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Foreign Investment in Retirement Homes in China

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Senior care industry is expected to be an emerging market in China that covers various sectors such as senior living institutions, nursing training, supplies for the elderly, financial products for the elderly, elderly entertainment and healthy facilities, etc. For some investors, the integration of the senior care sector will generate numerous prospects. Among others, retirement homes ("Retirement Homes") development is the most attractive for investors. Set forth below is our preliminary analysis on the major legal issues regarding the foreign investment in Retirement Homes in China.

1. Regulatory Analysis

(1) China's 12th Five-Year Plan

On April 17, 2011, Standing Committee of the State Council promulgated the 12th Five-Year Plan on the Development of Chinese Senior Care (《中国老龄事业发展“十二五”规划》) following the National 12th Five-Year Plan for National Economic and Social Development (《中华人民共和国国民经济和社会发展第十二个五年规划纲要》) issued early 2011, showing the determination of the Chinese authority to generally develop a healthy senior care market. According to the scheme, private capital including foreign investment is encouraged to take part in the sector. The government is trying to stimulate the construction of senior living communities, which is considered as the most suitable and acceptable elderly care model in China, and establishment of Retirement Home facilities that target to provide 3% of nation-wide "nursing beds" by 2015. At the same time, more legislative incentives are planned to be formulated and improved on the preferential policies in land planning, infrastructure facilities, taxations, etc, with a goal of boosting a transparent and healthy market on senior care industry and therefore attracting more private and foreign investors.

(2) Foreign Investment

Foreign investment in China is regulated by a number of laws and regulations, the most prominent of which is the Industrial Catalog Guidance of Foreign Investment (《外商投资产业指导目录》) (the "Foreign Investment Catalog") which is jointly promulgated by Ministry of Commerce (the "MOC") and China's National Development and Reform Commission (the "NDRC"). Pursuant to the Foreign Investment Catalog, amended in 2011 (the "2011 Catalogue"), which became effective on January 30, 2012, an investment project will fall into one of four categories: "encouraged", "permitted", "restricted" and "prohibited". "Service institutions for the elderly" are categorized as "encouraged" in the 2011 Catalogue, demonstrating the government's desire to encourage foreign investment in the social welfare sector and allow foreign investment to be made via a wholly foreign-owned vehicle. One implication of this designation is a potentially less time consuming and more supportive approval process.

(3) General Applicable Laws

Despite the lack of national legislation specifically regulating Retirement Homes, two laws (The Tentative Measures for Administration of Social Welfare Institutions (the "Tentative Measures") (《社会福利机构管理暂行办法》) issued by the Ministry of Civil Affairs (the "MCA") on December 30, 1999 and the Standards of Social Welfare Institutions for the Elderly (the "Standards") (《老年人社会福利机构基本规范》) issued by the MCA on February 6, 2001) have general applicability to Retirement Homes as the concept of 'social welfare institutions' covers all those institutions that provide care services to the elderly, including Retirement Homes.



Investment in New Retirement Home Projects

The Tentative Measures require foreign investors to set up a Retirement Home in the form of an equity or contractual joint venture with a Chinese party which obviously conflict with the 2011 Catalogue. As it was enacted in 1999, we believe this obsolete requirement will sooner or later be canceled. While no specific limit on the proportion of foreign ownership is imposed by law, close consultation with government departments, including the local MCA, should be initiated and maintained prior to submitting an approval application to prevent push back on the foreign party's shareholding ratio during the application process, which would inevitably result in delays.

The establishment of a foreign-invested Retirement Home must also be approved by the MOC at the provincial level. The local MOC, in consultation with the local MCA bureau, will decide within 30 days whether to approve the application. If the application is approved, the local MOC will issue a 'Foreign-Invested Enterprise Certificate of Approval', and the local MCA bureau will issue a 'Retirement Home Certificate of Approval'. Where services provided by a Retirement Home include a high-level of medical treatment such as diagnostic and therapeutic activity, the home may be classified as a 'medical institution' in addition to being designated a 'service institution for the elderly'. Medical institutions are subject to a range of additional investment criteria. Detailed procedures and regulatory requirements for the establishment of a new Retirement Home will be provided by the local authorities and will vary from region to region.

Acquisitions of Existing Retirement Homes by Foreign Investors

An acquisition of an existing Chinese-owned Retirement Home by a foreign investor would be subject to the usual government approvals process for foreign acquisitions. Approval will need to be sought from the MOC or its local counterparts depending on the size of the investment and will involve the submission of documents, including the equity purchase agreement, shareholders' agreement and articles of association, to the approval authority.

