

# Cross-Border Investigation and White-Collar Crime

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**JUNHE LLP**

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CHINA EXPERTISE

+86 10 8519-1300

GLOBAL REACH

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——The Legal 500



## Laws and Regulations

### **The Supreme People's Procuratorate and the Ministry of Public Security: The Provisions on the Review and Assessment of the Necessity of Detention by Public Security Bureaus and People's Procuratorates**

Recently, the Supreme People's Procuratorate and the Ministry of Public Security jointly issued the Provisions on the Review and Assessment of the Necessity of Detention by Public Security Bureaus and People's Procuratorates (《人民检察院 公安机关羁押必要性审查、评估工作规定》, the "Provisions"). The Provisions stipulate that procuratorial organs may initiate a review of the necessity for detention ex officio, or on the recommendation of the detention center. For criminal suspects who may be sentenced to less than three years' imprisonment, procuratorial organs shall conduct at least one review of the necessity for detention at the review and prosecution stage.

#### **JunHe Commentary**

The Provisions, as a supporting document for the implementation of the comprehensive management of misdemeanor crimes by procuratorial and public security organs, clearly set out the minimum number of times a review of the necessity for detention should be carried out at the review and prosecution stage of misdemeanor cases, which is significant in guiding the review of the necessity for detention. However, the Provisions only speak of "initiating the review process", and do not touch on other issues such as reviewing results and changes in the compulsory measures, and the implementation of any follow-up action remains to be seen.

### **The National Press and Publication Administration: *The Measures for the Administration of Online Games (Draft for Public Comments)***

On December 22, the National Press and Publication Administration issued the Measures for the Administration of Online Games (《网络游戏管理办法》(草案征求意见稿), “*Draft for Public Comments*”). The Draft for Public Comments states that online games must not contain content that reveals state secrets, endangers national security or harms national honor and interests.

#### **JunHe Commentary**

There is a strict censorship system for online games in China. We are of the view that it is not very likely that online games which have undergone strict scrutiny would involve state secrets or pose a threat to national security. However, game designers should be careful that the content of games should not harm national honor. For example, Taiwan is a part of China and should be included in the map of China.

A person in a dark suit and white shirt is holding a large, ornate golden scale of justice. The scale is tilted, with the right pan being higher. The background is a blurred office setting with computer monitors.

## Trending News

**State security agencies, in cooperation with other relevant departments, are to carry out special investigations and manage geographic information data security risks**

In the course of their work, state security agencies have found that when overseas geographic information system software is used in important industries, the software sometimes collects and transmits geographic information data, and some of the data is sensitive information and may involve state secrets. To this end, national security agencies are working with relevant departments to carry out special investigations and manage geographic information data security risks and will guide the units involved to carry out inspections and rectification.

### **JunHe Commentary**

When carrying out data processing activities such as geographic information data collection and processing, enterprises should establish a sound data security management system and pay attention to the selection of geographic information system software in accordance with the provisions in the *Data Security Law* and the *Counter-Espionage Law*.

### **Analysis on crimes regarding shareholders' withdrawal of contributed capital**

The *Criminal Law of the People's Republic of China* (《中华人民共和国刑法》, “*Criminal Law*”) clearly stipulates the crime of the withdrawal of contributed capital. In practice, there are cases in which the controlling shareholders use their control over a company to transfer all or part of their registered capital out of a company through related party transactions, fund borrowing and other means. The risk of committing the crime of the withdrawal of contributed capital by shareholders is a concern for enterprises. Our analysis is as follows:

#### **1. The constitutive elements of the crime of the withdrawal of contributed capital.**

According to the provisions of Article 159 of the *Criminal Law*, the subject of the crime of the withdrawal of contributed capital is limited to the initiator or shareholder of a company and requires the initiator or shareholder of a company to objectively carry out the withdrawal of capital and cause serious consequences, and to subjectively have the intention of withdrawing contributed capital.

