

# 瀚 一 律 師 事 務 所

## HAN YI LAW OFFICES

*www.hanyilaw.com*

### Shanghai Office

Suite 4103, II Grand Gateway  
3 Hongqiao Road  
Shanghai 200030, China  
Tel: (86-21) 6448-5600  
Fax: (86-21) 6448-5611

### Beijing Office

Suite C203-5A  
Lufthansa Centre Office Building  
50 Liangmaqiao Road  
Beijing 100125, China  
Tel/Fax: (86-10) 6410-5322

March 12, 2010

Memorandum to: Our Clients and Friends

### **Re: Regulatory Review on Administration of PRC State-Owned Assets Involved in M&A Transactions**

PRC state-owned enterprises are generally regarded as the main pillar of the Chinese economy and hold a predominate position in sectors essential to the national economy. In order to protect the interest of state-owned enterprises and to avoid the loss of state-owned assets, the PRC government has put into place a set of special legal instruments to closely regulate and supervise the operation of state-owned enterprises. Based on our practical experience and for your general reference purpose only, we have prepared this memorandum to briefly summarize some of the major legal issues with respect to the supervision and administration of the PRC state-owned property rights (“SOPR”) involved in M&A deals. (*Solely for the purpose of this memorandum, “China” or the “PRC” means the People’s Republic of China, excluding Hong Kong SAR, Macau SAR and Taiwan.*)

## **I Definition of and Supervision over SOPR**

### **1. Definition of SOPR**

The *Enterprise State-Owned Assets Law* published on October 28, 2008 is the first piece of legislation that clearly defines the scope of state-owned assets, i. e., enterprise state-owned assets (generally referred to as “SOPR” in practice) refer to all kinds of investments by the state into enterprises, such as wholly state-owned enterprises, wholly state-owned companies, state-controlled companies, state-participated companies (collectively, the “State-Funded Enterprises” or the “SFEs”) and their subsidiaries (together with the SFEs, the “State-Owned Enterprises” or the “SOEs”), as well as the interests formed from such investments.

### **2. Supervision Authorities of SOPR**

The State Council and local people’s governments will fulfill the shareholders’ obligations and responsibilities and enjoy the shareholders’ rights to SFEs on behalf of the state in accordance with applicable laws and regulations. The State Council should fulfill the shareholders’ responsibilities on behalf of the state to large-scale SFEs essential to the national economy and state safety<sup>1</sup> and

<sup>1</sup> According to the regulations issued by SASAC, the industries essential to the national economy and state safety refer to seven industries including military, electric fence and electricity, petroleum and petrification, telecommunications, coal, civil aviation and shipping.

SFEs engaging in the significant infrastructure area and significant natural resources areas as designated by the State Council. Such SFEs are generally referred to as “Central SFEs” in practice. The local people’s governments should fulfill the shareholders’ responsibilities on behalf of the state to other SFEs, which are generally referred to as “Local SFEs”.

In practice, the State-Owned Assets Supervision and Administration Commission (the “SASAC”) and its local counterparts will respectively fulfill the shareholders’ responsibilities to Central SFEs and Local SFEs on behalf of the people’s government at the same level.

SASAC offices could enjoy the following rights in their capacity as SFEs’ shareholders, including, among others, (i) receiving proceeds; (ii) participating in important decision-making process; (iii) appointing managerial personnel; (iv) participating in formulation of the articles of association of SFEs; and (v) appointing representatives of shareholders to attend the shareholders meeting of SFEs (if applicable). Meanwhile, SASAC offices should be accountable to the people’s government at the same level, and play a role in the protection of shareholders’ interests, the inflation-proof and appreciation of SOPR, and the avoidance of the loss of SOPR, so as to safeguard the legitimate rights of SFEs as a player of the market. SASAC offices cannot intervene in the business operation of SFEs other than performance of shareholders’ responsibilities.

## II Procedures and Certain Notable Issues related to Transfer of SOPR in Unlisted Companies<sup>2</sup>

### 1. General Procedures for SOPR Transfer

As may be involved in M&A deals, the transfer of SOPR owned by competent SASAC offices or their authorized investment institutions, SFEs or their subsidiaries should go through the following procedures:

- **Internal Resolution.** The transferor(s) should reach an internal written resolution with respect to the SOPR transfer.
- **Approval.** The SOPR transfer should be reviewed and approved by the competent SASAC office and/or superior authorities.<sup>3</sup>
- **Assets Appraisal.** The transferor(s) should conduct an assets appraisal on the target SOPR and submit the appraisal result for approval or filing.
- **Public Quotation.** The transferor(s) should make public quotation via a property rights exchange center (the “PREC”) to publicly solicit potential transferees.
- **Implementation of Transfer.** The SOPR transfer should be implemented through transfer by agreement, auction or bidding procedures based on the number of potential transferee(s).
- **Registration.** The transferor(s) and transferee(s) should timely effectuate the relevant property right registration procedures with the property right transaction certificate.

### 2. Certain Notable Issues with respect to SOPR Transfer

---

<sup>2</sup> The non-listed companies stated herein do not include any financial institutions.

<sup>3</sup> The transfer of SOPR in a SFE is subject to approval by the SASAC office funding such SFE. However, if the state will lose its control over the SFE due to the proposed SOPR transfer, such SOPR transfer should be subject to approval by the people’s government at the same level with the SASAC office. Further, SFEs can decide, at their own discretion, whether to transfer the SOPR in their subsidiaries (at various levels), but transfer of material SOPR in key subsidiaries should be subject to approval by the competent SASAC office funding such SFEs.

