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Memorandum to: Our Clients and Friends

### **PRC Law and Practice on PIPE Investments** **by Foreign PEs in A-Share Companies**

PIPE investment by PEs, although quite prevailing and mature in the international capital market, is still not commonly seen in the domestic PRC A-share market. However, foreign PEs are more likely to get higher returns from their investments in A-share listed companies at a time when the valuation of many A-share listed companies are at a reasonable or relatively low level due to the recent downward adjustment of the A-share market from its historic peak. Based on the provisions of applicable PRC laws and regulations and our practical experience, we have prepared this summary of the current PRC regulatory framework and practice with respect to foreign PEs' purchase of shares of A-share listed companies ("Foreign PEs' PIPE Investment in A-Shares") for your general reference.

#### **I. Overview of PRC Legal Frame**

Currently there is no PRC law or regulation that specifically addresses issues with respect to PIPE. As is the same with foreign investors' investment in A-share listed companies in general, when making PIPE investment in A-share listed companies, foreign PEs are subject to (i) applicable PRC laws and regulations governing entry of foreign investment, merger and acquisition of domestic companies by foreign investors, acquisition of listed companies and issuance of securities, as well as (ii) the regulations of various PRC authorities, including (x) authorities for general supervision purposes in this connection, such as the PRC Ministry of Commerce ("MOFCOM"), China Securities Regulatory Commission ("CSRC") and the State Administration of Foreign Exchange, and (y) other relevant PRC government authorities for industry-specific supervision purposes (e.g., the State-owned Assets Supervision and Administration Commission ("SASAC") or the PRC Ministry of Finance, if state-owned assets are involved; China Banking Regulatory Commission or China Insurance Regulatory Commission, if banking or insurance businesses are involved; the National Development and Reform Commission ("NDRC"), if fixed assets investment or certain special industries are involved).

In addition to general PRC laws and regulations such as the *Catalogue of Guidance for Foreign Investment Industries, Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Administrative Measures on the Acquisition of Listed Companies, Administrative Measures on the Issuance of Securities by Listed Companies, Implementing Rules on the Private Placement of Shares by Listed Companies*, there are two other regulations directly addressing issues related to Foreign PEs' PIPE Investment in A-Shares: (i) the *Administrative Measures*

*on the Strategic Investment in Listed Companies by Foreign Investors*, applicable to the strategic investment (which may be conducted through acquisition by agreement, subscription to the private placement of shares or other methods as stipulated in applicable PRC laws and regulations) by qualified foreign investors (including foreign PEs) in A-share listed companies that have completed the non-tradable share reform (the “Share Reform”) or are listed after the promulgation of the national share reform policies (collectively, “Fully-circulating A-share Listed Companies”), provided that the shares so purchased should in principle account for at least 10% of the outstanding shares of the listed company and should not be transferred within the next three years;<sup>1</sup> and (ii) the *Notice on the Relevant Issues concerning the Transfer of State-owned Shares and Corporate Shares of Listed Companies to Foreign Investors*, applicable to the acquisition by foreign investors (including foreign PEs) of the state-owned shares and corporate shares (collectively, the “Non-tradable Shares”) of A-share listed companies that have not completed the Share Reform,<sup>2</sup> pursuant to which and other relevant provisions governing the Share Reform the transfer of Non-tradable Shares should in principle be conducted through public bidding process, and certain specific arrangement should be made in connection with the Share Reform. In addition, the Non-tradable Shares so acquired by the foreign investors should be prohibited from listing and trading for the first year after implementation of the plans for the Share Reform (the “Lock-up Period”) and may be listed and traded with certain percentage restrictions for the second and third year after implementation of the plans for the Share Reform (the “Restricted Trading Period”). We note however that the holders of the Non-tradable Shares of A-share listed companies in practice often make additional commitment with respect to the Lock-up Period and/or the Restricted Trading Period as required by law.

In spite of some basic or procedural restrictions such as those on equity ratio and holding period, in general, there exists no material legal obstacle for Foreign PEs’ PIPE Investment in A-Shares so long as such investment is in compliance with the PRC policies regarding the entry of foreign investment.

## **II. General Ways for Foreign PEs’ PIPE Investment in A-Shares**

Based on applicable PRC laws and regulations and market practice, foreign PEs may make investment in A-share listed companies mainly through the following ways:<sup>3</sup>

### **1. Direct Acquisition**

#### **(a) Acquisition by Agreement**

Acquisition by agreement refers to foreign PEs’ acquisition of shares of A-share listed companies through a private agreement with the transferor of such shares rather than through a bid trading system. Shares to be purchased through acquisition by agreement may be the Non-tradable Shares of A-share listed companies that have not completed the Share

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<sup>1</sup> If a foreign investor intends to purchase less than 10% of the outstanding shares of an A-share listed company, it may consider, among others, either applying for a QFII license to directly engage in securities trading business at the secondary market, or making investment through ways of indirect acquisition as discussed in this memorandum.

<sup>2</sup> Since there only exists a very small number of A-share listed companies that have not yet completed the Share Reform, the opportunities for foreign investors to acquire such companies’ PRC state-owned shares or corporate shares are quite restricted.

