

Clients & Friends Memo

Impact of the New PRC Cross-Border Security Regulations on Debt Financing

18 June 2014

On May 12, 2014, the State Administration of Foreign Exchange (“SAFE”) of the People’s Republic of China (the “PRC”) issued a notice on the Issuance of Administration Rules of Foreign Exchange on Cross-border Security¹ (the “Notice”) and promulgated the Administration Rules of Foreign Exchange on Cross-border Security² (the “Rules”) and the Operational Guidelines for Implementing the Administration Rules of Foreign Exchange on Cross-border Security³ (the “Guidelines”, together with the Rules, the “New Rules”), effective on June 1, 2014. Twelve previous regulations or policies (the “Repealed Regulations”) listed in Appendix 3 to the Notice, were repealed when the New Rules took effect.

Summary of Changes. Aimed at reforming the existing regulatory scheme, easing capital control restrictions in the PRC and simplifying administrative and regulatory processes, the New Rules have removed a number of hurdles, redefined the scope of foreign currency regulations and are expected to encourage and assist PRC companies to raise funds outside of China for their overseas transactions and non-PRC companies to use their global assets to facilitate their PRC financing transactions. Future financing transactions will benefit from simpler financing structures, more efficient use of borrowers’ assets and greater legal certainty provided by the New Rules. Some major differences between the New Rules and Repealed Regulations are summarized in the appendix attached to this memorandum. In this memorandum, we use “onshore” to refer to the PRC, and “offshore” to refer to outside of China.

Under the New Rules, documentary requirements and regulatory processes are simplified and restrictions on loans between onshore and offshore entities are loosened.

¹ 《国家外汇管理局关于发布《跨境担保外汇管理规定》的通知》

² 《跨境担保外汇管理规定》

³ 《跨境担保外汇管理操作指引》

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- SAFE's approval is no longer required for the provision of cross-border guarantees or security arrangements (for example, collateral).
- Making a payment under a cross-border guarantee or security arrangement is no longer subject to SAFE's approval.
- Replacing the previous SAFE pre-approval as a condition for a cross-border guarantee or security arrangement, registration with SAFE after entering into a commitment is instead required under specified circumstances. However, registration with SAFE is not a condition precedent for the validity of a cross-border guarantee or security arrangement.

The New Rules are also expected to:

- result in lower funding costs for offshore and onshore debt financing transactions;
- facilitate offshore financing transactions (including bond offerings), stimulate growth of the bond market and provide additional methods of financing for offshore operations of PRC businesses and mergers and acquisitions;
- provide stronger protection for creditors (including bondholders) through guarantees or security arrangements, as compared to currently-existing credit support mechanisms; and
- permit a wider use of assets by offshore entities to assist with onshore financing transactions.

The New Rules have significantly relaxed the requirements on providing cross-border guarantees or security arrangements in offshore financings, which greatly facilitates both commercial lending and bond financing transactions. In a bond offering, offshore investors can now benefit from guarantees or security arrangements provided by the onshore parent of the offshore issuer. In a bank financing transaction, an offshore lender can also benefit (in addition to benefits provided by the onshore parent) from guarantees or security arrangements provided by the onshore subsidiaries or other affiliates of the offshore issuer. The different treatment is primarily due to the requirement that in a bond offering, the onshore guarantor or security provider must directly or indirectly own shares of the offshore issuer. It remains to be seen if this difference will significantly favor offshore commercial lending over offshore debt capital markets transactions.

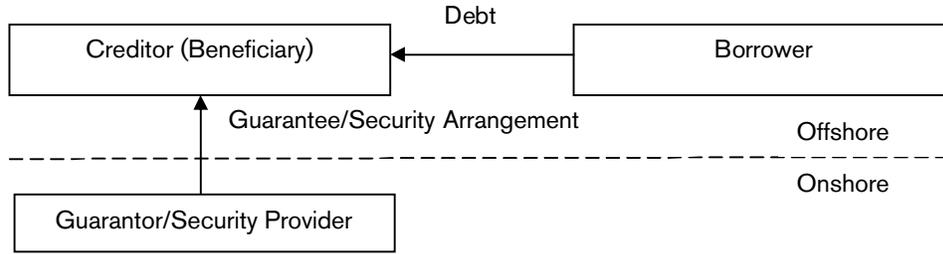
Categories of Cross-border Guarantees or Security Arrangements. Cross-border guarantees or security arrangements fall into three categories under the New Rules:

- (i) guarantees and security arrangements provided by onshore entities of offshore indebtedness (“**NBWD**” or “内保外贷”),
- (ii) guarantees and security arrangements provided by offshore entities of onshore indebtedness (“**WBND**” or “外保内贷”) and
- (iii) other cross-border guarantees and security arrangements.

Each category is briefly discussed below:

I. NBWD: Guarantees and Security Arrangements Provided by Onshore Entities of Offshore Indebtedness

NBWD is a cross-border guarantee or security arrangement provided by an onshore enterprise in respect of an offshore debt incurred by an offshore company. Both the creditor (or the beneficiary) and the borrower are offshore entities. The following chart shows the relationship among the parties:



Summary of Changes. Under the New Rules, onshore companies are allowed to provide guarantees or security arrangements to offshore borrowers without SAFE's prior approval or registration. When providing a guarantee or security arrangement, an onshore bank guarantor or security provider may complete its registration with SAFE using a data interface program, while an onshore non-bank guarantor or security provider needs only to complete its registration with a local SAFE bureau within 15 business days after execution of the relevant guarantee or security agreement. Failure to register the guarantee or security arrangement, however, does not affect its validity under the New Rules.

When making a payment under a guarantee or security arrangement, a bank guarantor or security provider can make payments pursuant to the guarantee or security arrangement without SAFE's approval. For an onshore non-bank guarantor or security provider, it can present the evidence of its SAFE registration to a domestic bank for making cross-border foreign exchange payments and no SAFE approval or verification is required.

The New Rules further remove shareholding and asset requirements of the parties and structural requirements relating to the relationship between the onshore guarantor or security provider and the offshore borrower, except in the case of an offshore bond offering, and abolish the existing quota limitation.

Significance to Debt Financing Transactions. The New Rules are of great significance to offshore debt financings in that:

- A PRC enterprise is now provided with an additional option to assist its offshore affiliates to raise funds offshore.

