

## Client Alert

April 2020

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## COVID-19: Managing compliance risks arising from charitable or donation activities in China


Medical resource shortages are increasingly challenging for many countries battling the COVID-19 pandemic. In response to the need, various companies and charitable funds are donating money, personal protective equipment (PPE), ventilators, medicines, disinfectants, food and other valuable resources. As we noted in our last alert ([Link](#)), compliance risks should be carefully considered when providing this valuable assistance to ensure that the resources are put in the right hands with no strings attached.

Our alert sets out an overview of the mandatory rules, special requirements and underlying compliance implications in China relating to donation activities. We also discuss practical tips on how companies can monitor, mitigate and manage the relevant risks.

### Overview of donation requirements in China

Companies seeking to support the fight against COVID-19 through charitable or donation activities in China need to have a good understanding of their rights and obligations. We have listed some of the key points in relation to the applicable legal and regulatory landscape below:

1. PRC law allows donations to be made voluntarily, but prohibits any profit-making activity conducted in the name of donations. Donations should be distinguished from "requisitions", such as where a company is ordered to sell products (e.g. masks, PPEs, ventilators) exclusively to the local government or compulsorily provide the products for free.
2. Under PRC Charity Law, donation obligations cannot be withdrawn at will. Once a company enters into an agreement or makes a public statement promising to donate, the donor is obligated to fulfill this commitment.
3. Chinese state-owned enterprises (SOEs) have to follow a stringent review and approval process according to regulations issued by the State-owned Assets Supervision and Administration Commission (SASAC). This includes:
  - Setting budgeting parameters in advance, taking into account the SOE's business size, profitability, debt burden, cash flow and other relevant financial capability.
  - Review and approval of recurring and ad hoc donations by headquarters on a transaction-by-transaction basis.
  - Filing of donation payments by SOEs with SASAC.
4. PRC Charity Law prohibits companies from raising funds by means of solicitation of donations from the public. Only charitable institutions with public fundraising qualifications are allowed to raise money by means of solicitation of donations from publically available channels.

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5. If a company in plans to donate money to an overseas entity, it is worth noting that a representative office of a foreign foundation is not allowed to accept donations in China. Donors will need to arrange for a foreign exchange account and transfer the money to foreign charity institutions through the account after satisfying any other banking approval processes.

## Other compliance risks

Companies should also be mindful of compliance risks associated with the particular industry and identity of donation recipients.

1. For healthcare companies, to mitigate potential compliance risks, donations should only be made directly to hospitals or other medical institutions at entity level. Internal departments or individuals such as employees of hospitals and institutions are prohibited from personally accepting donations.
2. At the same time, donors should conduct proper due diligence to ascertain the legitimacy of donation recipients and the subsequent use of the donations. In China, a donor has the legitimate right to monitor the use of the donations. Poor due diligence practices and lack of monitoring could lead to problems on the legitimacy and use of any donation.

Meanwhile, risk issues can arise in relation to the product quality of donations. Donors should ensure that donated items comply with local and destination product quality requirements and standards. Specifically:

1. Medical companies that plan to donate their own products must comply with product safety, effectiveness and quality under the PRC Product Quality Law.
2. Companies that intend to donate medicines or medical devices purchased or collected from outside of China should ensure that these items comply with the quality certifications and shelf-life requirements under PRC law.
3. Companies making donations overseas should pay attention to the product standards of the destination country or region. Recently, Chinese government authorities issued a notice requiring exporters to acknowledge that they have obtained domestic product certificates for the medical supplies exported to overseas countries, including confirmation that such medical supplies have met the quality requirements of the importing country. We are seeing an increasing number of disputes arising from product standard issues in different jurisdictions. In such cases, donors suffer not only economic losses but can face adverse reputational impact and potential product liability suits.

## Actions to consider

Effective compliance controls can safeguard the whole process of donation activity and ensure that it operates in an efficient way. Below are some practical tips for compliance risk controls in relation to donation activities.

1. Engage legal and compliance team members in the process, from decision making to supervision of the donations being made. The legal and compliance team should closely review the latest national, local and international (if applicable) legislative developments, assist with making decisions (e.g. whether to donate, what to donate, and who to donate to)



and be proactive in alerting senior management of any underlying compliance and regulatory risks.