<sup>3</sup> When discussing Foreign PEs’ PIPE Investment in A-Shares hereunder, our hypothesis is that the relevant investment is in compliance with the PRC policies regarding the entry of foreign investment.

Reform, as well as the shares of Fully-circulating A-share Listed Companies (in principle, with the exception of shares subject to the lock-up period). Please note that:

- (i) The acquisition by agreement of the Non-tradable Shares of A-share listed companies that have not completed the Share Reform should be conducted through public bidding. In addition, the transferor and the transferee of such Non-tradable Shares should make some specific arrangement with respect to the Share Reform, or carry out the proposed acquisition by agreement together with the Share Reform. Further note that during the Share Reform process, a foreign PE, after acquisition of the Non-tradable Shares, as a principle should assume the commitment made by the transferor in relevant plans for the Share Reform with respect to the consideration for tradability of such Non-tradable Shares, and should undertake to be subject to the Lock-up Period and/or Restricted Trading Period in the capacity of the holder of such Non-tradable Shares.
- (ii) With respect to Foreign PEs' acquisition of Fully-circulating A-share Listed Companies by agreement, such acquisition should generally be conducted through strategic investment, i.e., a foreign PE should purchase at least 10% of the outstanding shares of a listed company, and the shares so purchased may not be transferred within at least three years.
- (iii) If the shares to be transferred are held by state-owned or state-controlled companies, the transfer price should be determined based on the average of the weighted average prices of 30 trading days prior to the date of announcement of the proposed share transfer (or the execution date of the relevant share transfer agreement if it has been approved that no announcement of the transfer is required); where there exists the necessity for a lower transfer price, the minimum price should not be lower than 90% of such averaged price; and
- (iv) Acquisition by tender offer will be triggered under the circumstance that a foreign PE will hold more than 30% of the outstanding shares of an A-share listed company if acquisition by agreement is accomplished (*according to our experience, CSRC generally tends to not grant the exemption of tender offer with respect to a foreign investor's acquisition of an A-share listed company by agreement*).

In practice, Newbridge's acquisition of Shenzhen Development Bank (000001) in 2004 and CVC's acquisition of "Zhuhai Zhongfu" (000659) during 2006 and 2007 were conducted through acquisition by agreement. The acquisition of "Shuanghui Development" (000895) by Goldman Sachs and CDH also involved acquisition by agreement.

(b) Subscription to the Private Placement of Shares by Fully-circulating A-share Listed Companies

A foreign PE may subscribe to the private placement of shares by Fully-circulating A-share Listed Companies, provided that such subscription may only be conducted through strategic investment, i.e., the foreign PE should subscribe for at least 10% of the outstanding shares of the listed company and the shares so subscribed for may not be transferred within at least three years thereafter.

According to applicable regulations, the issuance price of shares subject to

private placement should not be lower than 90% of the average price of the issuer's shares for the 20 trading days prior to the date of benchmark pricing.<sup>4</sup> Please note however that, even if such pricing principle is followed, in practice, CSRC may still request the applicant to re-determine the issuance price or may directly block an application if the issuance price specified in the relevant strategic investment agreement is apparently lower than the market price of the issuer's shares at the time of CSRC's examination. In addition, under the circumstance that a foreign PE will hold more than 30% of the outstanding shares of a Fully-circulating A-share Listed Company as a result of its subscription of the private placement shares, acquisition by tender offer will be triggered, which however may be exempted by CSRC if the shareholders general meeting of the issuer so agrees.<sup>5</sup>

One successful case of Foreign PEs' PIPE Investment in A-Shares through subscription to the private placement of shares was GIC's investment in "Yangguang" (000608) during 2006 and 2007, while Goldman Sachs' investments in "Midea" (000527), "Fuyao Glass" (600660) and "Yangzhiguang" (600673) as well as CVC's investment in "Chenming Paper" (000488) all experienced failure.

## 2. Indirect Acquisitions

A foreign PE may also consider investing in an A-share listed company indirectly by:

(a) Acquisition of the Parent Company or Controlling Shareholder of An A-share Listed Company

A typical case was Blackstone's acquisition of 20% stake in "BlueStar Group" (which owns three A-share listed arms) to obtain indirect ownership in listed companies in 2008.

(b) Acquisition of An A-Share Listed Company Via Its PRC Subsidiary through Acquisition by Agreement, Subscription to Private Placement of Shares, or Direct Participation in The Secondary Market<sup>6</sup>

IBM's recent 1.56% stake in "Sichuan Changhong" (600839) was conducted by one of its PRC subsidiaries through block trade.

Please note that due to the different legal nature between indirect and direct acquisition of A-share listed companies, with respect to foreign PEs' indirect acquisition, in addition to the general laws and regulations governing the acquisition of listed companies (e.g., acquisition by tender offer will be triggered

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<sup>4</sup> The date of benchmark pricing refers to the benchmark date for calculating the basic issuance price, which may be (i) the date for the announcement of the board resolution, (ii) the date for the announcement of the resolution of the shareholders general meeting, or (iii) the initial day of the placement period, in each case, with respect to the proposed private placement of shares.

