Regional updates

CHINA
Paul Weiss

PHILIPPINES
SyCip Salazar Hernandez & Gatmaitan

MALAYSIA
Tay & Partners

SINGAPORE
Loo & Partners

INDIA
Singh & Associates

Each month, ALB draws on its panel of country editors to bring readers up to date with regulatory developments across the region

CHINA

Paul|Weiss

China Issues Filing Standards for Business Concentrations

On August 3, 2008, two days after China's Anti-Monopoly Law (the "AML") came into effect, the State Council determined the thresholds above which business concentrations must be reported to the Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") under the AML. This rule has been eagerly awaited: from now on, mergers, acquisitions and other transactions through which one undertaking obtains control over another – both inside and outside China – are subject to a new government procedure, if the thresholds are exceeded.

Under the *State Council Provisions of Filing Standards for Concentrations of Operators* (the "Provisions"), any of the following two tests triggers the reporting obligation under the AML:

- during the fiscal year preceding the concentration, the (aggregate) worldwide turnover of all enterprises participating in the transaction exceeded RMB 10 billion and the turnover within China of at least two participating enterprises individually exceeded RMB 400 million; or
- during the fiscal year preceding the concentration, the (aggregate) turnover within China of all participating enterprises exceeded RMB 2 billion and the turnover within China of at least two participating enterprises individually exceeded RMB 400 million.

The Provisions do not specify how turnover should be calculated, and therefore some key determinations will need to be made by the Anti-Monopoly Bureau. When deciding whether a filing is required, parties should assume that turnover is calculated by consolidating the party to the transaction and its subsidiaries. However, it is not yet clear how MOFCOM will define "subsidiary" for this purpose and whether the turnover of parent and other affiliated companies needs to be included as well.

Even when the thresholds are not met, the Provisions authorize the Anti-Monopoly Bureau to conduct investigations if "the facts and evidence collected in accordance with prescribed procedures show that such concentration has or may have the effect of excluding or restricting competition." Again, it is not yet clear what these procedures are and how the Anti-Monopoly Bureau will exercise this power.

As many global transactions are between corporations with substantial operations in China, MOFCOM has the potential of becoming one of the anti-trust regulators that can make or break deals hatched in another continent, like its counterparts in the United States and the European Union. But it will take time and experience for MOFCOM and practitioners to figure out when a mandatory filing is required, whether voluntary filings are advisable and how anti-monopoly review under the AML will affect the shape and timing of deals.

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PHILIPPINES

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The PERA Act: Towards a Secured Retirement

On August 22, 2008, President Gloria Macapagal-Arroyo signed into law Republic Act No. 9505 or the Personal Equity and Retirement Account (PERA)

Act of 2008. The PERA Act provides for a legal and regulatory framework on retirement plans, comprised of voluntary personal savings and investments.

Under the law, a contributor who is of legal age with a valid tax identification number (TIN) may establish a Personal Equity and Retirement Account (PERA) for the sole purpose of investing in PERA Investment Products in the Philippines. He or she may maintain a maximum of five (5) PERA, at any one time. These PERA Investment Products include, among others, unit investment trust funds, mutual funds, annuity contracts, insurance pension products, pre-need pensions plans, shares of stocks and other securities listed and traded in a local exchange.

A contributor may make an aggregate maximum contribution of one hundred thousand pesos (Php 100,000.00), or its equivalent in any convertible foreign currency to his or her PERA annually. For married couples, each of the spouses is entitled to make a maximum contribution of one hundred thousand pesos (Php 100,000.00), or its equivalent foreign currency annually. Overseas Filipino workers can contribute up to a maximum of two hundred thousand pesos (Php 200,000.00) in any given year. In addition to the mandatory Social Security contributions, private employers may also contribute to his or her employee's PERA to the extent of the amount allowable to the contributor-employee.

After at least five (5) annual contributions, distributions may be made when the contributor has reached age of fifty-five (55) years. The contributor may choose the distribution scheme that can be in one lump sum or on a pension for a definite period or during the lifetime of the contributor. Nonetheless, complete distribution will be made upon the death of the contributor irrespective of his or her age at the time of death.

