

China Simplifies Cross-Border Funds Transfers Made as Part of Intellectual Property Transactions

Synopsis: Historically, to complete a foreign exchange payment at a Chinese bank as part of a technology or intellectual property agreement, various registrations (with local Ministry of Commerce (“**MOFCOM**”), the Patent Office or Trademark Office) were required. Obtaining those registrations was time consuming, often delayed payments, and at times precluded the completion of such payments because registrations could not be obtained.

New rules released in China streamline or eliminate the need to obtain prior registrations to complete such foreign exchange payments. This is welcome news and a significant boost to effective technology transfers in China as payments from local payors should now be able to be made to foreign payees (e.g., foreign licensors) without extra layers of bureaucracy. These changes are a boon to licensors licensing into China and for completing inter-company arrangements such as technology development cost sharing arrangements.

Discussion: On July 24, 2013, the State Administration of Foreign Exchange (“**SAFE**”) released the *Guidelines on Foreign Exchange Administration of Trade in Services* 《服务贸易外汇管理指引》 (the “**Guidelines**”) and its implementation rules, *the Rules for the Implementation of the Guidelines on Foreign Exchange Administration of Trade in Services* 《服务贸易外汇管理指引实施细则》, (the “**Implementation Rules**”, and together with the Guidelines, the “**New Rules**”), which came into effect on September 1, 2013.

The New Rules simplify the documentation requirements for China onshore payors to convert Renminbi into foreign exchange for cross-border payments for trade-in services, including payments for cross-border royalties, transfers, and service fees involving:

- patents;
- copyrights (including software);
- trademarks;
- know-how, and;
- technical services;

In most cases, under the New Rules, obtaining certificates showing completion of the registration or recordation of intellectual property licenses and transfer agreements and technical services agreements (the “**Registration Certificates**”) with various Chinese authorities (such as the Patent Office, the Trademark Office, and the Ministry of Commerce) is no longer required in order for China onshore payors to convert Renminbi into foreign exchange at remitting China banks to make cross-border royalty, transfer, or service fee payments under such agreements. Parties are still called to complete certain such registrations or recordations under other Chinese regulations, however, obtaining such Registration Certificates is no longer required or a pre-requisite for banking purposes.

Prior to the New Rules, the need to obtain Registration Certificates often meant that, in practice, foreign licensors, transferors, and technical service providers would have to structure agreements or make amendments to agreements in order to satisfy the strict requirements of the Chinese authorities which process the Registration Certificates. Moreover, attempting to satisfy or explain to authorities how an agreement was in compliance with the requirements (which vary by the specific and local authority reviewing the application) often resulted in the foreign party not being able to receive fee payments from their Chinese licensees, transferees, or technical service recipients for several months to over a year while the registration or

recordation application was being approved (or in some cases not being able to receive payment at all because the requirements could not be met).

Under the New Rules:

- For payments equal to or under USD50,000, China onshore payors no longer need to submit any documentation for verification by the remitting bank. A Registration Certificate is no longer required. However, the remitting bank can still require a Chinese payor to provide documentation showing the nature of the transaction for verification if the nature of the foreign exchange payment is unclear.
- For payments above USD50,000, China onshore payors must provide: 1) a copy of the intellectual property license, transfer, or technical service agreement, 2) an invoice, and 3) a tax recordation form obtained from the State Administration of Tax (the “**Tax Recordation Form**”). Chinese onshore payors must pay applicable taxes prior to or soon after applying for the Tax Recordation Form. A Registration Certificate is no longer required. Note, that for cross-border payments relating to technology (patents, copyrights, know-how, or technical services) imports and exports that fall under one of the restricted categories for technology import or export as determined by MOFCOM, a Registration Certificate must still be obtained and presented to the bank prior to completing the cross-border payment.
- No tax recordation is required for payments equal to or under USD50,000 and there is no limit on the frequency of payments a China onshore payor can make. However, the New Rules prohibit and penalize evasion of applicable rules by “intentionally splitting payments.” For example, the following scheme would be prohibited: payment of a USD60,000 obligation through splitting that obligation into separate payments of USD10,000 made on six consecutive days in order to avoid the tax recordation requirement.

Chinese banks and foreign banks operating in China have quickly taken steps to implement the reduced documentation requirements to make cross-border payments for trade-in services, including payments for cross-border intellectual property royalty, transfer, and technical service fees. However, as the New Rules have only recently come into effect, implementation of the New Rules by banks and Chinese authorities may vary by locality and local banks and Chinese authorities should be consulted regarding current local practice. Nonetheless, the new cross-border payment and tax recordation procedures can be expected to make it easier for foreign intellectual property owners to receive license, transfer and service fee payments from Chinese business partners more quickly and to eliminate some of the uncertainty regarding receiving payments from licensees, transferees, or technical service recipients.

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