

October 2016



TABLE OF CONTENTS / 本期内容

FOREIGN INVESTMENT / 外商投资

FIEs Filing System Implemented / 外商投资企业备案制落地 2

PE & VC / 私募股权与创业投资

State Council Issued Opinions to Promote VC Investments / 国务院发文鼓励创业投资 4

CAPITAL MARKET / 资本市场

CSRC Amended *Administrative Measures for Material Asset Restructuring Involving Listed Companies* to Restrict Back-Door Listings / 证监会修改《上市公司重大资产重组办法》，严控借壳上市 5

TAXATION / 税收

The Ministry of Finance and the State Administration of Taxation Clarified Income Tax Policies on Equity Incentives and Capital Contribution with Technologies / 财政部、国家税务总局完善股权激励和技术入股有关所得税政策 5



FOREIGN INVESTMENT / 外商投资

FIEs Filing System Implemented 外商投资企业备案制落地

On September 3, 2016, the Standing Committee of the National People's Congress approved the *Decisions on Amending Four Laws Such as the Law of PRC on Wholly Foreign-Owned Enterprises* (the "Decision"), according to which the establishment or follow-on corporate changes of the foreign-invested enterprises (or FIEs) not engaging in the industries in the list of the special administration (the "Negative List") will only be subject to ex-post filing requirements with (instead of prior approvals of) competent offices of the Ministry of Commerce ("MOFCOM"). On the same day, MOFCOM released the *Draft Interim Measures for Filing Administration on the Establishment and Change of the Foreign-Invested Enterprise* (the "Draft") (please refer to our September 2016 Issue of China Regulatory Updates for more information).

To facilitate the implementation of the Decision, recently relevant authorities have successively promulgated supportive policies, including: (i) the State Administration for Industry and Commerce ("SAIC") issued the *Notice on Promoting the Registration Work for Foreign-Invested Enterprises after the Adoption of Filing Administration System* (the "Notice") on September 30, which clarified and streamlined relevant rules in connection with SAIC registrations of FIEs; (ii) National Development and Reform Commission and MOFCOM released the No. 22 circular of 2016 ("Circular 22") on October 8, which clarified the scope of the Negative List; and (iii) MOFCOM formally issued the *Interim Measures for Filing Administration on the Establishment and Change of the Foreign-Invested Enterprise* (the "Measures") on October 8, 2016 which spelt out the FIE filing requirements and procedures.

(a) Scope of the Negative List

According to the Circular 22, the scope of the Negative List includes the industries listed under the restricted and prohibited sectors of the *Catalogue of Industry for Guiding Foreign Investment (2015 Revision)*, as well as those listed under the encouraged sectors but subject to further restrictions on foreign shareholdings or senior executives. Moreover, the FIE establishment and corporate changes in relation to M&A by foreign investors shall still follow

the existing regulations.

It is noteworthy that, pursuant to the Measures and the foreign investment comprehensive administration system updated by MOFCOM on October 8, we understand that, although the previous filing measures for Free Trade Zones ("FTZs") (i.e., the *Pilot Measures on Filing Administration on Foreign Investment in FTZs* ("the FTZ Filing Measures") issued by MOFCOM on April 8, 2015) have been replaced by the Measures, the *Special Access Administrative Measures for Foreign Investment in Free Trade Zones* (the "FTZ Negative List") issued by the General Office of the State Council on April 8, 2015, is still effective. Thus, the establishment and corporate changes of FIEs in FTZs not falling into the FTZ Negative List should be subject to the filing requirements as stipulated in the Measures.

