相关融资合同项下债务的履行，提供融资的境外公司或金融机构可能要求债务人以自身财产提供担保或者取得相关第三人为债务人提供担保。本所律师根据中国现行有效的对外担保的法律法规和相关实践操作，对中国境内企业提供对外担保的主要法律程序进行了简要阐述，以期给拟提供对外担保的境内实体以及拟作为对外担保受益人的境外机构以参考（仅为本备忘录之目的，除特别注明外，“中国”不包括香港特别行政区、澳门特别行政区以及台湾地区）。

一、对外担保概述

1. 对外担保的定义

本备忘录讨论的对外担保，是指中国境内的商业实体（“担保人”，境内外资金融机构除外）以保证、抵押或质押等方式向中国境外的商业实体或者中国境内的外资金融机构（“受益人”也即“债权人”）承诺，当债务人未按照其与债权人的约定偿付债务时，由担保人代为履行偿付义务，或由受益人以担保人抵押、质押的财产折价或以拍卖、变卖该等财产的价款优先受偿的行为。实践中常见的对外担保主要是为以下债务提供的：

- (a) 境内商业实体对境外实体或境内外资金融机构的外币债务；¹以及
- (b) 境内商业实体的境外投资企业的境外债务（主要是指境内商业实体在境外注册的全资及参股企业（“境外投资企业”）的境外债务）。

请注意，对外担保如未经依法批准或登记，将不受中国法保护。

2. 对外担保的法律法规环境

目前专门规范对外担保行为的法律法规（以下统称“对外担保相关法规”）主要包括：

- ✓ 有关担保的一般性的法律法规（如《中华人民共和国担保法》和《中华人民共和国物权法》等）
- ✓ 《境内机构对外担保管理办法》（1996年10月1日起施行）
- ✓ 《境内机构对外担保管理办法实施细则》（1998年1月1日起施行）
- ✓ 中国国家外汇管理局（连同其地方分支机构，统称“外管局”）关于对外担保相关问题陆续发布的通知、复函以及最高人民法院的有关司法解释中的相关条款

二、对外担保的主体和方式

¹ 根据对外担保相关法规的规定，境内经批准经营人民币业务的外资银行向境内机构发放的人民币贷款，不视为境内机构的对外债务，不需要批准或进行外债登记。因此，为此类人民币贷款提供的担保，也不视为对外担保，不需要事前批准，也不进行对外担保登记。

1. 对外担保的主体要求

对外担保涉及担保人、被担保人和受益人三方主体。只有符合对外担保相关法规要求的实体之间方能建立起有效的对外担保关系，对外担保相关法规对各主体的范围要求如下：

(a) 担保人

除境内外资金融机构以外，基本上所有的境内商业实体均可以根据对外担保相关法规的规定提供对外担保，包括但不限于：中资金融机构，内资企业以及外商投资企业（包括中外合资经营企业、中外合作经营企业（二者合称为“合资企业”）和外商独资企业（“外商独资企业”））。

(b) 被担保人

对外担保的被担保人包括注册在中国境内的企业和该等境内企业的境外投资企业，但应符合下列条件：

- (i) 不得为亏损企业；并且
- (ii) 境外投资企业的净资产与总资产的比例应原则上不得低于 10%（如为贸易型企业）或 15%（如为非贸易型企业）。

据我们了解，实践中，部分地方的主管部门可能会允许一些外商独资企业为除其境外投资企业以外的其他境外关联方（如其母公司）提供对外担保。但也有不少地方主管部门认为该等其他境外关联方不具备成为对外担保被担保人的资格，因此拒绝为其办理相关登记。

(c) 受益人：一般情况下为境外商业实体和境内外资金融机构。

2. 对外担保可采用的方式及标的

根据对外担保相关法规的规定，担保人可以通过保证、抵押和质押等方式提供对外担保，但不得以留置或定金（贸易项下的预付款不属于本处所言的“定金”）的方式提供对外担保。其中：

- (a) 保证可以以保函、备用信用证、本票、汇票等形式出具；
- (b) 就抵押而言，可以在中国法律和行政法规未禁止抵押的财产上设定抵押，包括但不限于：(i)建筑物和其他土地附着物，(ii)建设用地使用权，(iii)抵押人依法承包并经发包方同意抵押的荒山、荒沟、荒丘、荒滩等荒地的土地使用权，以及(iv)机器、交通运输工具；
- (c) 就质押而言，可以在法律、行政法规禁止转让的动产以外的其他动产上设定质押，也可以以法律、行政法规允许出质的财产权利出质。其中，可以出质的权利包括但不限于：(i)汇票、支票、本票，(ii)债券、存款单，仓单、提单，(iii)可以转让的股票、股权，以及(iv)可以转让