(a) Transfer of “Material SOPR in Key Subsidiaries”

According to PRC laws and regulations, SFEs can decide, at their own discretion, whether to transfer the SOPR in their subsidiary companies (including subsidiaries at various levels, the same below), but transfer of material SOPR in key subsidiary companies (the “Major Transfer”) should be approved by the SASAC office funding such SFEs.

The current laws and regulations have made principle provisions with respect to the determination of Major Transfer and the approval authorities thereof. According to applicable PRC laws and regulations, Central SFEs should be empowered to determine whether the transfer of SOPR in their subsidiaries constitutes a Major Transfer and whether such transfer should be subject to approval by themselves or the SASAC. In respect of the transfer of SOPR in Local SFEs’ subsidiaries, the local SASAC offices funding such SFEs should be empowered to determine whether such transfer constitutes a Major Transfer and whether such transfer should be subject to approval by themselves. Further, we noted that SASAC has required local SASAC offices to clarify the scope of specific major subsidiaries of Local SFEs. However, no specific scope of such subsidiaries has been published to date.

Therefore, the transfer of SOPR in a SFE’s subsidiary involved in an M&A deal should be reported to the SFE via internal procedures, who will then further submit such transfer to the competent local SASAC office in order to identify the approval authority of such transfer. The transfer of SOPR of a Central SFE’s subsidiary should be reported to the Central SFE, who will determine the approval authority thereof on its own discretion. Further, it is worth noting that since Central SFEs are of large scale and are funded by SASAC, they enjoy greater power than Local SFEs in terms of approval authority to transfer of SOPR in their subsidiaries.

(b) Appraisal and Pricing

(i) *Matters Requiring Appraisal*

According to applicable laws and regulations, many economic activities conducted by SOEs are required to be appraised, among which, the following economic activities may be involved in M&A deals:

- Transfer of SOPR
- Subscription to additional registered capital of SOEs
- Assets transfer or assets swap
- Acceptance of contribution or repayment of debts by a non-state-owned enterprise with in-kind assets
- Merger, division, dissolution, bankruptcy
- Lease of state-owned assets to non-state-owned enterprises
- External investment with in-kind assets
- Purchase assets from non-state-owned enterprise

(ii) *Appraisal Procedures*

If SOEs conduct activities requiring appraisal procedures, the holders<sup>4</sup>

---

<sup>4</sup> The holder of the SOPR, or the occupant of the SOPR, generally refers to state-authorized departments or investment institutions, SOEs or other entities directly holding or

of the SOPR should entrust a qualified assets appraisal institution to conduct appraisal on the SOPR proposed to be transferred. Specifically, the appraisal projects satisfying certain conditions are further required to be submitted to the competent SASAC office or Central SFEs in charge of such SOPR for approval or filing purpose.<sup>5</sup>

*The Tentative Measures for the Administration of Appraisal of State-Owned Property Rights* (the “Tentative Measures”) has made principle provisions with respect to appraisal projects that are subject to approval and/or filing procedures as follows:

- The appraisal projects related to economic activities approved by the people’s governments at various levels should be subject to the examination and approval by local SASAC offices at the same level.
- The appraisal projects related to economic activities approved by SASAC should be subject to filing procedures with SASAC.
- The appraisal projects related to economic activities approved by Central SFEs and their subsidiaries at various levels should be subject to filing procedures with Central SFEs.
- Local SASAC offices are authorized to specify the allocation of responsibilities among government authorities in charge of approval and filing of appraisal projects with respect to economic activities approved by local SASAC offices or local SOEs.<sup>6</sup>

### (iii) Pricing

The price of the SOPR proposed to be transferred should be determined based on the approved or filed appraisal result.<sup>7</sup> Generally speaking, the transfer price of the SOPR cannot be lower than 90% of the appraisal price. Further, during the SOPR transfer process, in case the transaction price is lower than 90% of the appraisal price, the transaction should be suspended and cannot be resumed unless such price has been approved by the approval authority originally approving the economic activity. Otherwise, such SOPR transactions may possibly be deemed null and void.

---

managing the SOPR.

<sup>5</sup> In practice, certain local SASAC offices have made specific provisions as to what kind of appraisal projects should be approved and/or filed. Appraisal projects not stated in such regulations are not subject to approval and/or filing procedures. It is advisable for investors to make further inquiries with the competent SASAC offices when engaging in specific projects.

<sup>6</sup> Currently, certain local SASAC offices (e. g., Shanghai, Chongqing and Jiangsu Province) have issued specific regulations. According to the regulations of Chongqing, the overall assets appraisal projects of municipal enterprises whose net book value before such appraisal equals to or exceeds RMB30 million and the appraisal projects with respect to material economic activities approved by Chongqing People’s Government are subject to approval by Chongqing SASAC office. The appraisal projects as to economic activities approved by the people’s governments at district/county level are subject to approval by the competent SASAC office at the same level.

<sup>7</sup> In respect of internal assets reorganization of Central SFEs, if both transferor(s) and transferee(s) are Central SFEs or their directly or indirectly wholly owned onshore subsidiaries, the transfer price should be determined based on the appraised or audited net assets value and cannot be lower than such appraised or audited net assets value.