<sup>5</sup> The legal basis for such exemption could be found in Article 62 of the *Measures for Administration over the Acquisition of the Listed Companies*.

<sup>6</sup> Please note that due to China's foreign exchange control, foreign-invested enterprises (excluding foreign investment companies) are generally prohibited from making equity investment (including purchasing A-shares) with their RMB funds converted from foreign exchange under capital account, so the scale of the acquisition by a foreign PE's PRC subsidiary is limited to a large extent by the amount of its self-owned RMB fund.

if a foreign PE will hold interests through indirect acquisition in more than 30% of the outstanding shares of an A-share listed company), other relevant laws and regulations, including but not limited to the *Interim Provisions on the Domestic Investment of Foreign-invested Enterprises* should also apply.

The methods as discussed above are currently the most common ways for Foreign PEs' PIPE Investment in A-Shares. In practice, foreign PEs may use a combination of different methods when acquiring an A-share listed company. As for structured PIPE (such as convertible bonds) which is frequently used in the international capital market, since currently no implementing rules can be followed in China, it is not a viable investment means for the A-share market and relevant cases can rarely be found in practice.

### III. Factors Restraining Foreign PEs' PIPE Investment in A-Shares

As mentioned above, currently there is no material legal obstacle with respect to Foreign PEs' PIPE Investment in A-Shares, and under the current economic situation, foreign PEs may potentially get good returns from their investments in A-share listed companies. However, there seems to be very limited number of successful PIPE cases conducted by foreign PEs on the A-share market, which according to our understanding may be due to the following factors:

First, the whole transaction process (from negotiation to closing) of Foreign PEs' PIPE Investment in A-Shares involves various PRC government approvals, which not only prolongs the entire investment period of a foreign PE (*according to a study report by Ernst & Young, it takes an average of about 12 to 24 months to complete an M&A deal in China, while comparatively in a mature market, the time needed is only 3 to 9 months*) but also subjects the transaction to more uncertainties.

Second, the PRC government is extremely cautious about foreign investors' acquisition of domestic famous enterprises or brands, which to some extent makes the acquisition or investment involving issues such as protection of national brands, avoidance of market monopoly or national economic safety prone to fail. Factors attributable to Goldman Sachs' failure to acquire "Midea" may include the PRC government's concerns as mentioned above in addition to the reported price factor. A more commonly recognized example in this connection is Carlyle's failure to make investment in "Xugong".

In addition, most A-share listed companies probably are not eager for capital at this moment, and some PRC companies are unwilling to sell their shares at a low price when A-shares are undervalued. A-share listed companies' difficulty in accepting certain mature PIPE operations such as privatization of listed companies may also have contributed in this regard.

### IV. Case Study<sup>7</sup>

#### Case 1 Goldman Sachs' Acquisition of "Shuanghui Development" (000895)

Key Words: Indirect Acquisition; Acquisition by Agreement; Acquisition by Tender Offer; Share Reform

- On April 26, 2006, Rotary Vortex Limited ("Rotary Vortex"), a Hong Kong special purpose vehicle jointly established by Goldman Sachs Group Inc. and CDH China Growth Capital Fund II, won the bid to acquire 100% stake in a PRC state-owned company Henan Luohe Shuanghui Industry Group Co., Ltd. ("Shuanghui Group") which held 35.715% stake in a Shenzhen-listed company Henan Shuanghui Investment & Development Co., Ltd. ("Shuanghui")

<sup>7</sup> All cases introduced in this memorandum are based on publicly available information.

Development”) for RMB2.01 billion. Shortly afterwards, Rotary Vortex paid RMB562 million to further acquire 25% stake (about RMB4.3788 per share) in Shuanghui Development from Luohe Haiyu Investment Co., Ltd. (“Haiyu Investment”). After the completion of the above two acquisitions, Rotary Vortex would directly and indirectly hold 60.715% of Shuanghui Development in total.

As Shuanghui Development was in the Share Reform process, the acquisitions were conducted together with such Share Reform. Rotary Vortex undertook to accept the considerations of Shuanghui Group and Haiyu Investment for obtaining tradability for their Non-tradable Shares, and to realize all commitments made by Shuanghui Group and Haiyu Investment with respect to the Share Reform.

- In August, 2006, SASAC approved the transfer of state-owned equity in Shuanghui Group. In December, MOFCOM gave its approval to the acquisitions. On February 8, 2007, CSRC issued its no-objection letter with respect to Rotary Vortex’s acquisition report. Rotary Vortex’s obligation to initiate acquisition by tender offer, however, was not exempted by CSRC.
- On February 8, 2007, Shuanghui Development announced the summary of the tender offer report with respect to the purchase of the remaining 39.285% of the total share capital of Shuanghui Development. As the tender offer was not aimed at the privatization of Shuanghui Development, the purchase price under the tender offer was only RMB18 per share (*Shuanghui Development had suspended trading since June 1, 2006 and the closing price of the last trading day prior to the suspension (i.e., May 31, 2006) was RMB31.17 per share*).
- On April 27, 2007, Rotary Vortex received the no-objection letter from CSRC with respect to the tender offer report, and Shuanghui Development announced the tender offer report, pursuant to which the purchase price was raised to RMB31.17 per share (*according to the announcement, Rotary Vortex adjusted the purchase price after taking into consideration several factors including the closing price of Shuanghui Development on the last trading day prior to the suspension*).
- On June 12, 2007, Shuanghui Development announced the completion of the acquisition by tender offer. On June 5, 2007, Rotary Vortex paid the purchase price for 3,400 shares offered by the other shareholders pursuant to the tender offer report and completed the registration for such shares on June 7, 2007.
- On June 29, 2007, Shuanghui Development completed its Share Reform and resumed trading, which indicated the consummation of Rotary Vortex’s acquisition of Shuanghui Development. The 60.715% shares of Shuanghui Development so acquired by Rotary Vortex may not be transfer within three years therefrom.