- A cross-border guarantee or security arrangement in an offshore lending transaction or bond offering can constitute a stronger legal basis for protection of offshore creditors following an event of default given that it provides an additional source of security. Compared with the other credit support mechanisms adopted recently in offshore bond offerings (such as keepwell deeds and equity interest purchase undertakings), there should be fewer legal enforceability issues and regulatory risks associated with a guarantee or security arrangement under the New Rules. A registered guarantee or security arrangement may provide much needed certainty in a debt financing transaction.
- Funding costs are expected to be reduced as a result of enhanced access to the credit of onshore guarantors or security providers.

Restrictions. The New Rules, however, retain certain restrictions for the purpose of controlling the aggregate risk of cross-border guarantees and security arrangements. The remaining major limitations are as follow:

- Offshore funds can be used only in the offshore borrower's ordinary course of business and cannot be used for any speculative transactions or arbitrage trades.
- The offshore borrower may not repatriate funds borrowed offshore through loans, equity contributions or other securities investments, directly or indirectly, unless such borrower receives SAFE's approval.
- The offshore borrower may not use such borrowed funds to acquire, directly or indirectly, shares in an offshore target company more than 50% of whose assets are located in the PRC, unless such borrower receives SAFE's approval.
- The offshore borrower may not use such borrowed funds to repay debts it or other offshore companies incur, if proceeds of such debts have been previously sent, directly or indirectly, onshore, through equity or debt investments, unless such borrower receives SAFE's approval.
- The offshore borrower may not use such borrowed funds to make a payment for goods or services delivered by a PRC entity more than one year in advance of receipt for such goods or services, if such payment exceeds US\$1 million and 30% of the contract value, unless such borrower receives SAFE's approval.
- For an offshore bond offering, there are additional restrictions: (i) the onshore guarantor or security provider must be a direct or indirect shareholder of the offshore issuer (and not merely a subsidiary or affiliate of such a shareholder); (ii) proceeds of such bond offering must be used in offshore investment projects with which such onshore guarantor or security provider has an ownership relationship; and (iii) such offshore entity or project must have received the required approval, registration, filing or confirmation by the relevant PRC agency in charge of foreign investments, pursuant to relevant rules.

- If a non-bank guarantor or security provider makes payments under its guarantee or security without SAFE's approval, such non-bank guarantor or security provider is prohibited from providing new guarantee or security for any offshore indebtedness before it is fully indemnified by the borrower.
- An onshore guarantor or security provider must register with SAFE (i) the guarantee or security arrangement after its execution and (ii) the foreign debt it holds after making a payment under such guarantee or security arrangement.

Other cross-border credit support mechanisms, such as keepwell deeds and equity interest purchase undertakings, do not fall within the scope of cross-border guarantees or security arrangements covered by the New Rules. Thus, such undertakings remain unregulated in the PRC.

Primary Beneficiaries of the New Rules under NBWD. Due to the above restrictions, PRC companies having, or intending to expand, their offshore operations are expected to be the primary beneficiaries of the New Rules, particularly those companies which have PRC parents with strong credit, or which have significant onshore assets (not held in their PRC subsidiaries, from the standpoint of the bond deals). Where these companies are comfortable with the New Rules' prohibition of fund repatriation to the PRC, they can benefit from the abilities to provide or receive onshore guarantees or security arrangements directly from China for their offshore financings (including bond offerings) without SAFE's approval. PRC companies with domestically-focused operations, however, are expected to receive significantly lesser benefit from the New Rules, in light of the fact that they typically need to repatriate funds raised offshore into the PRC.

Issues Relating to Ownership Requirement in Offshore Bond Offerings. The New Rules require that the onshore guarantor or security provider be a direct or indirect shareholder of the offshore issuer in an offshore bond offering. This requirement effectively narrows the New Rules' application to a transaction where the offshore issuer is a subsidiary of the onshore guarantor or security provider. It prevents an onshore subsidiary of the guarantor or the security provider from providing a guarantee or security arrangement where the subsidiary does not directly or indirectly own shares of the offshore issuer. Similarly, where the offshore issuer owns shares in an onshore subsidiary, the subsidiary cannot provide an upstream guarantee or security arrangement. In a transaction where the relevant PRC business utilizes an onshore holding company structure, a NBWD guarantee or security arrangement provided by an onshore guarantor or security provider in an offshore bond offering will thus be structurally subordinated to the indebtedness of its subsidiaries.

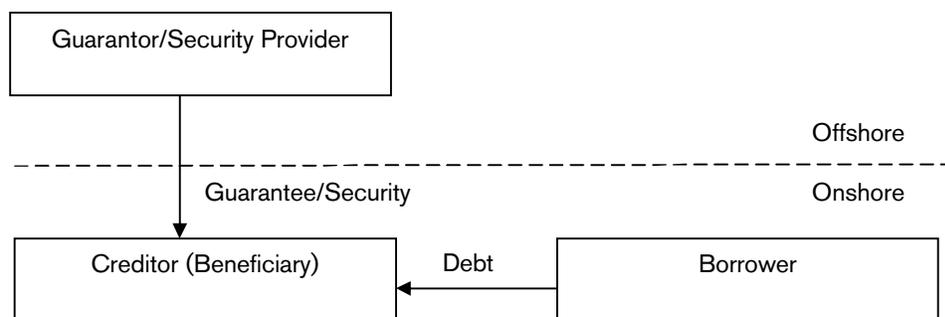
Interestingly, this ownership requirement is not imposed on cross-border guarantees or security arrangements provided for other types of debt financing transactions, such as commercial lending. An offshore bank lender can obtain guarantees and security arrangements not only from an onshore guarantor or security provider, but also from its subsidiaries or affiliates. If a guarantee or security arrangement is provided by an onshore subsidiary, such guarantee or security arrangement is not structurally subordinated to such subsidiary's other indebtedness.

As a result of this distinction, certain types of offshore creditors, such as lenders in loan transactions, will have better access to onshore subsidiaries' assets than bond investors. The different treatment seems to be rooted in SAFE's reluctance to relax requirements for transactions involving multiple investors, where investors' demands and purposes may vary significantly. The effect, whether intended or unintended, is that offshore bond investors will typically remain subordinated not only to domestic creditors, but may also now be similarly subordinated to offshore financial institution creditors.

The scope of application of the New Rules in respect of bond offerings also affects the use of other, unregulated, credit support mechanisms in future bond offerings. Before the New Rules took effect, a cross-border guarantee or security arrangement was required to be approved by SAFE and was subject to various shareholding and net asset restrictions. The stringent application requirements and lengthy time for obtaining approvals presented significant difficulties to many onshore companies. As a result, credit support mechanisms such as keepwell deeds, standby letters of credit and equity interest purchase undertakings have been adopted in offshore debt financing transactions to enhance the credit quality of bonds issued by offshore subsidiaries. Enforceability of some credit support mechanisms, however, has never been tested in the onshore legal system. If the equity ownership requirement in the New Rules proves to provide only limited benefits to offshore bond investors, such mechanisms may continue to be used in future bond offerings.