(c) Transfer Modes

In principle, SOPR transfer should be conducted through public quotation, bidding and auction procedures unless such transaction has met certain statutory conditions<sup>8</sup> and has been approved by the competent authority, in which case the SOPR transfer does not need to go through Public Quotation (as defined below) procedures and can be transferred by agreement.<sup>9</sup>

However, such statutory conditions are generally applicable to the reform of national structure and industrial policy. In practice, it is rarely seen that foreign investors have satisfied those statutory conditions and obtained all the requisite approvals. Therefore, SOPR transfers involving foreign investors should generally be conducted via PREC. SOPR transactions that are not duly conducted via PREC may possibly be deemed null and void.

(d) Soliciting for Potential Transferees

If SOPR transfer is conducted through a PREC, relevant information with respect to the SOPR transfer should be publicly disclosed (the “Public Quotation”) in order to solicit potential transferee(s). The transferor(s) may put forward explicit qualifications for transferee(s) in terms of qualifications, business reputation, operation status, finance status, management capability, assets scale and etc. In practice, if there are two or more potential transferees, auction or bidding procedures will be activated. If there is only one potential transferee after the Public Quotation procedures, the transferor(s) can directly enter into a transfer agreement with such transferee.

It is worth noting that the qualifications for transferee(s) specified during the Public Quotation procedures may not contain anything that is expressly directed at certain parties or that violates the principle of fair competition. If the qualifications for transferee(s) contain any ambiguity or unfair provisions, the PREC may ask the transferor(s) to make relevant modifications, or request the transferor(s) to give further interpretations or explanations in writing in connection with the implementing standards of such qualifications. Such explanations and interpretations cannot serve as valid qualifications for transferee(s) unless being duly approved by the competent government authority and published in the announcement of the SOPR transfer by the PREC.

### **III Supervision over Transfer of Shares in Listed Companies Held by**

---

<sup>8</sup> The statutory conditions for transfer by agreement are as follows: (i) In the case of structural adjustment of state-owned economy, the proposed acquisition is in compliance with the industrial policies and general plans with respect to the layout and structural adjustment of state-owned economy and does not contravene any prohibitive or restrictive rules in connection with national economic security, and can obviously promote the technical progress and industrial upgrade of the target company. Where the target company falls into key industries or fields of national economy, the target company should maintain its absolutely state-held status after the transfer by agreement of SOPR; or (ii) During the assets reorganization of state-funded enterprises, transfer by agreement of SOPR can be conducted if both the transferee and the transferor are State-Funded Enterprise or its wholly owned enterprises or absolutely controlled enterprises.

<sup>9</sup> The transfer by agreement of SOPR in Central SFEs is subject to approval by SASAC (where Central SOEs conduct assets reorganization that satisfy the conditions for transfer by agreement, such reorganization should be approved or decided by the Central SFEs and be sent to SASAC simultaneously) and the transfer by agreement of SOPR in Local SOEs is subject to approval by provincial level SASAC offices. Such approval authority cannot be delegated to a lower level.

## **State-Owned Shareholders**

Foreign investment into listed companies (the “Listed Companies”) controlled or participated by the state could generally be implemented through strategic investment in Listed Companies or indirect transfer of shares in Listed Companies held by state-owned shareholder(s).

### **1. Supervision on Strategic Investment**

Strategic investment in Listed Companies refers to medium- and long-term strategic acquisition investments of a certain size made by foreign investors in qualified Listed Companies and the obtaining of A-shares of such companies as a result of such investments. Generally speaking, strategic investment in Listed Companies can be made by ways of transfer by agreement or subscription to the private placement by Listed Companies.

In case of strategic investment made by foreign investors into a Listed Company through transfer by agreement or private placement, the state-owned shareholders of such Listed Company should duly submit the relevant plan to the competent SASAC office for approval. After obtaining the approval by the competent SASAC office, the Listed Company should duly submit the application documents with respect to the strategic investment to MOFCOM. After obtaining a preliminary approval from MOFCOM, the Listed Company should apply to CSRC for approval or file with CSRC following the completion of share transfer registration procedures (as the case may be). The strategic investment should be completed within one hundred and eighty (180) days after the obtaining of such preliminary approval issued by MOFCOM.

Moreover, foreign investors should fulfill reporting, public announcement and other legal obligations as required by applicable PRC laws and regulations for acquiring a Listed Company. Specifically, if shares or interests held or owned (or to be held or owned) by foreign investors exceed 30% of the outstanding shares of a Listed Company, the obligation of tender offer will be triggered. If foreign investors wish to exempt themselves from the obligation of tender offer, they should satisfy certain qualifications as stipulated in relevant laws and regulations and duly submit an application to CSRC. CSRC will decide whether to grant such exemption after examination.

### **2. Supervision on Indirect Transfer**

Where the nature of ownership or actual controller of the state-owned shareholder of a Listed Company has changed due to the equity transfer or private placement, it constitutes an indirect transfer of the shares held by the state-owned shareholder of the Listed Company. When foreign investors intend to conduct indirect transfer through equity transfer or private placement, the state-owned shareholder of the Listed Company should submit the transaction plan to SASAC for review and approval prior to the implementation of the equity transfer or private placement (with respect to equity transfer, prior to verification of the SOPR transfer; with respect to subscription to additional registered capital of the state-owned shareholder, prior to registration with the competent local offices of State Administration of Industry & Commerce (the “SAIC”).

Moreover, foreign investors should fulfill reporting, public announcement and other legal obligations as required by applicable PRC laws and regulations for acquiring a Listed Company. Specifically, if shares or interests held or owned (or to be held or owned) by foreign investors exceed 30% of the outstanding shares of a Listed Company, the obligation of tender offer will be triggered. If the transaction has satisfied all the applicable statutory qualifications and

conditions, foreign investors may duly submit an application to CSRC for the exemption of the obligation of tender offer and CSRC will decide whether to grant such exemption after examination.