#### **2. The crime of the withdrawal of capital contribution does not apply to enterprises that implement registration systems of subscribed capital contributions.**

The *Company Law of the People's Republic of China* (《中华人民共和国公司法》, “*Company Law*”), amended in 2013, changed the registration management of capital contributions from the “paid-in registration system” to the “subscribed registration system”. The *Notice of The State Council on Issuing the Reform Plan of the Capital Contribution Registration*



*System* (Guo Fa [2014] No. 7) (《国务院关于印发注册资本登记制度改革方案的通知》(国发〔2014〕7号)) further clarified that 27 types of industries such as “joint-stock limited companies established through fundraising” and “commercial banks” do not implement the subscribed registration system of capital contribution temporarily.

After the amendment of the *Company Law*, the Standing Committee of the National People's Congress subsequently issued the Interpretation on Articles 158 and 159 of the *Criminal Law of the People's Republic of China* (《关于<中华人民共和国刑法>第一百五十八条、第一百五十九条的解释》), clarifying that “the provisions of Article 158 and 159 of the *Criminal Law* only apply to enterprises that implement the registration system of paid-in capital contribution in accordance with the law.”

In addition, Article 2 of the *Notice on Strictly Handling Criminal Cases of Misrepresentation of Registered Capital and False Capital Contribution and Withdrawal of contributed capital in accordance with Law* (Gong Jing [2014] No. 247) (《关于严格依法办理虚报注册资本和虚假出资抽逃出资刑事案件的通知》(公经〔2014〕247号), the “Notice”) issued by the Supreme People's Procuratorate and the Ministry of Public Security re-emphasized that “based on the newly amended *Company Law* and the legislative interpretation of the Standing Committee of the National People's Congress, since March 1, 2014, except for companies that have implemented the registration system of paid-in registered capital in accordance with the law (see the *Notice of The State Council on Issuing the Reform Plan of the Capital Contribution Registration System* (Guo Fa [2014] No. 7)), ..... shareholders and initiators of a company shall not be held criminally liable for the crime of false capital contribution or withdrawal of contributed capital.....”

It can be seen that with the establishment of the registration system of registered capital contribution at the legislative level, the crime of the withdrawal of contributed capital is no longer applicable to enterprises that implement the registration system of registered capital contribution.

It should be pointed out that the newly revised *Company Law* in 2023 provides supplementary provisions for the registration system of registered capital contribution, clarifying that, in principle, the capital contributions made by shareholders need to be paid

in full within five years after the establishment of the company. It remains to be seen whether the newly revised Company Law will have an impact on the crime of the withdrawal of capital contribution.

**3. It is not appropriate to convict and sentence someone of the crime of withdrawing contributed capital if it occurred before the establishment of the registration system of registered capital contribution based on the laws and regulations of the amended**

Article 12 of the *Criminal Law*. This makes it clear that the law at the time of the act shall apply. If according to the law at the time of the act, the act is considered to be a crime, but if the current law does not consider it to be a crime or imposes a lighter penalty, the current version of *Criminal Law* shall be applied.

Article 3 of the *Notice* provides for the application of the law in handling cases of the withdrawal of contributed capital across a time limit, i.e., in respect to criminal cases of the withdrawal of contributed capital that have not been processed before March 1, 2014 or are being processed, except for companies that implement the registration system of paid-in capital contribution, and for cases that no longer meet the constitutive elements of the crime in accordance with the new *Company Law*, the public security bureaus and procuratorial organs shall no longer treat them as constituting a crime. For those that have entered criminal proceedings, the relevant proceedings shall be terminated.

In summary, with the establishment of the registration system of paid-in capital contribution from a legislation perspective, based on the criminal law principle that old and new laws with lesser punishment shall be applied, enterprises adopting the registration system of paid-in capital contribution, (even if there is a withdrawal of contributed capital by a shareholder or initiator, regardless of whether the withdrawal occurred after March 1, 2014 or not), should not be punished for the crime of the withdrawal of contributed capital.