II. WBND: Guarantees and Security Arrangements Provided by Offshore Entities of Onshore Indebtedness

WBND is a cross-border guarantee or security arrangement provided by an offshore entity in respect of an onshore debt incurred by an onshore company. The creditor (or beneficiary) is an onshore financial institution and the borrower is an onshore non-financial institution. The indebtedness must be a binding credit obligation denominated in RMB or a foreign currency. The following diagram illustrates the relationship among the parties:



Summary of Changes. Under the New Rules, no SAFE approval or registration is required for an offshore guarantor or security provider to provide WBND guarantee or security. Further, no SAFE approval is required for the guarantor or security provider to perform its obligations under the guarantee or security arrangement. The borrower, however, must register with SAFE a foreign debt within 15 business days after the guarantor or security provider makes any payment under the guarantee or security arrangement. There are no requirements or restrictions relating to the relationship between the offshore guarantor or security provider and the onshore borrower. Failure to register the guarantee or security arrangement does not affect its validity under the New Rules.

Significance to Debt Financing Transactions. The New Rules are of great significance to onshore debt financing transactions in that:

- A PRC company with a substantial offshore affiliate is provided with more options to finance its projects or operations onshore. The structure constitutes a viable channel for a multinational corporation with limited assets or financing alternatives onshore to finance its expansion or growth in the PRC with its assets offshore.
- With fewer restrictions under the New Rules, an offshore guarantee or security arrangement may also provide a more efficient financing alternative to a PRC domestic enterprise, especially where its offshore affiliate has significant assets overseas.

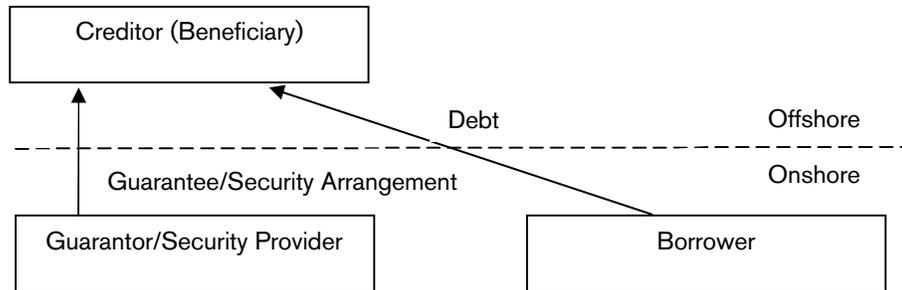
Restrictions. Certain restrictions are imposed to limit the aggregate scope of offshore guarantees and security arrangements provided to support indebtedness incurred onshore. Some of the major restrictions are as follow:

- If the offshore guarantor or security provider makes a payment under its guarantee or security arrangement, the onshore borrower may not procure any new offshore guarantee or security arrangement or make additional drawdowns from an existing guarantee or security arrangement before it fully indemnifies the offshore guarantor or security provider, without an approval from SAFE.
- If any offshore guarantee or security arrangement has been enforced, the aggregate unpaid principal amount of any foreign debt thereby incurred by the onshore borrower as a result of the enforcement is limited to the amount of the borrower's net assets (as indicated on the balance sheet of its most recently completed fiscal year) plus, if applicable, its foreign debt quota.
- If the offshore guarantor or security provider makes a payment under its guarantee or security arrangement, the onshore borrower must register with SAFE its foreign debt within 15 business days of such payments.

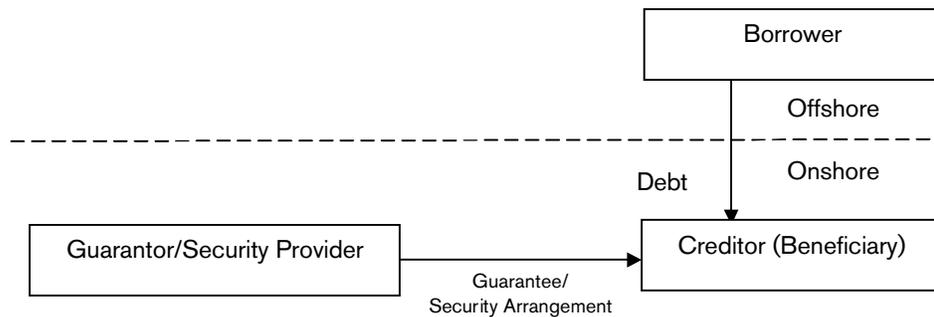
III. Other Cross-border Guarantees or Security Arrangements

Cross-border guarantees or security arrangements not falling into the above two categories are classified as other cross-border guarantees or security arrangements under the New Rules. Such guarantees or security arrangements may include, but are not limited to:

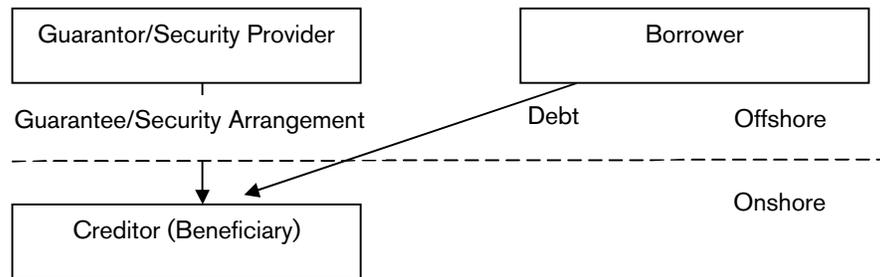
- Guarantee/security arrangement provided by an onshore company to an offshore creditor in connection with a loan that an onshore company borrows from the offshore creditor:



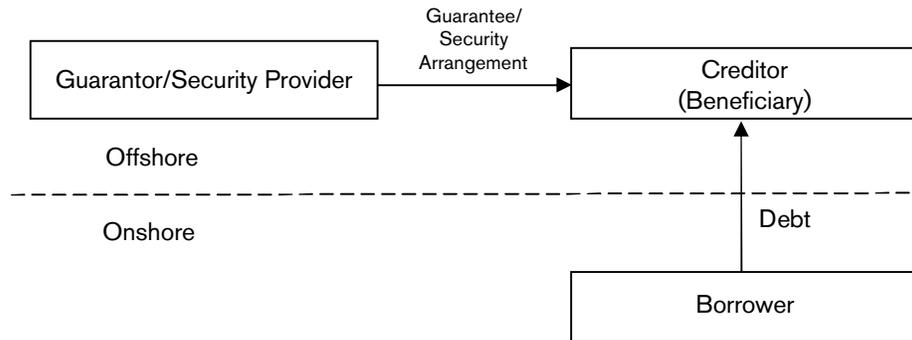
- Guarantee/security arrangement provided by an onshore company to an onshore creditor in connection with a loan that an offshore company borrows from the onshore creditor:



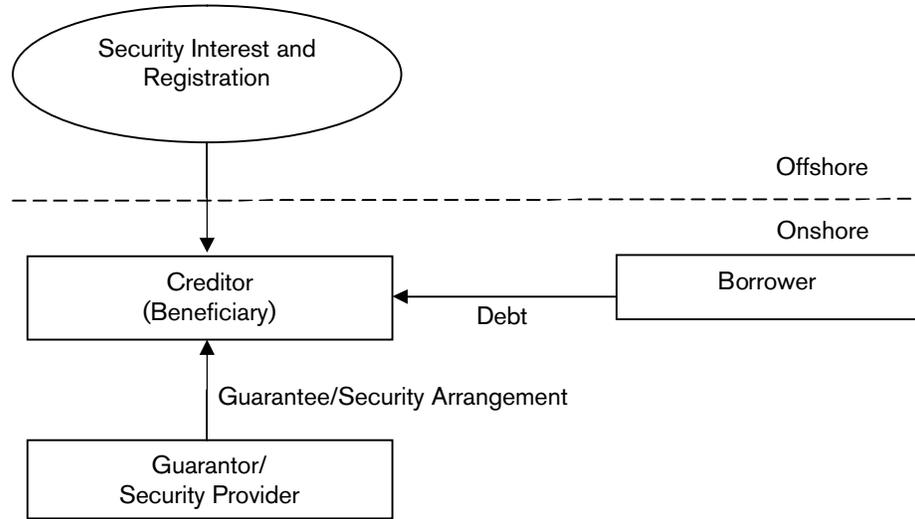
- Guarantee/security arrangement provided by an offshore company to an onshore creditor in connection with a loan that another offshore company borrows from the onshore creditor:



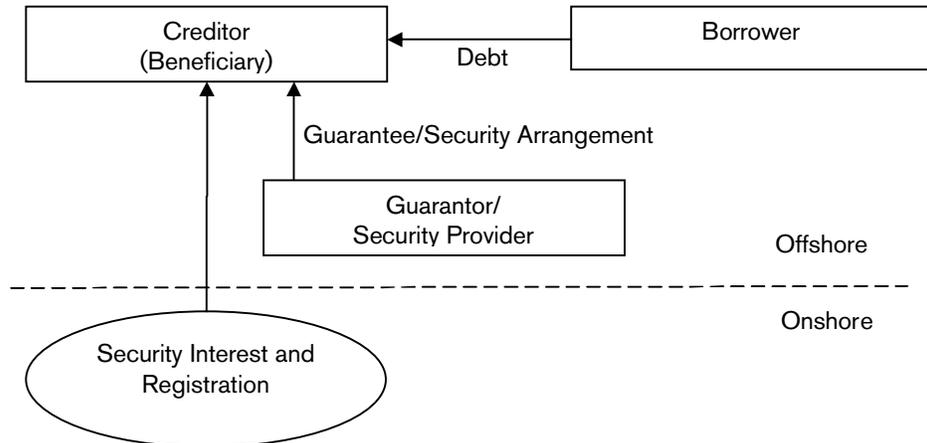
- Guarantee/security arrangement provided by an offshore company to an offshore creditor in connection with a loan that another onshore company borrows from the offshore creditor:



- Security interest is located and registered offshore while the borrower, guarantor or security provider and creditor are located onshore:



- Security interest is located and registered onshore while the borrower, guarantor or security provider and creditor are located offshore:



Summary of Changes. Under the New Rules, no SAFE approval or registration is generally required in connection with providing cross-border guarantees or security arrangements in this category except where specifically required. There are few restrictions under the New Rules in respect of other cross-border guarantees or security arrangements other than a general requirement of compliance with relevant laws (including SAFE rules). While the requirements on cross-border security are loosened, incurrence of cross-border indebtedness remains subject to applicable existing regulations.

IV. Remaining Issues

Notwithstanding the New Rules, certain existing regulations (the "PBOC Regulations") adopted by the People's Bank of China, such as the Administrative Measures for the Provision of Guarantee to Foreign Parties by Domestic Institutions⁴, which contain restrictions on PRC companies providing cross-border guarantees or security arrangements, have not been amended. For example, existing PBOC Regulations prohibit PRC companies from providing offshore guarantees or security arrangements unless in proportion to these companies' equity interests in their invested companies, or unless for their subsidiaries. Further, the PBOC Regulations impose on PRC companies requirements including amounts of offshore security in relation to their net assets and foreign currency revenues, as well as specific net assets versus total assets ratios.

Along with the effectiveness of the New Rules, SAFE abolished the Repealed Regulations, which were intended to supplement, and to provide implementation details of, the PBOC Regulations. In light of the PRC central government's objective in simplifying the government's administrative processes, we anticipate that similar amendments will be made in the PBOC Regulations.

V. Conclusion

The New Rules significantly simplify regulatory and administrative processes to make a more efficient debt financing market, which is expected to be helpful for PRC businesses seeking to raise funds offshore. The easing of capital controls is also expected to facilitate debt financing transactions onshore. It remains to be seen, however, how the equity ownership requirement in relation to NBWD's issuer and its guarantor or security provider will affect offshore bond offerings.

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⁴ 《境内机构对外担保管理办法》

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APPENDIX

Major Differences between New Rules and Repealed Regulations

A. NBWD: Guarantees and Security Arrangements Provided by Onshore Entities of Offshore Indebtedness

The following table sets forth some of the major differences between the New Rules and the Repealed Regulations as they relate to onshore guarantees and security arrangements for offshore financings:

Restrictions/Requirements	New Rules	Repealed Regulations
Validity of a cross-border guarantee or security arrangement	Validity not subject to SAFE approval or registration	Validity subject to SAFE approval and registration
Approval and registration	No SAFE approval needed; and SAFE registration required after execution of the guarantee or security agreement	Subject to SAFE approval; and SAFE registration within 15 business days after execution of the guarantee or the security agreement
Qualifications of the borrower	No shareholding or net asset restrictions	Stringent shareholding and net asset restrictions
Restrictions on the amount of guarantee/security	No quota restrictions	Quota restrictions
Relationship between the guarantor or security provider and the borrower	In a bond offering, the onshore guarantor or security provider must directly or indirectly own shares of the offshore issuer.	The onshore guarantor or security provider must own shares of the offshore issuer.
Credit enhancement structure	No verifications or approval requirements except that a non-bank financial institution cannot provide a new guarantee or security arrangement before it is fully indemnified by a borrower if it has made payments on behalf of that borrower under a guarantee or a security arrangement	Subject to SAFE case-by-case verification and approval for non-bank financial institutions or corporates