## **Case 2**      GIC’s Investment in “Yangguang” (000608)

Key Words: Strategic Investment; Private Placement

- On April 15, 2006, a subsidiary of GIC Real Estate Pte Ltd (“GIC”) and a Shenzhen-listed company Yangguang Co., Ltd. (“Yangguang”) entered into a letter of intent with respect to GIC’s strategic investment in Yangguang, pursuant to which Yangguang intended to issue through private placement 120 million shares of A-share common stock (accounting for 29.12% of Yangguang shares after the closing of the proposed private placement) to GIC, with the issuance price not lower than 105% of the average closing price of Yangguang shares for the 20 trading days prior to the date of the board meeting convened for the

private placement.

- On April 16, 2006, the private placement of shares to GIC was approved by the interim board meeting of Yangguang. On April 18, 2006, Yangguang announced the private placement report, pursuant to which the issuance price of shares subject to the proposed private placement was determined at 105% of the average closing price of Yangguang shares for the 20 trading days prior to the board meeting convened for the private placement (i.e., RMB5.71 per share). On May 19, 2006, the proposed private placement obtained approval from the interim shareholders general meeting of Yangguang.
- On November 15, 2006, the private placement of Yangguang shares to GIC was approved by MOFCOM in principle. On April 19, 2007, CSRC gave its preliminary approval, subject to conditions (the closing price of Yangguang jumped to RMB14.05 per share for the previous two days). On May 18, 2007, CSRC granted its final approval.
- On May 28, 2007, Yangguang issued 120 million shares of A-share common stock to GIC at RMB5.71 per share. On June 5, 2007, Yangguang completed the registration for such newly issued shares.
- On June 8, 2007, the additional Yangguang shares held by GIC were listed on Shenzhen Stock Exchange, subject to a lock-up period of three years.

### **Case 3**      Goldman Sachs' Investment in "Midea" (000527)

Key Words: Strategic Investment; Private Placement

- On November 21, 2006, a wholly-owned subsidiary of Goldman Sachs Group Inc. ("Goldman Sachs") and Shenzhen-listed GD Midea Holding Co., Ltd. ("Midea") entered into a private placement agreement, pursuant to which Goldman Sachs would subscribe for 75,595,183 shares of A-share common stock to be issued by Midea at RMB9.48 per share.
- The private placement of shares to Goldman Sachs was approved by the interim board meeting and the interim shareholders general meeting of Midea on November 21, 2006 and December 11, 2006, respectively.
- On June 8, 2007, Midea implemented the plan for the conversion of capital surplus into capital stock. In order to ensure that Goldman Sachs' shareholding ratio in Midea and its investment costs remain generally the same, the original private placement plan was adjusted so that the number of shares subject to the proposed private placement was increased to 151,190,366 and the subscription price was reduced to RMB4.74 per share.
- On June 13, 2007, MOFCOM approved Midea's private placement of shares to Goldman Sachs in principle, subject to the requirement that the number of shares to be issued should be the original 75,595,183 and the issuance price should not be lower than 90% of the average closing price of Midea shares for the 20 trading days prior to the announcement of the relevant board resolution (i.e., not lower than RMB7 per share). Such requirement turned out to be quite strict as compared with the adjusted private placement plan entered into by Goldman Sachs and Midea. Midea said in its announcement dated June 21, 2007 that it was in communications with MOFCOM, which had not yet gave its final reply.
- On August 29, 2007, CSRC blocked the adjusted private placement plan (Midea closed at RMB35.79 per share on August 28, 2007), which indicated the failure of Goldman Sachs' proposed investment in Midea.

#### Case 4      Blackstone's Investment in "BlueStar Group"

Key Words: Indirect Acquisition

- On September 7, 2007, an affiliate of The Blackstone Group ("Blackstone"), China National Chemical Corporation ("ChemChina") and China National BlueStar (Group) Corporation ("BlueStar Group", a wholly-owned subsidiary of ChemChina, with 27.08% stake in "BlueStar Cleaning" (000589), 53.96% stake in "BlueStar New Material" (600299) and 33.66% stake in "Shenyang Chemical" (000698)) entered into a share subscription agreement, pursuant to which Blackstone would pay USD600 million for 20% of the increased shares of BlueStar Group.
- In December 2007, NDRC approved Blackstone's investment in BlueStar Group.
- On October 6, 2008, ChemChina and Blackstone announced the closing of Blackstone's investment in BlueStar Group. On October 7, 2008, BlueStar Cleaning, BlueStar New Material and Shenyang Chemical disclosed in their respective announcements that MOFCOM had granted its permission to BlueStar Group's increase of registered capital and conversion into a Sino-foreign joint-stock limited company and that the relevant change registration with the State Administration for Industry and Commerce had been completed, which marked the consummation of Blackstone's indirect acquisition of three A-share listed companies.