(4) Policy Initiatives and Incentives

China's approval process is different between for-profit and non-profit institutions. A non-profit institution must obtain the approval of the MCA and the local government; however, because few (if any) foreign investors in China's senior care market are non-profit, this is less interesting than an understanding of the for-profit regulations.

In the regulatory regime of Retirement Homes, the profitable and non-profitable institution differ a lot in policies, especially in the zoning and construction of facilities, taxations, infrastructure cost, and most important, for non-profitable nursing homes, the local government would probably give some financial subsidies, which is however only enough to cover daily costs of the services, and investors cannot enjoy profit.

Pursuant to the Notice on Relevant Tax Policy for the Service Institutions for the Elderly (关于对老年服务机构有关税收政策问题的通知) issued by the State Administration of Taxation (the "SAT") and the Ministry of Finance on November 24, 2000, non-profit service institutions for the elderly will be eligible for self-used housing, land and vehicle and vessel usage taxes and enterprise income tax exemptions.

The government has recently stated that it intends to unveil a package of national-level policies to encourage foreign investment in Retirement Homes. In March 2011, Vice Minister of Civil Affairs Dou Yupei announced that China would seek to encourage overseas investment in this area and alluded to upcoming preferential policies for all Retirement Homes in the use of land, water and power, and tax breaks. Until now, such incentives have largely been enjoyed exclusively by non-profit and state-owned homes.

For now, details of these new incentives remain unclear. Existing policies do afford some tax incentives to overseas investors — for example, care services for the aged provided by Retirement Homes are exempt from business taxes (See the Opinion on Pushing Forward the Home-Based Care Services (关于全面推进居家养老服务工作的意见) issued by the SAT on January 29, 2008). However, until the new reforms take effect, other incentives are available only to non-profit institutions.

(5) Others

(1) China's law on Protection of the Rights and Interests of the Elderly (《中华人民共和国老年人权益保障法》) was enacted in 1996. In the draft amendment to the law (the "Draft Amendment") issued on July 6, 2012 for public review, which has not been promulgated yet, a chapter on social nursing care was added. The proposed chapter on social nursing care in the Draft Amendment specified three service models — (i) home care provided by caregivers from Retirement Homes, volunteers and social workers; (ii) community care including services such as medical treatment, cultural and entertainment activities, short-term care and daycare, and (iii) care provided by Retirement Homes. The proposed revision redefined the family's role in supporting seniors as an important part, instead of a main part, as per the current law. The Draft Amendment added more articles on social support for seniors, including social insurance and community support.

(2) The government has issued policy documents including Opinions on Accelerating Socialized Welfare Services (关于加快实现社会福利社会化的意见), Opinions on Supporting the Social Forces to Set up Social Welfare Agencies (关于支持社会力量兴办社会福利机构的意见) and Opinions on Accelerating the Development of Social Services for the Aged (关于加快发展养老服务业的意见) to speed up the development of institutional social services for the aged. Various models are encouraged to mobilize social resources for this purpose: state built and privately run, privately operated with government support, government subsidy, and services purchased by government.



2. Market Trends

Retirement Home industry is booming in China because a rapid increase in the proportion of its elderly population forces a nationwide shift from traditional family care to institutional care. Chinese government has been strengthening its efforts to develop community care services to improve supporting environment of home-based care service. Meanwhile it strongly encourages the development of institutional care to meet the diversified needs of older people. A social service system has been established, which is based on home care, supported by community services and supplemented by institutional care.

The senior care industry in China is still at the very early stage of development with around 100,000 senior housing institutions as of the end of 2010, providing a total of 3.5 million beds, according to the MCA. Based on disclosed plans, the coverage of senior care institutions will be increased to 3% of the elderly population and the supply of institutional Retirement Homes will be expanded to 6 million beds by the end of 2015. While the government aims at doubling the number of beds by 2015, even were this target to be achieved, it would only lead to 30 beds for every 1,000 retirement age citizens in China, as compared to 50–70 beds for every 1,000 retirement age citizens in developed countries.