B. WBND: Guarantees and Security Arrangements Provided by Offshore Entities of Onshore Indebtedness

The following table sets forth some of the major differences between the New Rules and the Repealed Regulations as they relate to offshore guarantees and security arrangements for onshore financings:

Restrictions/Requirements	New Rules	Repealed Regulations
Limit on the amount of indebtedness	No quota restrictions	Quota restrictions generally applicable with limited exceptions in some select regions
Registration requirement	No SAFE approval or registration requirement for providing guarantees or security arrangements	Onshore financial institutions to fulfill stringent filing requirements
Approval before payments under guarantees or the security arrangements	No verification or approval requirement	Substantial filing requirements; and Subject to SAFE verification and approval

C. Other Cross-border Guarantees and Security Arrangements

The following table sets forth some of the major differences between the New Rules and the Repealed Regulations as they relate to other cross-border guarantees and security arrangements:

Restrictions/Requirements	New Rules	Repealed Regulations
Validity of a cross-border guarantee or security arrangement	Validity not subject to SAFE approval or registration	Invalid without prior SAFE approval or registration after providing security
Approval and registration requirements	No SAFE approval or registration requirements	Subject to SAFE approval; and/or SAFE registration requirements
Other restrictions	Only a general requirement of compliance with relevant SAFE rules and other applicable laws	A number of restrictions including the qualification of the borrower and the existing relationship between the guarantor or security provider and the borrower

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中国跨境担保外汇管理新规对债务融资的影响分析

2014年6月18日

2014年5月12日，国家外汇管理局（“外汇局”）颁布了《国家外汇管理局关于发布《跨境担保外汇管理规定》的通知》（“通知”）以实行《跨境担保外汇管理规定》及《跨境担保外汇管理操作指引》（统称“《规定》”），并明确《规定》自2014年6月1日起生效。通知中附件3列明了12项之前的规章于《规定》生效时即予废止（“已废止规定”）。

主要变化：着眼于改革现有的监管体制，放松资本管制以及简化行政管理程序，《规定》取消了一系列限制，重新界定了外汇监管的范畴，以期鼓励及支持境内公司为其海外交易而在境外进行融资，并支持境外公司利用其全球资产为其境内的融资交易提供便利。未来的融资交易有望得益于融资结构的简化，债务人资产的更有效利用，以及《规定》更强的法律确定性。本备忘录的附件总结了《规定》和已废止规定的主要区别。在本备忘录中，“担保”指保证或物权担保；“境内”指中国大陆境内；“境外”指中国大陆境外。

《规定》简化了相关文件要求与监管程序，对境内外融资的限制有所放松。

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- 便于海外融资交易（包括发债），促进债券市场的发展，并为中国企业在海外的业务和并购提供额外的融资方式；
- 与现有的信用支持方式相比较而言，担保安排可以为债权人（包括债券持有人）提供更强有力的保护；且
- 容许境外机构更为充分地使用其资产为其境内融资交易提供支持。

《规定》在境外融资方面明显放松了提供跨境担保的要求，从而在很大程度上为商业贷款和债券融资交易提供了便利。在债券发行中，境外投资人如今可以从发行人的境内母公司所提供的跨境担保中受益。就银行融资而言，境外贷款人除境内母公司外，还可以从借款人的境内子公司，或其他关联机构所提供的跨境担保中受益。该两者区别在于为海外债券发行提供担保时，是否要求担保人应直接或间接地持有境外发行人的股权。而上述区别是否会使境外债务资本市场交易从中得益较少，而境外商业借贷得益较多，仍待进一步观察。

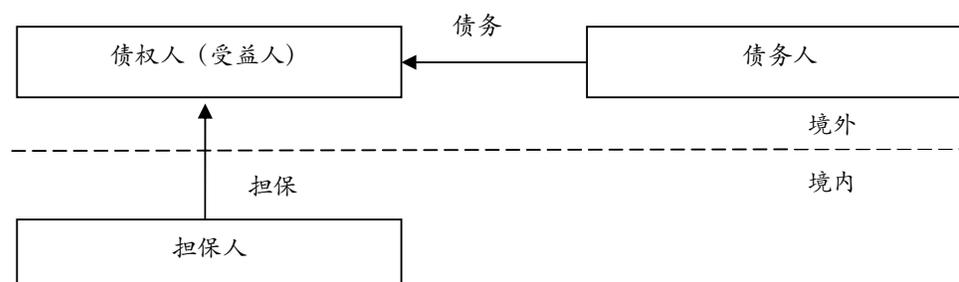
跨境担保分类：根据《规定》，跨境担保划分为如下三类：

- (i) 由境内机构为境外债务提供的担保（“内保外贷”）；
- (ii) 由境外机构为境内债务提供的担保（“外保内贷”）；及
- (iii) 其他形式的跨境担保。

每一类型作进一步讨论如下：

I. 内保外贷：境内机构为境外公司的境外债务提供的担保

内保外贷是指担保人注册地在境内、债务人和债权人注册地均在境外的跨境担保，具体结构如下图所示：



主要变化：根据《规定》，无须经外汇局的事先审批或登记，境内机构即可为境外债务人提供担保。如果担保人为银行，由担保人向外汇局报送内保外贷业务相关数据即可；如果担保人为境内非银行机构，则其应在签订担保合同后 15 个工作日内到当地外汇局办理担保登记手续。然而，未办理担保登记并不影响跨境担保合同的有效性。

如发生内保外贷履约，担保人为银行的，可自行办理担保履约项下对外支付，无须取得外汇局核准。担保人为非银行机构的，可凭担保登记文件直接到银行办理担保履约项下的购汇及对外支付，亦无须外汇局的核准。

除了为境外债务人债券发行项下的还款义务提供跨境担保，《规定》对内保外贷项下的担保人和债务人不再设定股权关系及资产要求等限制，对跨境担保亦不再设定额度限制。

对债务融资交易的影响：就境外债务融资而言，《规定》可能产生如下几方面的重大影响：

- 为中国企业帮助其境外关联机构在海外进行融资提供新的选择；
- 在境外借贷交易或债券发行中，境内机构提供跨境担保为境外债权人提供了更多安全，为境外债权人在出现违约情形时的权利保护提供更强有力法律基础。与现有境外债券市场上的其他信用支持方式（例如维好契约（Keepwell deeds）、股权购买承诺）比较而言，跨境担保相关的法律执行以及监管方面的风险较少。内保外贷项下经登记的跨境担保可为债务融资交易提供更多的确定性。