To discourage withdrawals prior to the distribution of the retirement proceeds, early withdrawals are generally subject to penalties. This notwithstanding, no early withdrawal penalty is imposed where the contributor is totally disabled or when the funds are withdrawn to pay for accident or illness-related hospitalization exceeding thirty days.

In order to encourage savings, the PERA Act provides a number of tax incentives for contributors and employers alike. The act gives a contributor an income tax credit of five percent (5%) of the total PERA contributions, plus all the income that he or she will earn from the investments and reinvestments are exempt from taxation. Moreover, withdrawals upon reaching the age of fifty-five (55) or upon a contributor's death are also tax exempt. The law also grants deductions from the gross income for taxation purposes to a private employer who opts to contribute to his or her employee's PERA.

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BOOSTER JABS

The real estate investment trusts ("REIT") industry received 2 massive boosts within a space of seven days. First, the Securities Commission ("SC"), the main regulator of REIT in Malaysia with an eye to make the REIT industry a vibrant and competitive industry domestically and internationally, announced a series of changes to its Guidelines on Real Estate Investment Trusts ("SC's Guidelines") that culminated in greater flexibility for market intermediaries. By doing so, SC now allows foreign shareholding in REIT managers at a high level of 70%. Previously, SC's Guidelines only allowed foreigners to hold up to 49% of the share capital of a REIT manager.

Besides liberalising foreign participation, SC also granted more flexibility to REIT managers in their investment and management of portfolio. Now, REIT managers are given more freedom to acquire foreign real estates. In managing their funds, they are also allowed to obtain a general mandate from unit holders to issue up to 20% of its fund size – a significant departure from the mandatory requirement to first obtain approval from unit holders in a unit holders' meeting each and every time new units are to be issued.

The other boost came in the form of tax reduction. The Minister of Finance, when announcing the Budget in Parliament, answered the prayers of many investors when he declared a reduction of tax rate payable on dividends given by REIT. Foreigners' erstwhile tax rate of 20% was reduced by half whilst tax rate applicable to local investors was reduced to 15%.

The liberalisation policies and the culling of tax rates will together generate more keen interest into the REIT industry and trigger an influx of foreign direct investments. If it materialises, market intermediaries and investors alike can certainly brace themselves for exciting and promising times ahead.

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Prolonged suspension not in interest of shareholders and market

"Cash companies" (companies which have sold their operations so that their assets comprise wholly or substantially of cash) and "distressed companies" (companies facing persistent financial difficulties) are given a reasonable period of time under the listing rules to submit proposals for very substantial acquisitions or reverse takeovers ("RTOs") with a view to resuming trading ("resumption proposals"). Such companies are given an extension of time to implement resumption proposals already approved by the Exchange. Continuation of listing is contingent on companies complying with the listing rules.

Safeguard interest of shareholders

Companies should submit satisfactory resumption proposals as soon as they can, to keep their suspension to the shortest period possible. A longer suspension is not necessarily helpful in the search for viable alternatives. Companies under suspension incur expenses, draw down on assets and the return of remaining cash to investors will be delayed. This in turn causes the financial position of such companies deteriorates.

From the past experience, proposals hurriedly put together near the delisting deadline are unlikely to satisfy SGX listing criteria. The prolonged wait for shareholders would have been in vain. Hence, the Exchange reminds suspended companies to take constructive steps towards the resumption of trading. The Exchange undertakes to process well-prepared proposals rapidly.

Suspended companies and directors should be aware of the opportunity cost for shareholders from prolonged suspension. Besides, cash should be returned to shareholders who can deploy the funds or re-invest according to their preference if the suspended company is unable find an investment within the timeframe granted.

Resumption of Trading via RTOs

The resumption proposals which involve very substantial acquisitions or RTOs have to comply with the standards and scrutiny applicable to initial public offering applications, in order to ensure consistent application of listing standards. Otherwise, unqualified listing applicants may obtain listing status by acquiring suspended companies.