#### **IV Supervision on Transfer of SOPR in Financial Enterprises**

##### **1. The Governing Authority of Transfer of SOPR in Financial Enterprises**

The *Measures for the Administration of the Transfer of State-Owned Property Rights in Financial Enterprises* (the “Measures”, which has become effective since May 1, 2009) issued by the Ministry of Finance (the “MOF”) on March 17, 2009 has made clear that MOF and its local counterparts are the departments in charge of the supervision on SOPR transfer of financial enterprises (the “Financial SOPR Transfer”). The issuance of the Measures is of great importance since the supervision authority of Financial SOPR Transfer was unclear and the relevant supervision system was not mature prior to the issuance of the Measures.

It is worth noting that SASAC issued the *Several Opinions in connection with Further Strengthening the Supervision over Local SOPRs* (the “Opinions”) on September 19, 2009 after the issuance of the Measures. The Opinions has pointed out that local SASAC offices may, subject to authorization by the people’s government at the same level, exercise, on a progressive basis, supervision over the SOPR in local financial enterprises, operational SOPR generated from investment by public institutions, and operational SOPR transformed from non-operational SOPR. According to the Opinions, the transfer of state-owned equity in a local state-funded financial enterprise is subject to approval by the financial enterprise itself or local SASAC office, or, as submitted through the local SASAC office, by the people’s government at the same level according to the laws and regulations governing SOPR transfer.

However, according to the Measures, Financial SOPR Transfer by (i) local MOF offices at the county level or above; (ii) investment entities authorized by the people’s governments at the county level or above or the local MOF offices thereof, or (iii) state-owned and state-controlled financial enterprises are subject to approval by MOF or its local counterparts. Therefore, the local people’s government should make further interpretations or authorizations to make clear the approval authority of Financial SOPR Transfer.

##### **2. Supervision on Financial SOPR Transfer in Private Companies**

According to the Measures, MOF and its local offices are the principal supervision authority of Financial SOPR Transfer. Among others, the transfer of financial SOPR by a local MOF office is subject to approval by the people’s government at the same level. Further, the Financial SOPR Transfer by an authorized institution of the people’s government is subject to approval by the MOF office at the same level.

Moreover, when a state-owned or state-controlled financial enterprise intends to transfer its SOPR in its immediate subsidiaries, approval from the competent MOF offices should be obtained. When the aforesaid immediate subsidiary intends to transfer its SOPR in its subsidiaries, approval from the holding (group) company should be obtained. If the transaction constitutes transfer of material SOPR in a key industry or in a key subsidiary,<sup>10</sup> or would lead to transfer of

<sup>10</sup> The “key industries” refer to eight industries including finance, military, electric fence and electricity, petroleum and petrification, telecommunications, coal, civil aviation and shipping. The “key subsidiaries” refer to: (i) state-owned or state-controlled financial enterprise(s) controlling companies in connection with the aforesaid key industries; and

control of financial enterprises or other key subsidiaries held by the target enterprise of the transfer, such transaction should be subject to approval by the competent MOF office.<sup>11</sup>

In addition to the aforesaid supervision and approval procedures applicable to Financial SOPR Transfer, such other issues as evaluation, pricing, transfer procedures should be governed by the Measures, the *Interim Measures on Supervision and Administrations of Appraisal of State-Owned Property Rights in Financial Enterprises* and *Notices on Implementation of the Measures on Administration of Transfer of State-Owned Property Rights in Financial Enterprises* and other specific regulations applicable to financial SOPR.

### **3. Supervision on Financial SOPR Transfer in Listed Companies**

The transfer of SOPR in listed financial enterprises and the transfer of shares in listed companies by financial SOEs should be effectuated through a lawfully-established securities trading system. If the transferor is the controlling shareholder of the listed company, the share transfer is subject to approval by the competent MOF offices. If the transferor is not a controlling shareholder of the listed company and its aggregate net transfer of shares during a complete financial year is less than 5% of the listed company's total share capital, the decision with respect to the share transfer shall be made by the transferor in line with its internal decision-making procedure, and, by January 10 of each year, it shall report to the competent MOF offices on its transfers of shares in the listed company for the preceding financial year. If such aggregate net transfer equals or exceeds 5% of the listed company's total share capital, it should first submit its transfer plan to the competent MOF office for approval before implementing the same.

## **V Supervision over State-Owned Equity/Share Pledge**

In addition to the foregoing discussions in connection with the supervision on SOPR, M&A deals may also involve circumstances where state-owned or state-participated shareholders provide pledges with their equity interests or shares to secure relevant debts. Currently, no specific regulations governing pledges provided by state-owned or state-participated shareholders have been issued by SASAC. In practice, such pledges are generally subject to general provisions governing equity pledges as provided in applicable PRC laws and regulations and other requirements as stipulated by local SASAC offices. For your general reference purpose only, we have set forth below several highlights with respect to the supervision over equity/share pledges provided by state-owned or state-participated shareholders:

### **1. Qualified Guarantees and Amount Limitation for the Pledge**

With respect to the pledges of equity interests or unlisted shares, certain local SASAC offices (such as those in Shandong, Xiamen and Jiaxing) strictly stipulate that only SFEs and their wholly-owned or exclusively-controlled subsidiaries can serve as qualified pledgors and pledgees, while the accumulative pledged amount shall not exceed a specified threshold as defined in applicable regulations.<sup>12</sup> As to the pledges of listed company shares,

---

(ii) state-owned or state-controlled financial enterprise(s) being the controlling shareholder(s) of a listed company.