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The above is a brief introduction of relevant PRC laws and regulations and practice with respect to Foreign PEs' PIPE Investment in A-Shares. With the development of PRC capital market, PIPE may become more popular on the domestic capital market and the relevant laws and regulations are sure to be improved. If there is any discrepancy between this memorandum and any future rules, circulars or policies to be issued by the PRC government authorities, such government issuance shall prevail. Again, this memorandum is for your general reference purpose only and shall not be relied on as any formal PRC legal opinion in any respect.

If you have any questions about this memorandum, please do not hesitate to contact us at [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com).

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## 外资 PE 进行 A 股 PIPE 投资的中国法律问题简析及案例简介

PE 进行 PIPE 投资在境外资本市场已较为成熟和普遍，但在中国 A 股市场还并不常见。不过，目前 A 股市场从历史高点大幅回调，不少 A 股上市公司的估值处于相对合理甚至偏低状态的情况，已引起一些外资 PE 的关注。外资 PE 若能在此时顺利入股 A 股上市公司，则可能有机会实现较高的投资回报。鉴于此，本所律师将在本备忘录中，对外资 PE 购买 A 股上市公司股份（“外资 PE 进行 A 股 PIPE 投资”）的相关中国法律规管和实践作简要介绍和探讨，供有兴趣的朋友参考。

### 一、 法律环境概述

中国现行法律法规并没有直接针对 PIPE 的专门规定。在外资 PE 进行 A 股 PIPE 投资的过程中，外资 PE 同一般外国投资者投资 A 股上市公司一样，应受与外资准入、外资并购、上市公司收购和证券发行有关的法律法规的调整，并接受商务部、证监会、外管局及其他相关中国政府部门的审核和监管（例如，涉及国有资产的，还需国资委或财政部审批；涉及银行保险业的，还需银监会或保监会审批；涉及固定资产投资及相关特定行业的，还需发改委核准等）。

就目前来看，除《外商投资产业指导目录》、《关于外国投资者并购境内企业的规定》、《上市公司收购管理办法》、《上市公司证券发行管理办法》及《上市公司非公开发行股票实施细则》等一般性法律法规外，《外国投资者对上市公司战略投资管理办法》以及《关于向外商转让上市公司国有股和法人股有关问题的通知》算是与外资 PE 进行 A 股 PIPE 投资直接相关的两个法律文件。前者适用于符合一定条件的外国投资者（包括外资 PE 在内）对已完成股权分置改革（“股改”）的 A 股上市公司和国家股改政策发布后新上市的 A 股上市公司（统称为“全流通 A 股上市公司”）的“战略投资”，即，以协议收购、认购定向增发的股份等中国法律法规规定的方式购买全流通 A 股上市公司的股份，但所购比例原则上不得低于目标上市公司已发行股份的 10%，<sup>1</sup>且在购买后三年内不得转让。后者则适用于包括外资 PE 在内的外国投资者购买尚未完成股改的 A 股上市公司的国有股及法人股（统称“非流通股”）。<sup>2</sup>根据该通知以及国家有关上市公司股权分置改革的规定，非流通股的转让原则上须以公开竞价的方式确定受让人并达成转股协议，并应配合股改作出相应安排。股改完成后，取得该等非流通股的外国投资者应遵守有关第一年不得上市交易及转让（“禁售期”）及第二、第三年有条件上市交易及转让（“限售期”）的限制。我们注意到，在实践中，不少持有 A 股上市公司非流通股的股东（包括外国投资者）甚至在前述法定禁售期及限售期之外作出了额外的禁售及限售期限的承诺。

尽管在入股比例及持有期限等方面受到限制，但总体而言，在符合中国外资准入政策的前提下，目前外资 PE 进行 A 股 PIPE 投资基本上已无实质性的法律障碍。

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<sup>1</sup> 如果外国投资者拟投资持有 10% 以下的 A 股上市公司股份，可考虑通过申请 QFII 资格在二级市场上直接购买股票，或以间接收购（请见本备忘录中的相关介绍）等方式达到投资目的。

<sup>2</sup> 但考虑到目前尚未完成股改的 A 股上市公司已为数不多，故外国投资者现阶段及今后购买该类公司国有股和法人股的机会也就很有限了。

## 二、 外资 PE 进行 A 股 PIPE 投资的一般方式

根据适用的中国法律法规并参考相关投资实例，外资 PE 进行 A 股 PIPE 投资主要可以通过以下几种方式：<sup>3</sup>

### 1. 直接收购

#### (a) 协议收购

协议收购是指外资 PE 不借助证券集中竞价交易系统，而通过私下协商的方式，与转让方完成交易从而取得 A 股上市公司的股份。协议收购的目标股份可以是未完成股改的 A 股上市公司的非流通股，也可以是全流通 A 股上市公司的股份（但处于禁售期内的股份原则上除外）。需要注意的是：