Retirement Homes in China are divided into several types. The following table reflects the differences among four types of Retirement Homes in China in certain main aspects:

	Independent living	Assisted living	Skilled nursing	Acute care
Nursing level	None	Low	Medium	High
Typical age of residents	65-80	80-90	Depends on health status	Varies based on demand
Characteristics	Pay for certain services such as housekeeping and meals; daily assistance is not required	Housing with supporting care and services, such as bathing, eating, toilet, mobility and dressing	Designed for seniors who require 24 hour skilled nursing services or who are receiving medical services	Patient receives active but short-term treatment for a severe injury or episode of illness, an urgent medical condition, or post operative convalescence

Though government departments are currently the largest operators in the China market — accounting for about 80 percent of the total supply in Beijing and Shanghai, the country's two most mature and affluent markets — recent years have seen increased participation from the private sector, among which domestic developers and insurance companies are the most-active first movers, according to CBRE research.

The following table indicates three major types of Retirement Homes investors in China:

Independent living	Representative	Movement in senior housing
Real estate developers	Green Town	One building in a Greentown apartment project. Services include serviced senior apartments, acute-care wards, dining room library and entertainment and activity center
Insurance companies	Tai Kang Life	Xiaotangshan (Beijing) project is under construction and planned to finish in 2013-2014, with an investment of RMB4 billion. Also planning another project in Hainan
Specialist operators	Long Life Group	JV with a local company in Shandong Province to establish a real estate company focusing on senior housing projects

Source: Company announcements

3. Conclusion

Currently China has not formed a complete legal system on Retirement Homes. Most of legislations are local regulations promulgated by local governments such as those in Shanghai, Tianjin, etc. In consideration of China's population development, Retirement Homes can be a sun-rising and high-growth industry under current economic crisis. However, since the law and regulation in this area are not complete, consultation and coordination with local government in setting up the Retirement Homes become very important. Until the new subsidy regime proposed by the MCA becomes embedded in China's national law or policy, foreign investors interested in investing in Retirement Homes in China will need to carefully discuss with and seek applicable policy support from the local Chinese government.



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Shanghai Office Managing Partner Edward Epstein focuses on mergers and acquisitions, real estate development and investment, antitrust issues and foreign direct investment, particularly in the manufacturing sector. With more than 20 years of legal experience in China, Mr. Epstein has counseled numerous multinational companies and become a sought-after expert on Chinese law. He is the editor of Troutman Sanders' monthly newsletter, China New Law Bulletin, which provides invaluable insight into China's fast-changing legal landscape.

Mr. Epstein's practice is evolving just as rapidly, and now includes advising companies on corporate and employment law, intellectual property rights and dispute resolution issues, particularly in service industries, such as retail, trading and distribution. He has extensive experience in handling real estate matters, complex land acquisition projects and advising clients on how their business structures can comply with China's regulatory requirements. He has also represented foreign clients before the China International Economic and Trade Arbitration Commission. He is fluent in English, Mandarin and German.

Edward is recognized as a "Leading Individual" in the corporate and M&A, and real estate categories in China in APL 500 (2009) and in the Corporate/M&A: Foreign: Mid-Market/FDI category in China in Chambers Asia (2010).



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Olivia Lee heads our Greater China Practice. She has many years of legal experience in Private Equity, M&A, and Capital Markets. She advises various world-leading private equity firms and their portfolio companies in full range of their activities, ranging from equity and debt investments, exit transactions (such as initial and follow-on public offerings, and mergers & acquisitions) to dispute resolutions. Her international and local legal experience have also enabled her to assist various real estate developers and investors in (i) identifying and resolving potential legal issues and (ii) assessing real estate companies' eligibility for overseas listings and equity & debt financing. In the M&A area, Olivia has been acting for international and local Chinese companies in in-bound and out-bound acquisitions since 1993. In the area of capital markets, she has represented issuers, underwriters and sponsors in a wide range of transactions ranging from initial public offering, reverse take-over, financing, spin-off, restructuring, private placement to issuance of derivatives in Hong Kong and North America. She is fluent in English, Mandarin Chinese and Cantonese.

Olivia is recognized as a leading private equity lawyer by Chambers Asia in 2008-2012, which reports that her expertise on handling inbound and outbound PRC deals is highly praised by international clients, and her "excellent attention to detail and a well-rounded consideration of the client's circumstances when giving advice", as well as her "all-rounded legal knowledge and experience" are key qualities for clients retaining her as legal advisor. Also, Olivia has been consistently ranked by Asia Pacific Legal 500, Chambers Asia, Chambers Global and PLC Cross-Border Private Equity Handbook as one of the leading lawyers in Capital Markets, Private Equity, Corporate and M&A in China and Hong Kong.