<sup>11</sup> Since SASAC has issued relevant regulations governing the supervision over Financial SOPR Transfer (as stated under item III.1), we suggest that investors to make further inquiries with the competent SASAC offices and MOF offices when engaging in specific projects.

<sup>12</sup> For example, Shandong SASAC office regulates that the aggregate pledged assets provided by any provincial level SFE shall not exceed its net assets. Further, the



SASAC has stipulated that the amount of pledged shares shall not be in excess of 50% of the aggregate shares then held by the state-owned shareholder in such listed companies and the pledgees should be the listed companies themselves or their wholly-owned or controlled subsidiaries. Moreover, the value of the pledged shares should be reasonably determined based on the market prices of the listed shares.

## **2. Prior Approval by the Competent SASAC Office**

According to the *Enterprise State-Owned Assets Law*, wholly state-owned enterprises or wholly state-owned companies cannot provide pledges for their affiliates without prior approval by the competent SASAC office. Moreover, certain local SASAC offices (such as those in Shandong Province, Jilin Province, and Ningbo and Huzhou of Zhejiang Province, among others) and local SAIC offices also specifically require that the approval from competent SASAC office is prerequisite for the establishment of a state-owned equity pledge.

## **3. Realization Procedures of Equity Pledge**

Certain local governments (e.g., Shanghai and Hubei) require that state-owned equity transfer as a result of realization of pledge thereon should be subject to assets appraisal, bidding, auction and listing procedures, as provided in applicable regulations issued by competent SASAC offices.

Therefore, if a potential M&A deal involves equity pledge provided by a state-owned shareholder, foreign investors should have an overall understanding of relevant regulations and requirements at both central and local levels and may need to take into consideration matters such as the requirements, timeframes and expenses for the establishment and realization of the pledge of equity interests or shares, so as to minimize potential risks that may arise out of the proposed transaction.

\* \* \*

The above is our brief summary with respect to the supervision over SOPR involved in M&A deals based on the currently effective PRC laws and our experience and we hope this has been helpful to you. It is notable that, in addition to the approval by the competent SASAC offices as stated herein, M&A deals involving SOPR may be subject to approvals by the competent MOFCOM offices, the industrial authorities and etc. Moreover, since the supervision over SOPR may be different from place to place, investors should fully consider the specific regulations and requirements issued by the competent SASAC offices. Furthermore, the laws and regulations governing the supervision over SOPR are subject to constant amendments and updates. 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. This memorandum is for your reference purpose only and cannot be deemed as our formal legal opinions with respect to the relevant issues.

If you have any questions, please feel free to contact us at [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com).

© Han Yi Law Offices

---

security provided to the same pledgee should not exceed 30% of its net assets on a cumulative basis, or 10% of its net assets in a single transaction.

## 关于：并购交易涉及的国有资产监管概述

国有企业是中国经济发展的中流砥柱，在关系中国经济命脉的关键行业和领域中，国有企业更是占据着主导地位。中国政府对国有资产和国有企业的监管制定了一系列专门规定，以有效保护国有经济，防止国有资产流失。外国投资者在对国有企业进行投资时，首要面临的即是国有资产的监管问题。结合有关国有资产监管的法律法规和实践操作，本所律师对外国投资者并购交易中涉及的国有资产监管的主要问题进行了简要阐述，以期给拟投资中国国有企业的境内外机构以参考（仅为本备忘录之目的，“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、 国有资产的界定和监管

#### 1. 国有资产的界定

2008年10月28日颁布的《企业国有资产法》首次以法律形式对国有资产做出了界定，即，企业国有资产（“国有资产”，实践中一般也称其为“国有产权”），是指国家对企业各种形式的出资所形成的权益，包括国家对国有独资企业、国有独资公司以及国有资本控股公司、国有资本参股公司（“国家出资企业”）及其子企业等的投资和出资所形成的权益（如股权、股份等）。

#### 2. 国有资产的监管机构

国务院和地方人民政府依照法律、行政法规的规定，分别代表国家对国家出资企业履行出资人职责，享有出资人权益。其中，国务院确定的关系国民经济命脉和国家安全<sup>1</sup>的大型国家出资企业，重要基础设施和重要自然资源等领域的国家出资企业，由国务院代表国家履行出资人职责，该企业一般被称为中央企业；其他国家出资企业由地方人民政府代表国家履行出资人职责，称为地方企业。

实践中，一般由国务院国有资产监督管理委员会（“国务院国资委”）以及地方国有资产监督管理委员会（“地方国资委”，与国务院国资委统称“国资委”）根据本级人民政府的授权分别对中央企业和地方企业履行出资人职责。

国资委对国家出资企业依法享有资产收益、参与重大决策和选择管理者等出资人权利，有权依法制定或者参与制定国家出资企业的章程，委派股东代表参加国有资本控股公司、国有资本参股公司召开的股东（大）会会议等。同时，国资委应当对本级人民政府负责，保障出资人权益，对国有资产保值增值负责，防止国有资产流失，维护国家出资企业作为市场主体依法享有的权利。除依法履行出资人职责外，国资委不得干预国家出资企业

