

SAFE CIRCULAR 16 - LATEST REFORM ON THE FOREIGN EXCHANGE SETTLEMENT UNDER CAPITAL ACCOUNTS

Aiming at nationwide reforming and unifying the current foreign exchange settlement policies under the capital accounts, on June 15, 2016, the State Administration of Foreign Exchange ("SAFE") launches *Circular on Reforming and Regulating Policies on the Administration over Foreign Exchange Settlement under Capital Accounts* (Huifa [2016] No.16) (in Chinese, "国家外汇管理局关于改革和规范资本项目结汇管理政策的通知") ("Circular 16") on its official website.

Circular 16 shall take effect on June 9, 2016 and the key features are highlighted as follows:

1. Nationwide Adoption of "At Will" Approach (in Chinese, "意愿结汇") for the Settlement of Foreign Debts

Based on the experimental implementation in four pilot free trade zones in Shanghai, Tianjin, Guangdong and Fujian, Circular 16 extends the "At-Will" approach for foreign debts settlement to the whole country. According to Circular 16, all domestic enterprises, including domestic-funded enterprises and foreign-invested enterprises (excluding financial institutions) could choose at will the timing for foreign exchange settlement of foreign debts.

2. Unified Policy on “At Will” Approach for Foreign Exchange Settlement under Capital Accounts

Circular 16 unifies relevant policies previously released by SAFE on the “At-Will” approach for foreign exchange settlement under capital accounts, including policies on the settlement of foreign exchange registered capital, foreign exchange foreign debts, repatriated foreign exchange funds raised through overseas listing and foreign exchange in the funds pool operated by the multinational enterprises. Other than the “Settle-to-Pay” approach¹ (in Chinese, “支付结汇”), Circular 16 enables all domestic institutions to choose the timing and amount to convert their foreign exchange funds under the capital accounts into RMB, at current stage, no limitation is set by SAFE, i.e. 100% of said foreign exchange funds could be converted into RMB, but SAFE shall be entitled to adjust the ration according to the then balance of international payment. Under the “At-Will” approach, domestic institutions shall open a “Settled-to-be-Paid” account (in Chinese, “结汇待支付账户”) to store the settled RMB. No document evidencing the usage of the settled RMB funds is required to be provided to the bank upon “At-Will” settlement, while SAFE will mainly fulfill the administration on usage of foreign exchange and the settled RMB upon payment, where documents evidencing the authenticity of the usage of settled RMB funds or foreign exchange capital funds, such as the underlying contracts and invoices, shall be submitted to the banks. In addition, banks will also verify the authenticity and compliance of evidencing documents for the previous payment when handling each payment of capital funds.

Notwithstanding the above, Circular 16 increases the limitation of accumulated amount of monthly imprest payment of a single institution from USD 100,000 to USD 200,000, which means the domestic institution could convert in maximum USD 200,000 per month into RMB in the name of imprest (in Chinese, “备用金”), without providing documents evidencing the payment.

3. Negative List for Usage of Foreign Exchange under Capital Accounts and the RMB Funds Settled Therefrom

The Circular 16 intends to adopt a “Negative List” approach to administrate the usage of foreign exchange and “At-Will” settled RMB funds under the capital account, it regulates as follows:

¹ “Settle-to-pay” approach requires that only if the authentic underlying transaction occurs and the payment in RMB is required could the foreign exchange be settled. Under this approach, the bank handling the settlement will review the documents evidencing the usage of settled RMB funds, such as the underlying contracts and invoices that are deemed necessary by the bank.

1. They shall not be directly or indirectly used for the payment beyond the business scope of the enterprises or the payment prohibited by the PRC laws and regulations;
2. Unless otherwise provided by the PRC laws and regulations, they shall not be directly or indirectly used for securities investment or other investment and financing except for the principal safeguarded bank wealth management products;
3. Unless permitted by the business scope of the enterprises, they shall not be used for granting loans to non-affiliate enterprises; and
4. Except for self-use purpose or for real estate enterprises, they shall not be used for constructing and purchasing real estate.

It sounds like that it is still prohibited to convert foreign exchange funds into RMB for equity investment, unless equity investment is included in the business scope of said company. Further, based on the above Negative List, it seems that SAFE may allow the affiliates to finance each other by using the foreign exchange or "At-Will" settled RMB funds; And using the "At-Will" settled RMB funds to repay the RMB bank loans (including entrusted loans) is no longer prohibited.

Circular 16 keeps silence to the administration on cross-border RMB under capital accounts, which has been treated same as foreign exchange under capital accounts by rules and policies promulgated by the Ministry of Commerce, the People's Bank of China and the SAFE. However, after the launch of Circular 16, under the capital account there are some difference between the use of the cross-border RMB funds and the settled RMB funds, for example, cross-border RMB is not allowed to be used for granting entrusted loans or purchasing any wealth management products, while the settled RMB funds is allowed to grant entrusted loan to the Affiliate Entity and purchase principal safeguarded wealth management products.

Circular 16 reflects the PRC government's intention to release the foreign exchange control under capital account step by step for the promotion of the internationalization of RMB. Some uncertainties, like the definition of "Affiliate Entity" might be further clarified by SAFE during the implementation of Circulate 16.

As usual, Garrigues will keep close eyes on the implementation and keep our clients posted.

Follow us:



www.garrigues.com

This publication contains general information and does not constitute professional opinion or legal advice.

© J&A Garrigues, S.L.P., all rights reserved. Exploitation, reproduction, distribution, public communication and transformation, total and partial, of this work, without written permission from Garrigues.

3205 West Gate Mall 1038 Nanjing Xi Lu – Shanghai 200041
T +86 21 5228 1122 - F +86 21 6272 6125

China World Trade Center 1, Jian Guo Men Wai Avenue (Tower 1 – Office 1815) - Beijing 100004
T +86 10 85720000 - F +86 10 85720020