- 由于引入了境内担保提供方的信用，融资成本有望进一步降低。

限制：《规定》仍然设定了一些限制，以控制跨境担保的总体风险。该等限制主要包括：

- 境外资金仅可用于境外债务人正常经营范围内的相关支出，不得用于任何投机性交易或者是套利贸易。
- 未经外汇局批准，境外债务人不得通过向境内进行借贷、股权投资或证券投资等方式将担保项下资金直接或间接调回境内使用。
- 未经外汇局批准，债务人不得将担保项下资金直接或间接用于获得境外标的公司的股权，且标的公司 50% 以上资产在境内。
- 未经外汇局批准，债务人不得将担保项下资金用于偿还债务人自身或境外其他公司承担的债务，如果债务的资金曾以股权或债权形式直接或间接调回境内。
- 未经外汇局批准，债务人不得使用担保项下资金向境内机构预付货物或服务贸易款项，如果付款时间相对于提供货物或服务的提前时间超过 1 年、预付款金额超过 100 万美元及买卖合同总价 30%。
- 对于境外债券发行，有以下额外限制：（i）境外债务人应由境内担保人直接或间接持股（而不仅仅是该股东的子公司或关联机构）；（ii）境外债券发行收入应用于与境内机构存在股权关联的境外投资项目；（iii）相关境外机构或项目已经按照规定获得国内境外投资主管部门的核准、登记、备案或确认。
- 非银行机构发生担保履约，在境外债务人偿清境内担保人承担的债务之前，未经外汇局批准，担保人必须暂停签订新的内保外贷合同。
- 境内担保人需登记事项如下：（i）发生担保履约的担保，（ii）担保履行后，境内担保人所享有的对外债权。

其他类型的跨境信用支持方式，比如维好契约和股权购买承诺，并不属于《规定》项下的跨境担保的范畴。因此，该等承诺在中国法规下仍未予限制。

《规定》中内保外贷部分的主要受益人：根据上文，目前已经或者正在计划扩张其海外运营的境内公司，特别是从债券交易的角度来看，若其境内母公司拥有非常良好的信用状况，或者拥有显著可观的境内资产（从债券来说，该资产并不由其境内子公司所有），将成为《规定》的主要受益人。如果这些公司能够不受制于《规定》中资金不得调回境内的限制，他们无须外汇局批准，则可从中国境内为其海外融资提供或获得境内担保中获益。鉴于那些业务集中在境内的中国公司通常需要将境外资金调回境内使用，他们受益于《规定》之处会明显减少。

境外债券发行项下担保所涉及的股权关系要求：《规定》要求境内担保人应直接或者间接持有境外债券发行人的股权。根据《规定》的该要求，则发行人实际上被限定为境内担保人海外子公司。这使得境内担保人的境内子公司，如果并未直接或间接持有境外债券发行人的股权，则将无法为债券发行提供跨境担保。类似地境外债券发行人在境内设立的下属子公司，根据该要求亦无法往上为境外债券发行人提供担保。因此，如果有关中国企业使用的是境内控股公司的结构，其为境外债券发行时提供的内保外贷下的担保将在偿债顺序上次位于其子公司的债务。

而有趣的是，该项股权要求并不适用于为其他类型的债务融资交易，例如商业借贷所提供的跨境担保。境外银行贷款项下的贷款人接受的跨境担保可以来自境内担保人，其子公司或关联公司。如果跨境担保是由境内子公司提供，则该等担保在偿债顺序上并不次位于该子公司的其他债务。

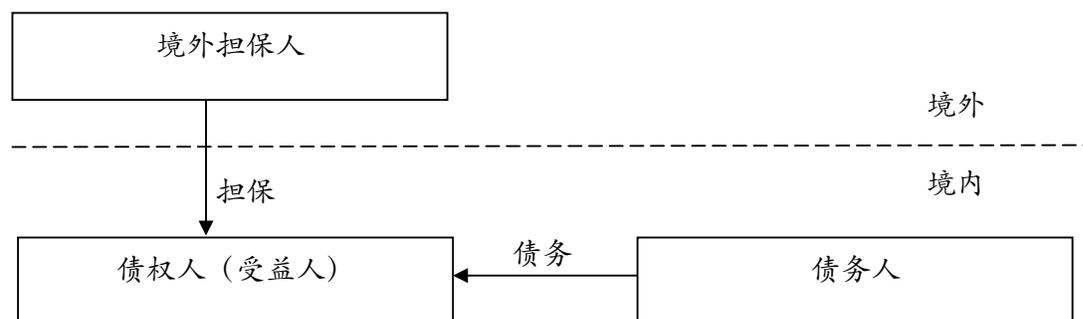
由于上述差异的存在，相比于债券持有人，某些境外债权人如贷款交易中的银行，将更容易得到境内子公司的资产。该区别体现了外汇局继续对有多位投资人参与的交易的严格管控，在此类交易中，投资人的诉求和目的变化较大。不论是否有意，交易的效果是境外债券投资人的地位不仅次位于境内债权人，现在还可能次位于境外金融机构债权人。

《规定》对于债券发行的适用范围也会对未来债券发行中其他未被监管的信用支持方式的使用产生影响。在《规定》施行前，一项跨境担保须取得外汇局批准并受限于相关的持股限制以及净资产值的限制。严格的限制以及取得批文所耗费的时长对很多境内公司来说会构成实质性障碍。因此，一些信用支持方式，比如维好契约、备用信用证和股权购买承诺，已在境外债务融资交易中被采用，以增强由境外子公司发行的债券的信用评级。但是，这其中某些信用支持方式的实际执行效果如何，在境内的法律体制下尚未被实

例验证。如果上述《规定》中的持股要求被证实只为境外债券投资人提供有限好处，则该等信用支持方式可能还会在未来的债券发行中沿用。

II. 外保内贷：由境外机构为境内债务提供的担保

外保内贷是指担保人注册地在境外、债务人和债权人注册地均在境内的跨境担保。且债权人（受益人）须为是境内金融机构，债务人为境内非金融机构，担保标的是以本外币履行的有约束力的信贷义务。具体结构如下图所示：