- (i) 对未完成股改的 A 股上市公司的非流通股进行协议收购的，应以公开竞价的方式确定受让人并达成转股协议。此外，协议双方应对股改做出相应安排，或应使协议收购与股改组合运作。股改过程中，受让该等非流通股的外资 PE 原则上应继续执行出让方在股改方案中关于非流通股获得流通权的对价安排，并以非流通股股东的身份依法作出有关禁售期及限售期的承诺；
- (ii) 对全流通 A 股上市公司进行协议收购的，外资 PE 原则上应以战略投资的方式进行，即，至少购买该目标上市公司已发行股份的 10%，且在完成收购后的三年内不得转让其购得的股份。如协议收购的对象为国有及国有控股企业等单位持有的 A 股上市公司股份，则协议收购的价格应以该目标上市公司股份转让信息公告日（经批准毋须公开股份转让信息的，以股份转让协议签署日为准）前三十个交易日按规定方法计算出的股票均价为基础确定，确需折价的，其最低收购价格也不得低于该均价的 90%；以及
- (iii) 外资 PE 以协议收购方式持有 A 股上市公司股份超过 30% 的，将触发“要约收购”（据我们了解，对于包括外资 PE 在内的外国投资者协议收购 A 股上市公司，证监会目前一般倾向于不给予要约收购豁免）。

在外资 PE 进行 A 股 PIPE 投资的实践中，2004 年新桥收购“深发展”、2007 年 CVC 收购“珠海中富”等都属于协议收购，而 2006 年至 2007 年间高盛和鼎辉对“S 双汇”（股改完成后更名为“双汇发展”）的收购中亦用到了协议收购。

#### (b) 认购全流通 A 股上市公司定向增发的股份

<sup>3</sup> 本备忘录在探讨外资 PE 进行 A 股 PIPE 投资的方式时，均以相关投资符合中国外资准入政策这一假设为前提。

外资 PE 可以作为全流通 A 股上市公司定向增发股份的对象，但其认购该等定向增发的股份只能以战略投资的方式进行，即，认购比例不低于该目标上市公司已发行股份的 10%，并至少持股三年。

根据规定，定向增发的股份发行价应不低于定价基准日<sup>4</sup>前二十个交易日公司股票均价的 90%。但值得注意的是，实践中，即使前述定价条件得以满足，如果相关战略投资协议确定的发行价明显低于证监会审批时该目标上市公司的市场流通价格，证监会也可能会要求申请人重新确定发行价，或者直接否决该次发行申请。此外，外资 PE 因取得全流通 A 股上市公司向其定向增发的新股而导致其持有的股份超过该上市公司已发行股份的 30%的，同样会触发要约收购。但在此情形下，若该上市公司股东大会同意该外资 PE 免于发出要约，经向证监会申请一般可以获得豁免。<sup>5</sup>

在外资 PE 以此方式进行 A 股 PIPE 投资的案例中，2006 年至 2007 年间 GIC 入股“阳光股份”获得了成功，而高盛入股“美的电器”、“福耀玻璃”、“阳之光”以及 CVC 入股“G 晨鸣”（现更名为“晨鸣纸业”）则均未成功。

## 2. 间接收购

外资 PE 也可以考虑通过以下途径，间接收购 A 股上市公司：

- (a) 整体或部分购买上市公司母公司或控股股东的股权或股份，从而间接持有上市公司的权益。

黑石于 2008 年以认购增资的方式取得中国蓝星(集团)总公司 20%的股权，从而间接拥有了该集团公司旗下三家 A 股上市公司——“蓝星清洗”、“星新材料”（现更名为“蓝星新材”）及“沈阳化工”的权益，即为本交易方式下的典型案例。

- (b) 利用其在中国境内已设立的外商投资企业，以协议受让、认购增发或在二级市场上直接购买股票等方式间接入股 A 股上市公司。<sup>6</sup>

IBM 近期取得“四川长虹”1.56%的股份就是以其在中国境内的一家外商投资企业为媒介，通过大宗交易的方式完成的。

<sup>4</sup> 定价基准日是指计算发行底价的基准日，可以为关于该次定向增发的董事会决议公告日、股东大会决议公告日或发行期的首日。

<sup>5</sup> 有关要约豁免的法律规定可参见《上市公司收购管理办法》第 62 条。

<sup>6</sup> 但值得注意的是，由于中国有关外汇管制的现行规定原则上不允许外商投资企业（投资性公司除外）将其外国股东投入的外汇资本金结汇用于股权投资（包括购买 A 股股票），故此类间接收购的规模会很明显地受制于该等外商投资企业自有人民币资金的数量。

需要注意的是，由于间接收购与直接收购 A 股上市公司在法律性质上的不同，外资 PE 在进行间接收购时，除应遵守有关上市公司收购的一般性法律法规外（如，间接收购导致外资 PE 拥有权益的股份超过某 A 股上市公司已发行股份的 30%，亦将触发要约收购），还需遵守《关于外商投资企业境内投资的暂行规定》等法律法规。