(b) Filing for FIE Establishment and Corporate Changes

Compared with the previous Draft, the Measures mainly include the following revisions:

- **Filing Matters:** (i) a new filing matter is added as "whether it is eligible for the duty exemption and deduction for imported equipment as provided by the state" while the filing matter of "equity pledge" has been deleted. According to the previous MOFCOM regulations, equity pledge of an FIE is a matter subject to approvals. Since such matter is not included in the Negative List, whether equity pledge requires prior approval still needs to be further clarified by MOFCOM; (ii) FIEs are required to state the status of the legal announcement procedures when submitting filings for merger, spin-off or capital decrease; and (iii) a foreign-invested company listed on the stock market or the NEEQ is only required to make filings for changes of shareholdings

or investors' basic information when the accumulated change of foreign investors' shareholdings exceeds 5% or there is a change of the absolute or relative controlling status.

- **Penalties:** according to the Draft, an administrative penalty of "suspension of the relevant business" will be imposed if an FIE engages in restricted sectors without prior approval from competent MOFCOM office or engages in prohibited foreign investment sectors. Such type of penalty has been removed from the Measures.
- **Entities Deemed as Foreign Investors:** the Measures no longer deem a foreign-invested equity investment enterprise as a foreign investor while, in the relevant previous MOFCOM regulations, a foreign-invested partnership with investment as its main business is deemed as a foreign investor. Therefore, whether a foreign-invested equity investment partnership will be deemed as foreign investor still needs to be further clarified by MOFCOM.
- **Arrangement for Transitional Time Period:** for any FIE establishment or corporate change case already accepted by relevant MOFCOM office before the Measures take effect, if the approval procedure has not yet completed and the case falls into the filing scope as stipulated in the Measures, the approval procedure shall be terminated and such FIE or its investors shall proceed with the filing procedure in accordance with the Measures instead.
- **Coordination with Other Regulations:** investors from Hong Kong, Macau and Taiwan districts shall

generally follow the rules of the Measures if their investments in mainland China fall into the Negative List. However, if such investors are Hong Kong or Macau service providers, then the filing procedures shall be conducted in accordance with the *Pilot Measures on Filing Administration on Hong Kong/Macau Service Providers' Investments in Mainland China*. In addition, the Measures abolished the FTZ Pilot Measures and have clarified that in case of any inconsistency between the Measures and the previous MOFCOM regulations issued before the Measures take effect, the provisions of the Measures shall prevail.

(c) SAIC Registration for FIE Establishment or Corporate Changes

- **Jurisdiction of Registration Authorities:** FIEs not engaging in the industries in the Negative List shall register with SAIC's local offices that are authorized to administer foreign investment registrations (the "Authorized AIC") at the lowest administrative level for their establishment, follow-on corporate changes or termination, while the registrations of FIEs falling into the Negative List shall still be subject to the existing rules for jurisdiction of registration authorities. As to the change of registration for any FIE established before the issuance of the Notice, if such change falls outside the Negative List, such FIE may register with either its original registration authority or the Authorized AIC at the lowest administrative level; if such change falls into the Negative List or involve adjustment of the powers between approving authorities, such FIE may choose to register with either its original registration authority or the

Authorized AIC at the same administrative level as the current approving authority (if there is no Authorized AIC at this administrative level, then such FIE may register with the SAIC office at a higher level).

- **Rules for Registration:** if the establishment, follow-on corporate changes or termination of an FIE fall outside the Negative List, such FIE will not be required to submit filing receipts issued by competent MOFCOM office and the relevant SAIC office shall treat it as domestic enterprise during the registration procedures. However, if the industries in the Negative List are involved, such FIE shall submit the approval letter together with the certificate of approval issued by competent MOFCOM offices in order to register with the relevant SAIC office.
- **Arrangement for Transitional Period:** for any FIE that has already obtained the approval letter and the certificate of approval from competent MOFCOM office before October 1, 2016 but has not yet registered with relevant SAIC office yet, the existing registration rules for FIEs shall still apply.