2. Proper documentation:

- The donor should mandate written approvals from different functions within the donor company, e.g. legal, finance, compliance and public relations prior to making the donation.
- The donor should document every phase of the donation including internal discussions, approval process, delivery or payment, and ensure that documents generated from a donation, e.g. contracts, receipts, bank statements and meeting minutes, are retained.
- Under PRC law, a written contract is mandatory when making donations to healthcare institutions. We recommend, where possible, that parties enter into written contracts for all donation activities. Such a contract should contain appropriate compliance language as well as supervision rights for the donor to be satisfied that the donation is used for the agreed purpose.
- For accounting books and records, donations should be recorded accurately and completely for tax and compliance purposes.

3. Ensure donation activities are separate from obtaining or retaining business - this is a critical element to mitigating any anti-bribery risk. Significant liability under PRC laws or extraterritorial laws such as the US FCPA or UK Bribery Act may result if a donation is used for the purpose of a bribe. Keeping the part of the business function making the donation separate from the sales or business development function, as well as ensuring the recipient has properly recorded the donation, is important to mitigate this risk.

4. Closely monitor donations when they are treated as part of the company's routine payments. Companies should implement strong internal controls to identify whether improper payments are being made under the guise of donations.

5. Due diligence and supervision of recipients:

- Donors should identify and conduct proper due diligence on the recipient to ensure that the donations are received by the right entity, and used for the agreed purpose.
- In China, a donor has the legitimate right to monitor the use of the donations. Specifically, PRC law gives donors the right to review the recipient's annual audit report and financial statements. Donors should seek advice on how to manage such rights.

6. As more companies are making donations overseas due to the escalation of the outbreak, these donors should pay close attention to product quality requirements and standards provided by both China and the destination country or jurisdiction.

Companies regard making donations to support the fight against the COVID - 19 crisis as part of their corporate social responsibility. Credible compliance risk control mechanisms play an important role in safeguarding the ethical standard of this valuable contribution. Effective and efficient measures will not only secure the compliant operations of the company, but will ensure that the contributions ultimately reach those in actual need.

## 新冠疫情: 慈善捐赠活动中的合规风险管控

当前许多与新冠疫情抗争的国家正在面临着医疗物资紧缺的严峻挑战。为了响应这一全球性的需求,许多公司和慈善基金会加入了捐赠的行列中,主动提供资金、个人防护用品、呼吸机、药品、消毒剂、食品及其他宝贵资源。正如我们在上一篇风险提示([链接](#))中所提到的,在提供此类宝贵援助的同时,公司需要注意随之而来的合规风险,确保捐赠的资源能够不带附加条件地交到正确的对象手中。

此篇风险提示将对在中国开展的捐赠活动所涉及的法律强制性规定、特殊要求、及潜在合规问题进行探讨,同时也将分享一些与公司监管、减轻及管控合规风险相关的实用贴士。

### 中国法律项下的捐赠要求概览

公司若希望通过在中国开展的慈善活动或捐赠活动为抗击新冠疫情的战役提供支持,则应当对其所享有的权利及承担的义务有充分的了解。以下罗列了相关适用法律法规的一些要点:

1. 中国法律允许自愿的捐赠,但是禁止以捐赠的名义开展任何营利活动。捐赠应当与任何形式的“征用”严格区分。例如公司被要求仅可向当地政府供应产品(如口罩、个人防护用品、呼吸机等)或免费提供产品的情况应被视为“征用”。
2. 根据《中华人民共和国慈善法》(“**《慈善法》**”),捐赠人不得随意撤回其捐赠承诺。一旦捐赠人签订了捐赠协议或公开承诺捐赠,则捐赠人有义务履行其承诺。
3. 根据国务院国有资产监督管理委员会(“**国资委**”)颁布的相关规定,国有企业对外捐赠必须遵守严格的审批流程,包括:
  - 考虑自身经营规模、盈利能力、负债水平、现金流量等财务承受能力,合理制定捐赠预算费用;
  - 无论是预算内的捐赠事项还是超出预算的临时捐赠事项均需经过公司的逐层审批方可开展;
  - 国有企业的捐赠事项需向国资委备案。
4. 《慈善法》禁止一般公司通过公开募捐的方式募集资金。根据规定,只有取得公开募捐资格的慈善组织可以通过公开募捐的方式从公开渠道募集资金。
5. 如果公司计划向海外实体捐赠资金,则其需要注意境外慈善基金会的代表处在中国境内是不得接受捐赠的。另外,捐赠人需要开立外汇账户,在满足银行的审批要求之后,通过该外汇账户向境外慈善组织划转捐赠资金。