主要变化：根据《规定》，境外担保人提供外保内贷无须取得外汇局核准或登记，境外担保人履行跨境担保项下的义务亦无须取得外汇局批准，但若外保内贷发生境外担保履约的，境内债务人应在担保履约后 15 个工作日内向外汇局办理登记。外保内贷项下未对境外担保人和境内债务人之间的关联关系进行限定，未办理登记并不影响外保内贷在《规定》下的担保效力。

对债务融资交易的影响：《规定》对境内债务融资交易将产生重大影响

- 有重大境外关联机构的境内公司可以有更多的选择为其境内的项目及运营进行融资。此公司结构为在境内资产和融资渠道均有限的跨国企业利用其境外资产为其中国境内的扩张进行融资提供了可行的渠道；且
- 基于《规定》减少了对外保内贷的限制，引入境外担保可为中国境内的本土企业，特别是在其境外关联机构在海外拥有重大资产的情况下，提供了更为高效的融资选择。

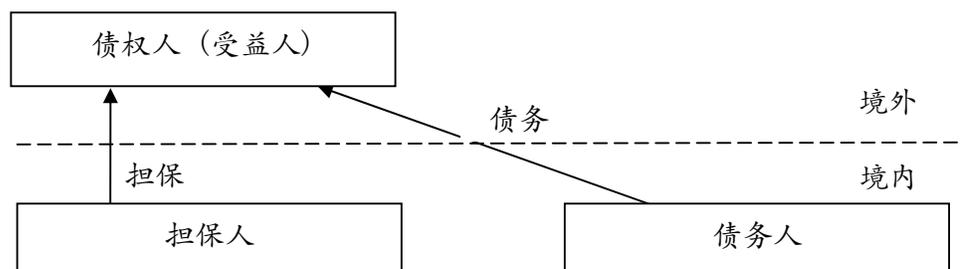
限制：新规仍设定了一些限制，以限制为支持境内债务的境外担保的总体范围，主要包括：

- 外保内贷业务发生担保履约的，在境内债务人偿清其对境外担保人的债务之前，未经外汇局批准，境内债务人应暂停签订新的外保内贷合同；已经签订外保内贷合同但尚未提款或尚未全部提款的，未经所在地外汇局批准，境内债务人应暂停办理新的提款。
- 境内债务人因外保内贷项下担保履约形成的对外负债，其未偿本金余额不得超过其上年度末经审计的净资产数额（以及其已批准的外债额度，如适用）。
- 外保内贷业务发生境外担保履约的，境内债务人应在担保履约后 15 个工作日内到所在地外汇局办理短期外债登记及相关信息备案。

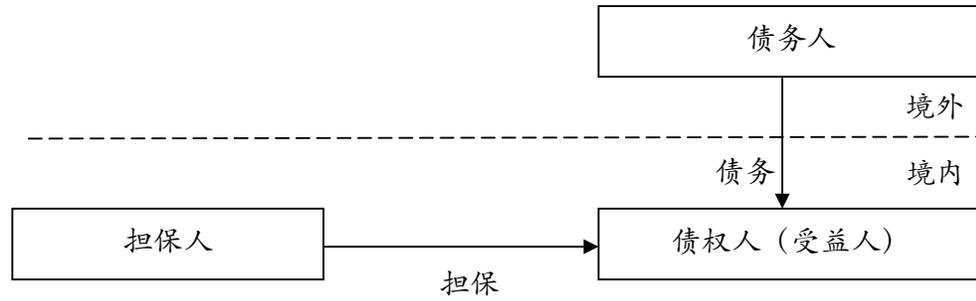
III. 其他形式的跨境担保

在《规定》中，除前述内保外贷和外保内贷以外的其他跨境担保情形皆归为其他形式的跨境担保。这类担保情形包括但不限于：

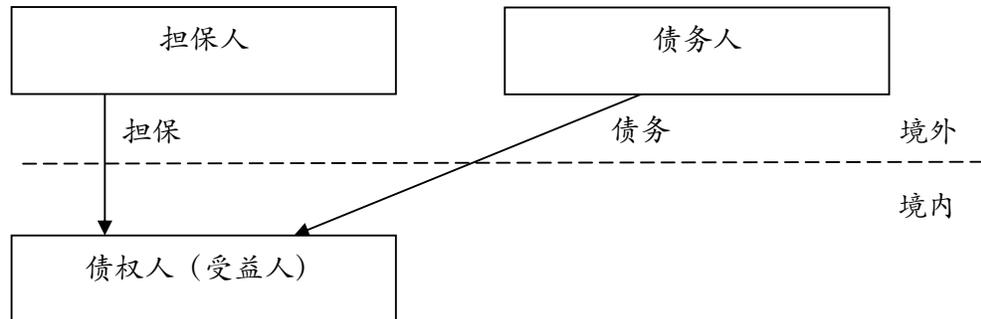
(1) 境内公司向境外债权人提供的关于境内公司向境外债权人借贷的跨境担保，如图：