2016年9月3日，全国人大常委会通过了《关于修改〈中华人民共和国外资企业法〉等四部法律的决定》（“《决定》”），将不涉及国家规定实施准入特别管理措施（“负面清单”）的外商投资企业（“FIE”）的设立和变更由审批改为备案制；商务部于同日发布了《外商投资企业设立及变更备案管理暂行办法（征求意见稿）》（“征求意见稿”）（*相关内容请参见我所2016年9月刊China Regulatory Updates*）。

为配合《决定》的实施，相关主管部门近日纷纷发布了配套文件：(i) 国家工商行政管理总局于9月30日发布了《工商总局关于做好外商投资企业实行备案管理后有关登记注册工作的通知》（“《通知》”），明确了FIE工商登记的相关规则；(ii) 国家发展和改革委员会、商务部于10月8日发布了2016年第22号公告（“22号公告”），明确了负面清单的范围；以及(iii) 商务部于10月8日正式发布了《外商投资企业设立及变更备案管理暂行办法》（“《办法》”），规定

了FIE备案的有关要求与程序。

(a) 负面清单的范围

根据22号公告，负面清单的范围按《外商投资产业指导目录（2015年修订）》中限制类和禁止类，以及鼓励类中有股权要求、高管要求的有关规定执行。涉及外资并购设立企业及变更的，按现行有关规定执行。

值得注意的是，根据《办法》及商务部10月8日更新的外商投资综合管理信息系统，我们理解，尽管适用于自贸区原适用的外商投资备案办法（即商务部于2015年4月8日发布的《自由贸易试验区外商投资备案管理办法（试行）》（“自贸区备案办法”））已被《办法》所取代，但国务院办公厅于2015年4月8日发布的《自由贸易试验区外商投资准入特别管理措施（负面清单）》（“自贸区负面清单”）仍应有效。因此，自贸区内外商投资企业的设立及变更不涉及自贸区负面清单的，应按照《办法》实行备案管理。

(b) FIE设立及变更备案

与此前的征求意见稿相比，《办法》主要在以下方面进行了修改：

- 备案事项。(i) 新增备案事项“是否属于国家规定的进口设备减免税范围”，删除备案事项中的“股权质押”。根据商务部门此前的相关规定，FIE股权质押属于审批事项，而该等事项并不在目前的负面清单范围之内，该事项是否需经商务部门审批，还有待商务部门进一步明确；(ii) 明确合并、分立、减资等应当在办理变更备案时说明依法办理公告手续的情况；以及(iii) 规定外商投资的上市公司及在全国中小企业股份转让系统挂牌的公司，可在外国投资者持股比例变化累计超过5%以及控股或相对控股地位发生变化时，就投资者基本信息或股份变更事项办理备案手续。
- 惩罚措施。删除备案主体未经审批在限制投资领域投资、或在禁止投资领域开展投资经营活动时，可能被处以“停止开展相关经营活动”的处罚。
- 视同外国投资者的情形。《办法》不再将外商投资的股权投资企业视为外国投资者；而在此前商务部的相关规定中，以投资为主要业务的外商投资合伙企业视同境外投资者。究竟合伙制的外商股权投资企业是否会被视为外国投资者，还有待商务部门的

进一步明确。

- 过渡期安排。《办法》实施前商务主管部门已受理的FIE设立及变更事项，未完成审批且属于备案范围的，审批程序终止，FIE或其投资者应按照《办法》办理备案手续。
 - 与其他规定的协调。港澳台地区投资者投资不涉及负面清单的，参照适用《办法》办理。港澳服务提供者的相关投资备案应按照《港澳服务提供者在内地投资备案管理办法（试行）》办理。此外，《办法》废除了自贸区备案办法，并明确商务部于《办法》生效前发布的部门规章及相关文件与《办法》不一致的，适用《办法》。
- (c) FIE设立及变更工商登记
- 明确了登记管辖。对于不涉及负面清单管理的FIE的