的注册商标专用权、专利权、著作权等知识产权中的财产权。²

对于抵押和质押，担保人应该拥有作为抵押物和质物的所有权或财产权利。

三、外管局对对外担保的管理

鉴于中国依然实行外汇管理，而提供对外担保可能使作为担保人的境内机构承担以外币支付的债务，因此中国法律规定，所有对外担保均应由外管局进行监督和管理。

1. 分类管理及基本要求

外管局主要从以下几个方面规范担保人的对外担保行为：提供对外担保应满足的条件、对外担保的限额、被担保人的类型（以及主债务的类型）以及对外担保的审批权限和宽严程度。其中，基于担保人企业类型的不同，外管局的管理程度和要求也不同。总体而言，外管局对中资企业对外提供担保的限制最为严格，而对外商独资企业最为宽松。外管局对于不同类型担保人提供对外担保的管制的比较，请参见本备忘录附表一的相关内容。

2. 管理方式

具体操作层面上，外管局对对外担保的管理可分为两个阶段：

(a) 对外担保的签约管理

分为对外担保的事先批准（“对外担保批准”）和对外担保的事后登记（“对外担保登记”）。其中，对外担保批准是指担保人在提供对外担保之前，就对外担保行为申请主管外管局的批准，而对外担保登记则是指当事人签署对外担保合同后，在规定时间内（通常为签订相关对外担保合同后的 15 天内）到主管外管局完成对外担保登记。

所有的对外担保均需要进行对外担保登记，但并非所有的对外担保均需要对外担保批准。其中，以下几项对外担保无需取得外管局的事先批准：(i)外商独资企业提供的对外担保；(ii)内资企业和合资企业为自身债务提供的对外抵押或对外质押；及(iii)中资金融机构提供的部分对外担保。

(b) 对外担保的履约核准

是指外管局就担保人履行其对外担保合同项下的担保义务（主要是担保人为履行担保义务而进行的购汇和外汇汇出）进行批准。所有的对外担保如需履约均需要经过外管局的核准方可进行。

² 除前述标的外，对于以土地承包经营权、应收账款为标的的对外担保而言，目前部分外管局拒绝核准该等担保或为其办理登记。如遇具体项目时应就该等问题进一步咨询主管外管局。

此外，根据对外担保相关法规，债权人与被担保人修改债务合同的主要条款导致担保责任变更的，或债权人将担保项下的权利转让的，均应取得担保人同意³并报经外管局批准。否则，担保人的担保义务将自动解除。但是不需外管局事前批准的对外担保，债权人与被担保人修改债务合同主要条款或债权人转让担保项下的权利，不需获得外汇局批准。

3. 未遵守对外担保管理相关规定的后果

根据对外担保相关法规，未能遵守对外担保签约管理的相关规定，包括未进行对外担保登记或者应经外管局批准的对外担保未经批准，均将导致对外担保合同无效。

应指出的是，对外担保合同无效并不意味着担保人一定无需承担任何责任，根据规定，无效对外担保合同担保人按照以下原则承担责任：(i)已经法院、仲裁机构判决或裁定的，担保人应按照人民法院或仲裁机构的裁定和判决金额核准履约；或(ii)担保人与债权人未经人民法院或仲裁机构裁定自行达成协议的，担保人承担责任的金额根据以下原则判断确定：主合同有效而对外担保合同无效的，担保人的责任不得超过债务人不能清偿部分的 1/2；主合同无效导致对外担保合同无效而担保人有过错的，担保人的责任不得超过债务人不能清偿部分的 1/3。

四、对外担保涉及的其他审批、登记

除上述提及的主管外管局对对外担保的批准和登记管理外，视对外担保的主体和标的的特殊性，对外担保还可能需得到或进行以下政府审批或登记、备案，方可有效设立。

1. 以外商投资企业的股权出质须经商务部门批准

根据相关规定，以外商投资企业的股权出质，应报送批准该企业设立的商务部门审查，并应持该商务部门同意出质的批复向主管该外商投资企业的工商局办理登记。未按规定办理审批和备案的质押行为无效。

据我们了解，实践中部分地方的商务部门要求外商投资企业在质押其境内投资企业的股权时也要参照上述关于审批和登记的规定。

2. 以特定抵押物、质物设定抵押权、质权应经相应登记机关登记

对于根据中国有关法律规定需要就相关抵押物的抵押办理抵押物登记的，抵押人在办理对外担保登记手续之后，还应到相应部门办理抵押物、质押物登记（如抵押土地使用权和厂房应到相关房屋和土地管理部门办理抵押登记，抵押机器设备应到相关工商局办理抵押登记），否则，相关对外担保即使取得了外管局的批准或登记仍有可能被认为没有合法设立。根据我

³ 对债权人转让其担保项下的权利而言，担保合同另有约定的，可不经担保人同意。

们的了解，实践中有个别地区的房屋和土地管理部门可能不受理房产和土地的对外抵押申请。因此，为谨慎起见，相关当事方在就对外担保作出安排之前应先咨询当地房屋和土地管理部门。

3. 外商独资企业对外抵押其财产或权益应经商务部门批准

根据相关规定，外商独资企业将其财产或者权益对外抵押，须经其主管商务部门批准，并向其主管工商局备案。但据我们了解，目前实践中很多地方的商务部门已经不严格执行该等规定，即不再对外商独资企业对外抵押行为实施审批管理。