<sup>1</sup> 根据国务院国资委的相关规定，关系国民经济命脉和国家安全的行业包括军工、电网电力、石油石化、电信、煤炭、民航、航运等七大行业。

的经营活动。

## 二、 非上市企业<sup>2</sup>国有股权转让的一般程序及值得注意的问题

### 1. 国有股权转让的一般程序

并购交易中，各级国资委或其授权的投资机构、国家出资企业或其子企业转让其持有的国有资产的，一般需经过以下程序：

- **内部决议。** 转让方就国有股权转让做出相关书面决议。
- **审批。** 将国有股权转让报经相关国资委及/或上级部门<sup>3</sup>审批或决定。
- **资产评估。** 转让方组织对目标企业进行资产评估，并将结果报请核准或备案。
- **挂牌。** 转让方通过产权交易市场挂牌，公开征集意向受让方。
- **实施转让。** 根据挂牌后意向受让方的数量采取协议、招投标或拍卖的方式实施转让。
- **登记。** 双方凭产权交易凭证办理相关产权登记手续。

### 2. 国有股权转让值得注意的问题

#### (a) “重要子企业”国有产权转让的审批

依据相关规定，国家出资企业决定其子企业（包括各级子企业，下同）的国有产权转让，但重要子企业的重大国有股权转让事项（“两重事项”），应取得该国家出资企业所属国资委的批准。

关于“两重事项”的界定以及子企业国有产权转让的审批机关的确定，目前法律法规仅做了原则性规定，即中央企业子企业的国有产权转让行为，由该等中央企业自行判断是否属于“两重事项”以及是否须报国务院国资委批准；地方企业子企业的国有产权转让行为，由地方国资委依据其具体的管理要求确定是否属于“两重事项”以及是否需经其批准。此外，我们注意到，国务院国资委已要求地方国资委尽快明确地方企业的重要子企业的范围，但截至目前尚无明确的具体范围公布。

可见，一般而言，并购交易涉及国家出资企业子企业的国有产权转让的，应先通过内部程序将该转让事项报其所属的国家出资企业，由该国家出资企业进一步报请地方国资委以确定该转让事项的审批机关；其中子企业所属的国家出资企业为中央企业的，该等转让事项报至中央企业后，由中央企业自行决定国有产权转让的审批机关。此外，值

<sup>2</sup> 本部分所涉及的非上市企业并不包括金融企业。

<sup>3</sup> 国家出资企业的国有产权转让由其所属国资委决定，但转让企业国有产权致使国家不再拥有控股地位的，应当报本级人民政府批准。此外，国家出资企业决定其各级子企业的国有产权转让，但其重要子企业的重大国有股权转让事项，应取得该国家出资企业所属国资委的批准。

得注意的是，由于中央企业的规模较大、级别较高，就对子企业国有产权转让的审批而言，其审批权限一般大于地方企业。

## (b) 评估和定价

### (i) 需要进行评估的情形

根据相关法律法规的规定，国家出资企业及其子企业实施的诸多经济行为均需依法经评估后实施，其中并购交易可能涉及的经济行为主要包括：

- 国有资产转让
- 对国家出资企业或其子企业增资或资产置换
- 接受非国有单位以非货币资产出资或抵债
- 合并、分立、解散、破产
- 整体资产或者部分资产租赁给非国有单位
- 以非货币资产对外投资
- 收购非国有单位的资产

### (ii) 评估程序

国家出资企业及其子企业发生需依法进行评估的行为的，应当由其产权持有单位<sup>4</sup>委托具有相应资质的资产评估机构进行评估。特别地，符合一定条件的评估项目还应依法将评估报告报履行出资人职责的国资委或中央企业核准或者备案。<sup>5</sup>

关于何种项目需报核准、何种项目需备案，国务院国资委颁布的《企业国有资产评估管理暂行办法》规定，经各级人民政府批准的经济行为，其所涉及的资产评估项目由相关人民政府国资委负责核准。经国务院国资委批准的经济行为，其所涉及的资产评估项目由国务院国资委负责备案；经中央企业及其各级子企业批准的经济行为，所涉及的资产评估项目由中央企业负责备案。此外，地方国资委、地方企业及其子企业批准的经济行为，其所涉及的资产评估项目的核准及备案管理工作的职责分工，由地方国资委根据各地实际情况自行规定。<sup>6</sup>

<sup>4</sup> 产权持有单位，部分地方称之为国有资产占有单位，一般是指直接持有或者直接管理企业国有产权的国家授权的部门或者国家授权投资的机构、国有企业以及其他组织。

<sup>5</sup> 实践中，部分地方国资委已就需要核准及/或备案的评估项目的具体范围作出细化的规定，即在法定范围以外的评估项目，无需报经审批及/或备案。具体项目中涉及该问题时，可有针对性地检索当地国资委关于国有资产评估的具体规定或进一步咨询当地国资委。

<sup>6</sup> 目前部分地方国资委已就此颁布相关具体规定，如上海市、重庆市、江苏省等。以重庆的相关规定为例，重庆市人民政府批准实施的重大经济事项、市级企业资产评估前的账面国有净资产在 3000 万元（含 3000 万元）以上的整体资产评估项目，由重庆市国资委负责核准；区县人民政府批准的经济事项，资产评估项目由区县国资委核准；其他经济项目实行备案制。

### (iii) 定价

经备案或核准的资产评估结果是确定国有资产转让价格的依据。<sup>7</sup> 一般情况下，国有产权的转让价格不得低于前述资产评估结果的90%。在国有产权交易过程中，交易价格低于资产评估结果的90%时，应当暂停交易，在获得相关产权转让审批机构同意后方可继续进行。未依法经批准的，该等产权交易存在被认定为无效的法律风险。