RTOs often involve significant dilution of shareholding level of the incumbent minority shareholders. The directors of suspended companies have the responsibility to evaluate whether RTOs will benefit incumbent minority shareholders vis-à-vis returning the cash earlier to shareholders.

Extension to implement viable resumption proposals

For the reasons outlined above, the Exchange does not have strong grounds for granting extensions of time without clear signs of distressed and cash companies submitting viable resumption proposals. An extension will be granted where it is necessary to implement viable proposals that would restore the companies to compliance with continuing listing obligations on a sustained basis.

Maintaining Listing Standards

The Exchange prescribes minimum entry requirements and continuing listing obligations, in order to maintain quality and foster an enduring marketplace. Maintaining listings standards is critical in upholding the integrity of the market and safeguarding the interest of shareholders.

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INDIA

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Currency Futures Contract: A new player in capital market of India.

In the context towards the continued expansion of the financial market, the financial regulating bodies of India, Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) have always initiated various kinds' steps whether it is introducing short selling activities or issuing guidelines for listing of Debentures or reducing the time span in issuing right shares to 43 days, etc. Now they have added a new tool to the existing menu of foreign exchange hedging tools available to the residents, i.e. 'Exchange traded currency futures contract'. It has been felt by the regulators that wider hedging opportunities could enhance the flexibility for the residents to manage their currency risk dynamically, so this move is a step towards mitigating the risk.

Exchange traded currency futures contract shall facilitate efficient price discovery, enable better counterparty credit risk management, wider participation, trading of standardized product, reduce transactions costs, etc.

Permission to participate in the currency future market in India subject to directions contained in the currency futures (Reserve Bank) directions, 2008.

Currency Futures can be described as a standardized foreign exchange derivative contract traded on a recognized stock exchange to buy or sell one currency against another on a specified future date, at a price specified on the date of contract, but does not include a forward contract and currency future market means the market in which currency futures are traded.

The General Permission has been given for currency futures in US Dollar-Indian Rupee or any other currency pairs, as may be approved by the Reserve Bank from time to time. At present the Reserve Bank of India has only allowed US Dollar-Indian Rupee currency pairs.

Future contract in the form of currency is exactly like a futures contract on Nifty. A future price F is traded on the screen. That pertains to the INR/USD exchange rate at a future date. If the spot price goes up, the futures buyer (the long) makes a profit at the expense of the futures seller (the short). The futures will be cash settled. The gainer will be paid in rupees by the loser. No foreign exchange will change hands. No foreign exchange will cross the boundary of India.

It is important to mention that at present only persons resident in India as defined under Section 2(v) Foreign Exchange Management Act, 1999 shall participate in the currency futures market and can purchase or sell currency futures to hedge an exposure to foreign exchange rate risk or otherwise.

To begin with, Foreign Institutional Investors (FIIs) and Non-Resident Indians (NRIs) would not be permitted to participate in currency futures market.

Among the various other features of the directions, 2008 the main features are that only USD-INR contracts are allowed to be traded. The size of each contract shall be USD 1000. The contracts shall be quoted and settled in Indian Rupees. The maturity of the contracts shall not exceed 12 months. The settlement price shall be the Reserve Bank's reference rate on the last trading day.

The Reserve Bank of India from time to time shall modify the eligibility criteria for the participants, modify participant-wise position limits, prescribe margins and/or impose specific margins for indentified participants, fix or modify any other prudential limits, or take such other actions as deemed necessary in public interest, in the interest of financial stability and orderly development and maintenance of foreign exchange.

As far as participation of banks are concerned, to enable Banks to become clearing members and/or Trading Members of the currency derivative segment of an Exchange, an exchange shall amend its bye laws as suggested by RBI and SEBI.

It is expected that after curing the initial hiccups which may be caused in the functioning currency futures the regulators will not wait for long to allow the FIIs and NRIs to join the arena of currency futures.

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