五、对外担保值得注意的其他几个问题

1. 对外担保合同的法律选择与适用

实践中，很多对外担保合同的当事人选择适用其他司法辖区的法律管辖其对外担保合同。中国司法实践中对于该等法律选择的效力存在一定的分歧，大部分法院认为该等法律选择不发生法律选择的效力，相关的对外担保行为应适用中国法；但也有观点不否认该等法律选择的效力，但认为该等法律选择不排除中国关于担保的强行性法规的适用。可见，无论是否选择适用相关的其他国家/地区的法律，中国法律法规关于对外担保的强行性规定（如关于担保的批准和登记的相关规定就属于强行性规定）均应该被遵守。

因此，即使相关当事人一致同意选择适用其他国家/地区的法律，担保的受益人仍应关注相应批准及/或登记程序是否已完成，以确保相关对外担保有效设立。

2. 承诺性函件的效力

我们注意到，在债务人对外融资、尤其是境外融资的过程中，经常有中国的地方政府或者债务人在国内的母公司等向境外债权人出具包含类似以下措辞的承诺性函件：“本政府/公司愿意督促债务人切实履行还款责任，按时归还债权人贷款本息。如债务人出现违约情况，本政府/公司将负责解决，不让贵司在经济上蒙受损失。”实践中，亦存在境外债权人凭借该等承诺性函件要求人民法院判决地方政府或境内公司履行担保义务的案例。

应注意的是，并非所有此类函件均属于有约束力的担保性文件。最高人民法院曾在其审判指导工作中指出，人民法院认定此类函件是否构成我国《担保法》意义上的保证，应根据出具人出具该等函件的背景情况，该等函件的具体内容以及可以查明的其他事实情况作出。由此看来，人民法院在审判实践中应更倾向于个案分析，以确定某个具体的承诺性函件的效力。如果法院认定该等函件只是属于安慰函的性质，并不构成对外保证，则出具该等函件的一方理论上不会因此而承担对外担保责任。

3. 对外担保的执行

如果根据相应的担保合同的规定，担保人应该承担担保责任，但担保人拒绝履行义务，则为要求担保人履行担保义务之目的，担保合同的受益人需向有管辖权的仲裁机构或者法院提起诉讼，要求担保人履行担保义务；在获得仲裁机构或法院生效的仲裁裁决或判决之后，受益人可以凭该等仲裁裁决或判决向相应的法院申请强制执行。

* * *

以上是我们根据现行有效的中国法律法规以及实践对境内商业实体提供对外担保，特别是有效设立对外担保应取得的批准、登记及/或备案等进行的简单总结，希望对阁下有所帮助。由于中国各地的实践和具体操作不尽相同，并且中国外汇管理制度也面临新的变革以适应形势发展的需要，如果本备忘录内容与相关政府部门另行颁布的任何规章、通知或政策有不一致之处，应以有关政府部门颁布的规定为准。本备忘录仅供阁下用作一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。

如阁下对于本备忘录述及之内容有任何疑问，敬请随时与敝所联系。

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2009年9月23日

附表一

本表是根据对外担保相关法规整理的外管局对几类境内商业企业提供对外担保的相关具体要求和方式,仅供参考,具体应以各地方外管局的具体操作为准。

➤ 相关限制性规定:

	内资企业	合资企业	外商独资企业
对外担保的 余额限制	不得超过其净资产的 50%，以及上年度的外汇收入		
担保人应满足的 条件	贸易型企业： 净资产/总资产 ≥ 15%； 非贸易型企业： 净资产/总资产 ≥ 30%		将财产对外抵押应符合以下条件： (i) 投资者已按照章程的规定如期缴付出资； (ii) 抵押期限不超过企业经营期限
对被担保的债权的限制	不得为外商投资企业股东的出资义务提供担保		
	仅可为其直属子公司或其参股企业中的中方投资部分对应比例的外债提供担保； ⁴ 为外商投资企业的中方投资部分对应比例的对外债务提供担保时，需确保外方投资部分对应比例的对外债务已获得担保		

⁴ 根据相关规定，被担保人为以发行 B 股或者 H 股等方式在境外上市的外商投资企业除外，即在该等情况下，内资企业也可能为其整个债务提供担保。但据我们了解，鉴于该等实践比较少见，不少地方外管局并不是很熟悉，故遇具体项目时最好作进一步咨询。

➤ 外管局对对外担保的管理:

		内资企业	合资企业	外商独资企业
对外担保批准 (有效期为六个月)	审批权限	<p>担保人所在地外管局: 为内资企业提供的对外担保, 为外商投资企业提供的1年期以内(含1年)的对外担保, 为境外投资企业提供的对外担保</p> <p>国家外管局: 为外商投资企业提供的1年期以上(不含1年)的对外担保; 担保人为中央直属内资企业和在国家工商局领取营业执照的外商投资企业(不含外商独资企业)的</p>		不适用
	审批管理	除以自身资产为自身债务提供对外抵押或质押无需批准以外, 其他的对外担保均需逐笔批准		无需取得批准
对外担保登记	逐笔登记: 担保人应自担保合同订立之日起15天内到所在地外管局登记			
履约核准	向担保人所在地外管局申请核准			