## 其他合规风险

公司还应当注意与特定行业及受赠人身份相关的合规风险。

1. 根据相关法律规定，医院和其他医疗机构的内部职能部门或个人（如医院或医疗机构的员工）不得自行接受捐赠，因此为了降低潜在的合规风险，捐赠人应当直接向医院或医疗机构进行捐赠。
2. 同时，捐赠人还应当开展适当的尽职调查以确保受赠人以及后续对捐赠物资的处置合乎法律的规定。在中国，捐赠人享有监督捐赠物资使用情况的法定权利。尽职调查的不到位以及监管的欠缺可能会导致捐赠物资的合法性及对捐赠物资的使用出现问题。

此外，捐赠物的产品质量也可能会引发风险问题。捐赠人应当确保捐赠物符合本地及捐赠目的地的产品质量要求及标准。尤其：

1. 医药企业若计划捐赠其自己生产的产品，则必须确保产品符合《中华人民共和国产品质量法》下规定的产品安全、使用性能及质量要求。
1. 一般企业若计划捐赠从中国以外的地区购买或获得的药品或医疗设备，则必须确保此类捐赠的物资符合中国法律项下的质量认证及质保期要求。
2. 企业向海外捐赠物资的，需要注意捐赠目的地国家或地区的产品标准。近期，中国政府颁布了一项公告，要求出口医疗物资的出口商承诺出口到海外的医疗物资已取得我国产品注册证书，并且符合进口国的质量标准要求。当前，由于不同地区的产品标准问题而产生的争议数量正日益增多。在此类案件中，捐赠人不仅仅需要承担经济损失，同时也面临着负面的声誉影响及潜在的产品质量诉讼。

## 公司可以考虑采取的行动

有效的合规管控可以为捐赠活动的全过程提供保障，并确保捐赠活动高效推进。就捐赠活动中的合规风险管控，我们列举了以下几项实用贴士以供参考：

1. 从捐赠活动的决策起，至对捐赠物资使用情况的监督，公司应要求法律及合规团队的成员参与捐赠活动的全过程。法律及合规团队应及时了解最新的国家、地方及国际（如适用）立法发展，进而帮助决策（如是否捐赠、捐赠何物、向谁捐赠等），并积极主动地向高级管理层提示可能存在的合规及监管风险。
2. 做好恰当的文件保存工作：
  - 捐赠人应当要求公司内部相关部门，如法务部、财务部、合规部、公共关系部等，在捐赠活动开展之前做出书面审批。
  - 捐赠人应当记录捐赠活动的每一个环节，包括内部讨论、审批程序、发货或支付等，并确保捐赠活动中产生的文件，如合同、收据、银行明细、会议纪要等，均得到了妥善的保存。
  - 根据中国法律规定，向医疗卫生机构捐赠物资时，需要签订书面合同。我们建议，捐赠人应当尽可能就所有的捐赠活动签订书面协议。此类捐赠合同应包含适当的合规条款以及捐赠人的监督权，确保捐赠物资的使用符合捐赠的目的。



- 出于税收及合规目的，捐赠人还应当将捐赠活动准确、完整地记录在公司的会计账簿中。
1. 确保捐赠活动与获得或维持业务相分离——这是降低反贿赂风险的关键因素。如果开展捐赠活动的目的是为了进行贿赂，则会触发中国法律或相关域外法律（如美国的《反海外腐败法》或英国的《贿赂法案》）项下严重的法律责任及后果。为了降低此类合规风险，最为关键的是公司须要将负责开展捐赠活动的业务部门与公司的销售部门或业务拓展部门相分离，并确保受赠人对捐赠活动进行了准确的记录。
  2. 进行金钱捐赠时，应当将支付款项纳入公司日常资金支付的监管措施中，并对其进行紧密监督。公司应当实行有力的内部管控措施，以识别是否存在假借捐赠的名义进行不当支付的情况。
  3. 对受赠人的尽职调查与监管：
    - 捐赠人应当确认受赠人的身份，并对其开展适当的尽职调查，以确保捐赠物资交予了正确的接收方，并确保捐赠物资的使用符合约定的目的。
    - 在中国，捐赠人享有对捐赠物资使用情况的法定监督权。具体而言，中国法律规定捐赠人有权查询受赠人对所捐赠物资管理使用的有关资料。捐赠人可以就如何使用这些权利征询专业建议并妥善运用这些权利。
  1. 随着越来越多的公司由于疫情的加剧而开始向海外进行捐赠，捐赠人还应当密切关注中国及捐赠地国家或地区颁布的产品质量要求。

许多公司将为抗击新冠疫情提供帮助视作履行其企业社会责任的一种体现。可靠的合规风险管控机制对保障准确实现这一善举有着重要的作用。有效且高效的合规管控措施将不仅可以确保公司经营的合规性，也将确保公司的捐赠最终送达真正有需要的人手中。

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