设立、变更（备案）及注销登记，《通知》规定原则上实行属地管辖，由其所在地最基层一级外资被授权局办理相关登记；而对于落入负面清单的FIE的登记则仍继续执行级别管辖原则。对于已经设立的FIE变更登记不涉及负面清单管理的，企业可以自主选择向原登记机关或向其所在地最基层一级外资被授权局申请登记；如已经设立的FIE变更登记涉及负面清单管理的，或在本次变更登记中发生审批机关审批权限调整的，企业可以自主选择向原登记机关或向与审批机关同级的外资被授权局申请登记（如同级没有外资被授权局的，也可向上一级外资被授权局申请登记）。

- 明确了登记规则。对于不涉及负面清单的FIE的设立、变更（备案）和注销登记，《通知》规定无需提交商务主管部门出具的备案证明，

登记机关应按照内外资企业一致的原则履行审查责任；而对于涉及负面清单的FIE的设立、变更（备案）和注销登记，需依法提交商务主管部门出具的批复和批准证书。

- 明确了过渡期安排。根据《通知》，对于在2016年10月1日以前已经取得商务主管部门的批复和批准证书，但尚未到登记机关申请办理登记注册的企业，登记机关仍按照现行的外商投资法律法规办理登记注册。

PE&VC / 私募股权与创业投资

State Council Issued Opinions to Promote VC Investments 国务院发文鼓励创业投资

China's venture capital ("VC") investment industry has developed rapidly in recent years, which broadened financing channels for startups and small businesses. Meanwhile, however, the risks of illegal fundraising are also increasing due to lack of proper regulatory framework for VC sector. On September 16, 2016, the State Council issued *Several Opinions on Promoting the Sustainable and Healthy Development of Venture Capital Investment* (the "Opinions"), proposing several guidance opinions from a number of aspects to promote healthy development of VC industry.

According to the Opinions, relevant ministries and commissions under the State Council shall provide more policy support and improve legal environment for VC industry, including, among others: (i) to broaden funding sources of VC investment through supporting various institutional investors such as state-owned enterprises, insurance companies, university funds and trust companies to make VC investment, promoting cooperation between VCs and financial institutions, and encouraging banks to provide M&A loans; (ii) to establish a regulatory scheme suitable for VC industry through stipulating interim regulation for VC funds and adopting special administrative

policies for VCs on various aspects to distinguish VCs from other types of private equity funds; (iii) to improve the exit channels for VCs through fully exerting the function of Main-Board market, ChiNext stock market, NEEQ market and regional stock markets; (iv) to open up VC industry to foreign investors through streamlining administrative procedures and allowing foreign invested VCs to remit the RMB funds converted from their foreign exchange capital to target companies' accounts pursuant to their actual investment scale; and (v) to improve relevant preferential tax policies favorable to VC industry development.

The Opinions reflect the central government's commitment to support VC investment, and are expected to have positive effect on the whole industry in China. We will keep an eye on the detailed implementing rules to be issued in the future in this connection.

近年来，我国创业投资快速发展，一方面拓宽了创业企业融资渠道，另一方面也因法律环境的不完善以及监管的滞后造成非法集资的隐患。2016年9月16日，国务院印发《关于促进创业投资持续健康发展的若干意见》（“《意见》”），从多个方面提出促进创业投资行业的原则性指导意见。

根据《意见》，各部委将加强对创业投资企业的政策支持和法规完善，主要包

括：(i)通过支持国有企业、保险公司、大学基金、信托公司等各类机构投资者进行创业投资并鼓励创投企业与各类金融机构合作，银行开展并购贷款业务等方式拓宽投资资金来源；(ii)制定私募投资基金管理暂行条例，同时对创业投资企业在行业管理、备案登记等方面采取与其他私募基金区别对待的差异化监管政策，建立适应创业投资行业特点的监管体制；(iii)充分发挥主板、创业板、全国中小企业股份转让系统以及区域性股权市场功能，完善创业投资退出机制；(iv)放宽创投行业外商投资准入，简化管理流程，允许外资创业投资企业按照实际投资规模将外汇资本金结汇所得的人民币划入被投资企业；以及(v)完善相关税收优惠政策。