以上介绍的几种方式是目前外资 PE 进行 A 股 PIPE 投资的主流方式。实践中，外资 PE 在对一家 A 股上市公司进行收购时往往会混合采用其中的多种方式。至于国际资本市场上已较为常见的可转债等结构性 PIPE，由于中国在现阶段尚缺乏具体的规定，故在 A 股市场上的可操作性相对较小，可以找到的相关案例也很少。

### 三、 制约外资 PE 进行 A 股 PIPE 投资的几个因素

如上文所述，外资 PE 进行 A 股 PIPE 投资目前在中国法层面并无实质性障碍。在目前的经济形势下，成功入股 A 股上市公司也可能获得不错的投资回报。但纵观 A 股市场，外资 PE 成功的 PIPE 案例似乎并不多。究其原因，我们认为可能与以下因素有关：

首先，外资 PE 进行 A 股 PIPE 投资从谈判至交割，由于涉及多个中国政府主管部门的审批，不但在客观上拉长了外资 PE 的整个投资周期（据安永会计师事务所的一份研究报告显示，在中国完成一笔并购交易的平均时间大约为 12~24 个月，而在发达市场这一过程仅需 3~9 个月），而且使交易面临更多的不确定性。

其次，中国政府对待包括外资 PE 在内的外国投资者收购国内知名企业和品牌的态度尤其谨慎，这也在一定程度上使得该类并购或投资因涉及民族品牌保护、市场垄断防范以及国家安全保障等因素而更容易流产。高盛收购“美的电器”的失败，除媒体披露的价格原因外，恐怕也不排除监管层在前述问题上的顾虑，而凯雷集团最终无缘徐工则被业界公认为与前述因素直接相关。

此外，大部分 A 股上市公司目前可能并不严重缺乏资金，部分中国企业在 A 股上市公司估值偏低的情况下不愿低价出让股份，以及一些成熟的 PIPE 资本运作手段（如上市公司私有化）因上市公司一般无法接受而无施展空间等现实因素，也制约了外资 PE 对 A 股上市公司进行 PIPE 投资。

### 四、 典型案例简析<sup>7</sup>

#### 案例一 高盛收购“S 双汇”（000895，现更名为“双汇发展”）

关键词：间接收购、协议收购、要约收购、股权分置改革

- 2006 年 4 月 26 日，高盛集团及鼎晖中国成长基金 II 在香港合资设立的一家特殊目的公司——罗特克斯有限公司（Rotary Vortex Limited）（“罗特克斯”）

<sup>7</sup> 本备忘录介绍的案例均根据公开资料整理而成。

以 20.1 亿元人民币的价格竞标获得了河南省漯河市双汇实业集团有限责任公司（“双汇集团”）100%的国有产权。随后，罗特克斯以约 5.62 亿元人民币签约受让漯河海宇投资有限公司（“海宇投资”）所持 A 股上市公司 S 双汇 25%的股份（股份转让价格约为每股 4.3788 元人民币）。因双汇集团持有 S 双汇 35.715%的股权，故交易完成后，罗特克斯实际持有 S 双汇的股份达到 60.715%。

由于 S 双汇当时尚在股改中，故前述收购是与 S 双汇的股改组合进行、一并实施的。罗特克斯也因此承诺，接受股改方案中有关双汇集团及海宇投资作为 S 双汇原非流通股股东所应执行的非流通股获得流通权的对价安排，并保证完全履行双汇集团及海宇投资在股改中的所有承诺。

- 2006 年 8 月，双汇集团国有产权转让获得国务院国资委的批准；同年 12 月，罗特克斯的上述间接收购及协议收购申请均获得商务部批准。2007 年 2 月 8 日，罗特克斯收到了证监会对收购报告书的无异议函，但中国证监会并未豁免其要约收购义务。
- 2007 年 2 月 8 日，S 双汇公告《要约收购报告书摘要》，要约收购比例为 S 双汇总股本的 39.285%。由于此次要约收购不以终止 S 双汇上市为目的，故要约收购价格仅为每股 18 元人民币（S 双汇自 2006 年 6 月 1 日起停牌直至股改完成，停牌前一天（2006 年 5 月 31 日）的股票收盘价为每股 31.17 元人民币）。
- 2007 年 4 月 27 日，罗特克斯收到证监会对《要约收购报告书》的无异议函；同日，S 双汇公告了《要约收购报告书》，将收购价格上调为每股 31.17 元人民币（根据公告，收购人罗特克斯是在综合考虑了 S 双汇停牌前一天的股票收盘价格等因素后，重新确定的要约收购价格）。
- 2007 年 6 月 12 日，S 双汇公告要约收购生效，经确认的流通股股东已预受要约且未撤回的股份共计 3,400 股。罗特克斯于 2007 年 6 月 5 日完成向上述流通股股东支付收购价款，并于 2007 年 6 月 7 日完成受让上述流通股股份的过户手续。
- 2007 年 6 月 29 日，S 双汇股改方案实施完毕（股票简称由“S 双汇”变更为“双汇发展”）并复牌，罗特克斯的收购亦正式完成，其直接及间接持有的双汇发展 60.715%的股份在三年内不得转让。