### (c) 转让方式

国有资产转让原则上应该在产权交易市场中通过挂牌、招标或拍卖等程序公开进行，只有在符合法定条件<sup>8</sup>且依法经审批机关<sup>9</sup>批准后方能通过协议转让的方式进行。但协议转让的法定条件一般适用于国家对国民经济进行结构调整以及产业政策调整的情形，外国投资者符合该等法定条件并通过审批的情形非常少，一般外国投资者只能通过产权交易机构公开受让国有资产。此外，未依法在产权交易机构中进行交易的，相关国有资产转让亦存在被认定为无效的法律风险。

### (d) 受让方的征集

在产权交易市场中公开进行国有资产转让的，应公开披露有关国有产权转让的信息，广泛征集受让方。转让方可以对受让方的资质、商业信誉、经营情况、财务状况、管理能力、资产规模等提出必要的受让条件。经公开征集产生两个以上受让方的，应根据转让标的的具体情况采取拍卖或者招投标方式组织实施产权交易；经公开征集只产生一个受让方的，转让方与受让方可以直接签订产权转让协议，实施产权交易。

值得注意的是，根据国务院国资委颁发的相关规定，转让方在产权转让公告中提出的受让条件不得具有明确指向性或违反公平竞争的内容。对受让条件中表述不明确或者有违反公平竞争内容的，产权交易机构将向转让方提出修改建议，或要求转让方对受让条件的执行标准作出

<sup>7</sup> 中央企业在本企业内部实施资产重组，转让方和受让方均为中央企业及其直接或间接全资拥有的境内子企业的，转让价格可以资产评估或审计报告确认的净资产值为基准确定，且不得低于经评估或审计的净资产值。

<sup>8</sup> 进行协议转让的法定条件为：(i)在国有经济结构调整中，拟直接采取协议方式转让国有产权的，符合国家产业政策以及国有经济布局和结构调整的总体规划。受让方的受让行为不得违反国家经济安全等方面的限制性或禁止性规定，且在促进企业技术进步、产业升级等方面具有明显优势。标的企业属于国民经济关键行业、领域的，在协议转让企业部分国有产权后，仍应保持国有绝对控股地位；或(ii)在国家出资企业内部资产重组中，确需采取直接协议转让的，其中转让方和受让方应均为国家出资企业或其全资、绝对控股企业。

<sup>9</sup> 协议转让事项的批准权限，中央企业由国务院国资委批准（中央企业在本企业内部实施资产重组，符合协议转让条件的，由中央企业负责批准或依法决定，同时抄报国务院国资委）；地方企业由省级国资委批准，审批权不得下放或分解批准权限。

书面解释和具体说明。该等书面解释和具体说明只有在经相关批准机构审核并由产权交易机构在产权转让公告中一并公布后，方可作为确认或否定意向受让方资格的依据。

### 三、 国有股东所持上市公司股份转让的监管

外国投资者拟通过并购交易实现对国资背景的上市公司的控股或参股的，一般通过对上市公司战略投资、国有股东所持上市公司股份的间接转让实现。

#### 1. 战略投资的监管

对上市公司战略投资，一般是指外国投资者对符合一定条件的上市公司进行中长期战略性并购投资。对上市公司进行战略投资一般通过协议转让和认购上市公司定向发行的新股两种方式进行。

外国投资者拟对上市公司进行战略投资的，在交易各方依法签署相关股份转让协议或定向发行协议后，持有该上市公司股份的国有股东应按规定程序将该等协议转让或定向发行方案报相关主管国资委审批。在取得国资委的批复后，该上市公司应向商务部报送有关战略投资的申请文件。在取得商务部的原则批复函后，上市公司应向证监会申请核准或在办理股份转让登记手续后报证监会备案（依具体情形而定），并在取得商务部原则批复函后的 180 日内完成战略投资。

此外，外国投资者应按中国相关法律法规的规定履行信息披露等法定义务。特别地，当外国投资者持有一个上市公司的股份达到该公司已发行股份的 30%，拟继续增持股份的，将触发要约收购义务，即其应当向所有股东发出全面要约或部分要约。在符合相关规定的前提下，外国投资者可以向证监会申请豁免要约收购，由证监会审核确定是否同意该等豁免申请。

#### 2. 间接转让的监管

上市公司国有股东因产权转让或增资扩股等原因导致其经济性质或实际控制人发生变化的，构成国有股东所持上市公司股份的间接转让。交易各方实施间接转让的，在产权转让或增资扩股方案实施前（其中，国有股东国有产权转让的，应在办理产权转让交易鉴证前；对国有股东增资扩股的，应在办理工商登记前），国有股东应将转让方案逐级报国务院国资委审核批准。

此外，间接转让亦应当依法履行信息披露等法定义务，且当外国投资者已经或者计划持有或拥有权益的股份超过上市公司已发行的股份 30% 时，也将触发要约收购义务。在符合相关规定的情况下，外国投资者可向证监会申请豁免，由证监会审核后作出是否同意豁免的决定。

### 四、 金融企业国有资产转让的监管

## 1. 金融企业国有资产转让的监管机构

2009年3月17日，财政部发布《金融企业国有资产转让管理办法》（“《金融国资转让办法》”，已于2009年5月1日起实施），首次明确了财政部是金融企业及其子公司国有资产转让的监管部门。《金融国资转让办法》发布前，我国金融企业国有资产的监管机构不明确，金融企业国有资产监管体制亦不完备。