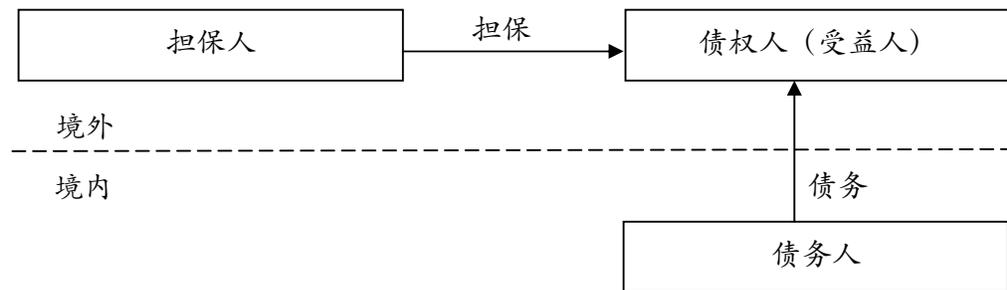
(2) 由境内公司向境内债权人提供的关于境外公司向境内债权人借贷的担保，如图：



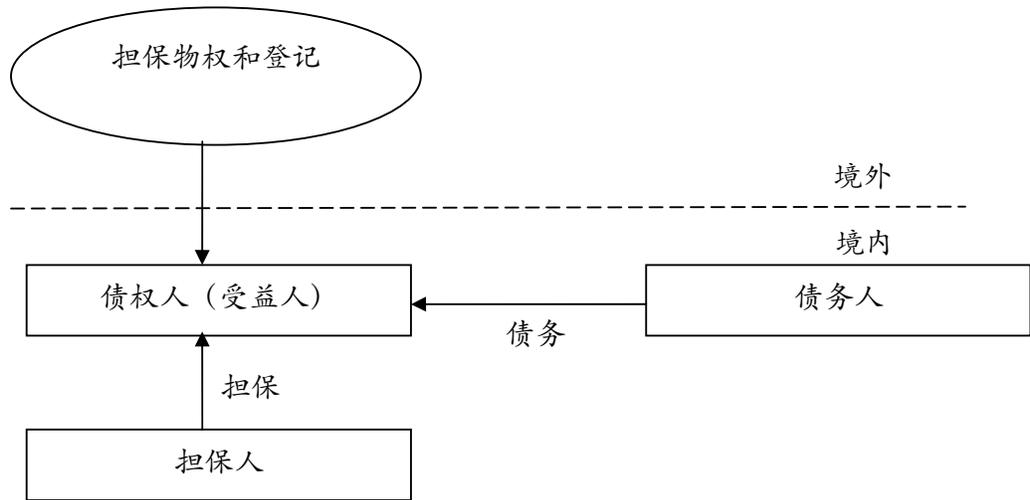
(3) 由境外公司向境内债权人提供的关于境外公司向境内债权人借贷的担保，如图：



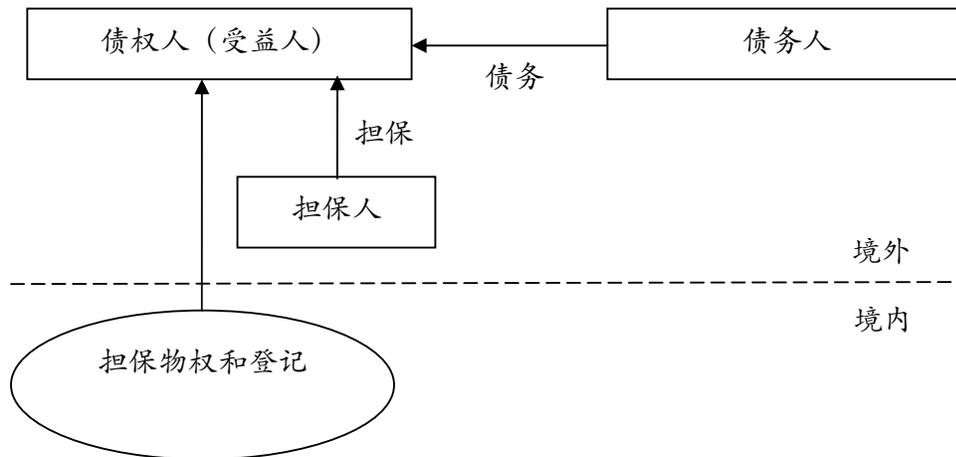
(4) 由境外公司向境外债权人提供的关于一家境内公司向境外债权人借贷的担保，如图：



(5) 担保物权及其登记地在境外，债务人，担保人和债权人均在境内。



(6) 担保物权及其登记地在境内，债务人，担保人和债权人均在境外。



《规定》变化小结：

在《规定》中，除非特殊规定，提供其他形式的跨境担保一般不要求外汇局的批准和登记。《规定》在其他形式的跨境担保方面，除了要求遵守相关法律（包括外汇局的规定）的一般性要求外，基本没有限制。虽然对跨境担保的要求有所放松，但跨境债务方面仍然受限于现行规定。

IV. 待决事宜

尽管《规定》已出台，但现存的中国人民银行颁布的法规（“央行法规”），如《境内机构对外担保管理办法》等，并未修订。该等央行法规规定了对中国公司提供跨境担保的限制。例如，现有央行法规要求：内资企业只能为其直属子公司或者其参股企业中中方投资比例部分对外债务提供对外担保。并且，央行法规还规定境内公司境外担保数额的限定与公司净资产值、外汇收入和净资产与总资产比例相关。

随着《规定》的生效，外汇局废除了与央行法规配套的规定和实施细则。考虑到中国中央政府简化行政程序的目标政策，可以预期该等央行法规亦会进行类似修订。

V. 结论

《规定》大量简化了监管和行政程序，有利于建立更为高效的债务融资市场，即有益于中国业务在海外的资金筹措。放松资本管制预期也将使境内的债务融资交易更加便利。但是，对于内保外贷发行人和担保人两者持股关系的要求将如何影响境外债券发行，仍有待进一步观察。

进一步信息

如果阁下希望获得进一步信息，敬请按照如下方式进行联系：

凯威莱德国际律师事务所：

Gregory M. Petrick +852 2946 1100 / +44 20 7170 8688 / +1 212
504 6373

合伙人，欧洲及亚洲重组业务的负责人

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合伙人

附录 新旧法规主要不同点对比

I. 内保外贷：由境内实体为境外债务提供担保

下表对比新旧法规，列示涉及内保外贷的主要不同点：

限制/条件	《规定》	已废止规定
跨境担保安排的有效性	不以外汇局批准或登记为生效要件	以外汇局批准和登记为生效要件
批准和登记	无需外汇局批准； 签订担保合同后应当按要求到外汇局办理登记手续。	须经外汇局批准 签订担保合同后应当在15个工作日内到外汇局办理登记手续。
债务人主体资格	无持股要求及净资产限制	严格要求持股关系及净资产值
担保数额限制	无额度限制	有额度规定
担保人和债务人关系	仅在债券发行时，境内担保人应直接或间接的持有境外发行人股份。	境内担保人应当持有境外发行人股份。
信用增级结构	无审核或审批要求，除以下情形： 非银行机构发生担保履约的，在境外债务人偿清境内担保人承担的债务之前，未经外汇局批准，担保人必须暂停签订新的内保外贷合同。	非银行金融机构或企业须经外汇局进行个案核准。

II. 外保内贷：由境外实体为境内债务提供担保

下表对比新旧法规，列示涉及外保内贷的主要不同点：

限制/条件	新规	已废止规定
债务数额限制	无限制	除少数部分地区的例外，数额限制一般适用。
登记要求	对于提供担保无需外汇局批准或登记	境内金融机构须遵守严格的备案要求
办理担保履约项下对外支付前的批准	无批准或核准要求	实质备案要求且须经外汇局批准和核准

III. 其他形式的跨境担保

下表对比新旧法规，列示涉及其他形式跨境担保的主要不同点：

限制/条件	新规	已废止规定
跨境担保安排的有效性	不以外汇局批准或登记为生效要件。	未经外汇局批准或登记的对外担保无效。
批准和登记要求	无须批准且无登记要求	须经外汇局批准；和/或符合外汇局登记要求
其他限制	只宽泛要求应遵守外汇局相应规则和其他相关法律规定。	主要为两方面限制，即债务人的主体资格限制以及担保人和债务人之间的股权关系要求