## 案例二 GIC 入股“阳光股份”（000608）

关键词：战略投资、定向增发

- 2006 年 4 月 15 日，新加坡政府产业投资有限公司（GIC Real Estate Pte Ltd）的一家下属子公司（“GIC”）与 A 股上市公司阳光股份签署了《外国投资者战略投资意向书》，阳光股份向 GIC 定向发行 1.2 亿股人民币普通股（A 股），发行价格不低于阳光股份为该次定向增发而召开的董事会会议之日（“定价基准日”）的前 20 个交易日的股票收盘价的算术平均值的 105%，GIC 将持

有阳光股份此次发行后总股本的 29.12%。

- 2006 年 4 月 16 日，阳光股份召开临时董事会会议通过了上述定向增发股份的事宜。2006 年 4 月 18 日，阳光股份公告了《关于非公开发行特定对象情况的报告书》，将本次定向增发的股份价格确定为定价基准日前 20 个交易日股票收盘价的算术平均值的 105%，即，每股 5.71 元人民币。2006 年 5 月 19 日，阳光股份召开临时股东大会，通过了上述定向增发股份事宜。
- 2006 年 11 月 15 日，阳光股份的定向增发申请获得商务部的原则性批准；2007 年 4 月 19 日，获得证监会有条件审核通过（此前两天，阳光股份的收盘价已升至每股 14.05 元人民币）；2007 年 5 月 18 日，获得证监会的正式核准。
- 2007 年 5 月 28 日，阳光股份以每股 5.71 元人民币的价格向 GIC 发行了 1.2 亿股 A 股股份。2007 年 6 月 5 日，阳光股份办理了有关本次定向增发股份的登记及过户事宜。
- 2007 年 6 月 8 日，GIC 所持阳光股份的新增股份在深圳证券交易所上市，禁售期为三年。

### 案例三 高盛入股“美的电器”（000527）

关键词：战略投资、定向增发

- 2006 年 11 月 21 日，美的电器与高盛集团的一家全资子公司（“高盛”）签订了一份《定向发行协议》，高盛以每股 9.48 元人民币的价格认购美的电器 75,595,183 股新增人民币普通股（A 股）。
- 2006 年 11 月 21 日和 2006 年 12 月 11 日，美的电器分别召开临时董事会会议及临时股东大会会议，通过了上述定向增发股份的事宜。
- 2007 年 6 月 8 日，美的电器实施了 2006 年度资本公积金转增股本的方案（每 10 股转增 10 股）。为保持高盛预期的持股比例及入股成本大致不变，双方对前述定向增发方案进行了调整，将增发股份总数上调为 151,190,366 股，并将发行价格下调为每股 4.74 元人民币。
- 2007 年 6 月 13 日，商务部原则同意美的电器向高盛进行定向增发，但要求增发的股份数为原定的 75,595,183 股，并要求发行价格不得低于董事会决议公告前 20 个交易日内公司股票收盘价均价的 90%（即不低于每股 7 元人民币）。此等要求与高盛和美的电器达成的定向增发调整方案相去甚远。2007 年 6 月 21 日，美的电器就此发出公告，称正与商务部进行沟通，但未获得商务部的明确答复。
- 2007 年 8 月 29 日，证监会亦否决了高盛和美的电器调整后的定向增发方案（美的电器 2007 年 8 月 28 日的收盘价已达每股 35.79 元人民币），高盛入股美的电器由此宣告失败。

#### 案例四 黑石入股“蓝星集团”

关键词：间接收购

- 2007年9月7日，黑石集团某关联公司（“黑石”）与中国化工集团公司及中国蓝星（集团）总公司（“蓝星集团”；当时为中国化工集团公司的全资子公司，持有3家A股上市公司的股份，分别是：“蓝星清洗”（000598）27.08%、“星新材料”（后更名为“蓝星新材”，600299）53.96%以及“沈阳化工”（000698）33.66%）签署了一份《股份认购协议》，黑石以6亿美元为对价认购蓝星集团20%的股份。
- 2007年12月，国家发改委作为行业主管部门，批准黑石入股蓝星集团。
- 2008年10月6日，中国化工集团公司与黑石共同宣布黑石投资于蓝星集团的项目已正式完成交割。2008年10月7日，蓝星清洗、蓝星新材及沈阳化工3家公司分别发出公告，称其母公司蓝星集团增资扩股并变更为中外合资股份有限公司一事已获得商务部批准，并已在国家工商总局完成变更登记手续。由此，黑石实现对3家A股上市公司的间接收购。

\* \* \*

以上为我们对目前涉及到外资PE进行A股PIPE投资的相关法律规定和实践的简要介绍。随着中国资本市场的发展和成熟，PIPE这种投资形式可能会被更多的投资者运用于中国市场，相信中国主管部门相应的立法和执法监管也将随之趋于健全和完善。如果本备忘录所述内容与中国主管部门另行颁布的规章、通知或政策有不一致之处，请以该等规章、通知和政策为准。本备忘录仅供阁下一般性参考，并不能视为我们就相关事项出具的任何正式的法律意见。

如阁下对于本备忘录所述及之内容有任何疑问，敬请与敝所联系（[inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com)）。

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