值得注意的是，在《金融国资转让办法》颁布之后，国务院国资委又于2009年9月19日颁布了《关于进一步加强地方国有资产监管工作的若干意见》（“《意见》”）。《意见》指出，地方国资委可根据本级人民政府授权，逐步将地方金融企业国有资产、事业单位投资形成的经营性国有资产、非经营性转经营性国有资产纳入监管范围。根据《意见》，地方国资委履行出资人职责的地方金融企业，其国有股权转让将依照企业国有资产转让的有关规定，由企业决定或者由地方国资委批准，或者由地方国资委报本级人民政府批准。

而根据《金融国资转让办法》，县级以上人民政府财政部门 and 县级以上人民政府或其财政部门授权投资主体转让所持金融企业国有资产，国有及国有控股金融企业转让所持国有资产，由财政部门负责监督管理。可见，关于该等金融企业国有资产转让的主管审批机关的确定，还有赖于主管地方人民政府作出进一步规定或授权。

## 2. 非上市金融国资转让的监管

根据《金融国资转让办法》，财政部门是金融国资转让的主要监管部门。其中，财政部门转让金融企业国有资产，应当报本级人民政府批准。政府授权投资主体转让金融企业国有资产，应当报本级财政部门批准。

此外，国有及国有控股金融企业转让子公司的产权，应当报财政部门审批。前述一级子公司转让所持子公司产权，由控股（集团）公司审批。但涉及重要行业、重点子公司<sup>10</sup>的重大国有产权转让，或者导致转让标的企业所持金融企业或者其他重点子公司控股权转移的，应当报财政部门审批。<sup>11</sup>

除前述金融国资转让的审批监管外，金融国资转让过程中还涉及到评估、定价及转让程序等问题，需适用《金融国资转让办法》、《金融企业国有资产评估监督管理暂行办法》以及《关于贯彻落实〈金融企业国有资产转让管理办法〉有关事项的通知》等针对金融国资的专门规定。

<sup>10</sup> 重要行业是指金融、军工、电网电力、石油石化、电信、煤炭、民航、航运 8 大行业。重点子公司是指国有及国有控股金融企业对涉及上述行业的公司拥有控股权，以及对上市公司拥有控股权。

<sup>11</sup> 鉴于国资委亦就金融国资转让的监管出台了相关规定（如本备忘录第四.1 项下所述），我们理解，在具体项目中涉及金融国资转让的审批问题时，应进一步咨询当地国资委及财政部门。

### 3. 金融上市公司国有股份转让的监管

转让上市金融企业国有股份和金融企业转让上市公司国有股份应当通过依法设立的证券交易系统进行。其中转让方为上市公司控股股东的，应将股份转让方案报财政部门审批后实施；为上市公司参股股东的，只有在 1 个完整会计年度内累计净转让股份达到上市公司总股本 5% 时，方需报财政部门批准后实施；未达到 5% 的，按内部决策程序决定并按年度向财政部门报告即可。

## 五、 国有股权/股份质押的监管

除前述与国有资产监管有关的问题外，并购交易还可能涉及国有股东以其拥有或持有的股权/股份设置质押，向债权人提供担保的情形。目前，国务院国资委尚未出台关于国有股东提供股权质押的专门规定。实践中，国有股东提供股权/股份质押的，主要依据股权质押的一般规定以及地方国资委的规定和要求办理。国有股东提供股权/股份质押的，主要有以下几个值得注意的问题：

第一，被担保人的范围以及质押股权/股份的数额。就非上市的国有股权/股份质押而言，部分地方（如山东省、厦门市以及嘉兴市等）国资委要求，股权质押仅能在国家出资企业与其独资或绝对控股的子公司之间进行，且累计担保的数额不得超过一定的限额。<sup>12</sup>就国有股东质押其持有的上市公司股份而言，国务院国资委规定，用于质押的股份数量不得超过其所持上市公司股份总额的 50%，且仅限于为本单位及其全资或控股子公司提供质押，质押股份的价值应以上市公司股票价格为基础合理确定。

第二，股权/股份质押设立的国资委前置审批。《企业国有资产法》规定，未经国资委同意，国有独资企业、国有独资公司不得为关联方提供担保。部分地方（如山东省、吉林省、宁波市、湖州市等）国资委及工商局也明确要求，以国有股权出质，需事先获得相关国资委的批准。

第三，质押的实现程序。上海、湖北等地的相关法规要求，因国有股权质押的实现导致国有股权转让的，需依国资委的相关规定执行。即需依法对该等股权进行资产评估，并通过招拍挂程序转让国有股权，进而实现质押权。

因此，在并购交易中，如交易结构中涉及国有股东提供股权质押的，外国投资者应充分了解国资委、当地法规及主管机关的要求，充分考虑股权/股份质押的设立和实现所需的条件、时间和成本，最大程度地规避交易过程中可能存在的风险。

\* \* \*

<sup>12</sup> 如山东省国资委规定，省管企业的累计担保总额不得超过其净资产。对同一个担保申请人提供的累计担保总额不得超过其净资产的 30%；对单个担保申请人提供的单项担保总额不得超过其净资产的 10%。



以上是我们根据现行有效的中国法律法规以及实践对并购交易中可能涉及的国有资产监管的主要问题进行的简单总结，希望对阁下有所帮助。需提请阁下注意的是，除本备忘录涉及的国资委审批外，涉及国有资产的并购交易还需依法报经商务部门、行业主管部门等审批。且国有资产监管具有一定的地域属性，在具体项目中，投资人应充分考虑目标公司所属国资委和地方政府的具体规定和监管要求。此外，国有资产监管的法律法规也在不断地修订和更新中，相关法律法规的规定如与本备忘录不一致的，应以该等法律法规为准。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 (inquiry@hanyilaw.com)。

©瀚一律师事务所  
2010年3月12日