**4. Attention should be paid to the risk that responsible personnel may commit the crime of the misappropriation of funds or the crime of embezzlement by taking advantage of their duties.**

With regard to the activities of shareholders occupying funds (including registered capital) of a company that adopts a registration system of registered capital contribution, although the *Criminal Law* does not prohibit the borrowing and lending of funds between affiliated companies, if a company's employee who is instructed by shareholders takes advantage of their position, illegally uses funds belonging to the company (including capital contribution), or uses the aforementioned funds for personal purposes, or for investment, to repay personal debts on behalf of the shareholder, etc., and causes harm to the interests of the company, other shareholders and creditors, the risk cannot be ruled out that those who take part in those instructions and/or carry out the aforementioned activities may commit the crime of the misappropriation of funds or embezzlement by taking advantage of their duties.

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# OUR TEAM



## Cross-border investigation and white-collar crime – JunHe

As the Chinese government continues to strengthen the enforcement of regulations involving national security, enterprises not only need to focus on internal risk management, but also be prepared to respond to government investigation. Cross-border investigation and white-collar crime is one of the specialized fields of JunHe. Over the years, JunHe has adhered to a concept of “deeply ingrained in the local, and well-informed about the international”, and has integrated knowledge resources, talent reserves and professional experience in related fields. It has formed a professional team with legal expertise and practice experience. The JunHe team has extensive experience in cases involving cross-border investigations and white-collar crime; we assist enterprises in preventing, handling and defending such cases, and provide optimal crisis management and dispute resolution plans tailored to the specific circumstances of each case, which has resulted in outstanding outcomes.

### Editorial team for the Issue

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**ZOU, Weining**

Partner

**Email:** zouwn@junhe.com

**Tel:** +86-10 8519 1343



**HE, Zhiyao**

Associate

**Email:** hezhy@junhe.com

**Tel:** +86-10 8540 8724



**GAO, Rui**

Associate

**Email:** gaorui@junhe.com

**Tel:** +86-10 8553 7834



**XU, Haiying**

**Email:** xuhaiying@junhe.com

**Tel:** +86-10 8553 7871

# JUNHE LLP

CHINA EXPERTISE, GLOBAL REACH

## 北京总部

电话: +86 10 8519 1300  
传真: +86 10 8519 1350  
邮箱: junhebj@junhe.com

## 上海分所

电话: +86 21 5298 5488  
传真: +86 21 5298 5492  
邮箱: junhesh@junhe.com

## 广州分所

电话: +86 20 2805 9088  
传真: +86 20 2805 9099  
邮箱: junhegz@junhe.com

## 深圳分所

电话: +86 755 2939 5288  
传真: +86 755 2939 5289  
邮箱: junhesz@junhe.com

## 杭州分所

电话: +86 571 2689 8188  
传真: +86 571 2689 8199  
邮箱: junhehz@junhe.com

## 成都分所

电话: +86 28 6739 8000  
传真: +86 28 6739 8001  
邮箱: junhecd@junhe.com

## 青岛分所

电话: +86 532 6869 5000  
传真: +86 532 6869 5010  
邮箱: junheqd@junhe.com

## 大连分所

电话: +86 411 8250 7578  
传真: +86 411 8250 7579  
邮箱: junhedl@junhe.com

## 海口分所

电话: +86 898 3633 3401  
传真: +86 898 3633 3402  
邮箱: junhehn@junhe.com

## 香港分所

电话: +852 2167 0000  
传真: +852 2167 0050  
邮箱: junhehk@junhe.com

## 纽约分所

电话: +1 212 703 8702  
传真: +1 212 703 8720  
邮箱: junheny@junhe.com

## 硅谷分所

电话: +1 888 886 8168  
传真: +1 888 808 2168  
邮箱: junhesv@junhe.com



[www.junhe.com](http://www.junhe.com)