《意见》的出台体现了政府对创业投资的支持态度，对整个投资行业产生积极影响。对于后续具体政策的出台和落实我们将持续关注。

CAPITAL MARKET / 资本市场

CSRC Amended Administrative Measures for Material Asset Restructuring Involving Listed Companies to Restrict Back-Door Listings

证监会修改《上市公司重大资产重组办法》，严控借壳上市

On September 8, 2016, the China Securities Regulatory Commission (“CSRC”) released the *Decision on Amending the Administrative Measures for Material Asset Restructuring of Listed Companies* (the “Decision”), with effect as of the date of promulgation. As compared with the *Draft Decision on Amending the Administrative Measures for Material Asset Restructuring of Listed Companies* (the “Draft”) (please refer to July 2016 issue of our *China Regulatory Updates* for more details), the Decision only made the following slight revisions:

- (a) First of all, the Decision imposes more stringent compliance requirements on the controlling shareholders and actual controllers of the listed companies to be restructured in back-door listings. Specifically, if the person or entity who in the last 3 years has been a controlling shareholder or actual controller of a listed company to be restructured is under investigation for suspected crime or violation of laws or regulations, then the proposed back-door listing transaction will not be allowed unless the controlling shareholder or the actual controller has already terminated such suspected illegal behaviors for more than 3 years. In addition, the back-door listing restructuring plan shall be able to eliminate the adverse effect arising therefrom without losing the controlling shareholder or the actual

controller from their legal responsibilities associated with such illegal behaviors.

- (b) Moreover, the Decision imposes more stringent lock-up period requirements on certain shareholders. In addition to the 36-month lock-up period requirements for the existing controlling shareholder, the actual controller of the listed company and their affiliates, any party that has acquired shares of the listed company from the aforementioned person or entity during the restructuring process should also be subject to the 36-month lock-up period.

It is anticipated that the Decision will further increase the difficulty of back-door listings, which in turn will help to curb speculations on shell resources. However, considering the slow pace of IPO launching, the companies seeking for public listing and the PE funds desiring to exit could also be adversely impacted by CSRC’s new regulation. The regulators may need to find a balance between the government regulation of capital market and the maintenance of market participants’ activity level.

2016年9月8日，中国证券监督管理委员会（“证监会”）发布了《关于修改〈上市公司重大资产重组管理办法〉的决定》（“《决定》”），自公布之日起实施。与6月17日证监会发布的《关于修改〈上市公司重大资产重组管理办法〉的决定（征求意见稿）》（“征求意见稿”）（相关内容请参见我所2016年7月号*China Regulatory Updates*）相比，《决定》除了对以下内容作出小幅

修改外，基本采纳了征求意见稿中的内容：

- (a) 在对壳资源的限制方面，进一步完善了对上市公司控股股东、实际控制人的合法合规要求，规定上市公司最近3年内的控股股东、实际控制人不应存在因涉嫌犯罪或违法违规正被立案侦查或调查的情形，除非涉嫌犯罪或违法违规的行为已经终止满3年，交易方案能够消除该行为可能造成的不良后果，且不影响对相关行为人追究责任。
- (b) 在锁定期方面，除上市公司原控股股东、原实际控制人及其控制的关联人在该上市公司中拥有权益的股份须锁定36个月外，增加了在交易过程中从前述主体直接或间接受让该上市公司股份的特定对象也应适用36个月的锁定期。

《决定》的发布使借壳上市的难度陡增，有利于遏制炒作壳资源的市场乱象，但在A股IPO不畅的背景下，也给有迫切上市需求的公司以及私募基金的退出造成障碍。监管层仍需在规范市场行为和保持市场主体积极性之间寻找平衡。

TAXATION / 税收

The Ministry of Finance and the State Administration of Taxation Clarified Income Tax Policies on Equity Incentives and Capital Contribution with Technologies

财政部、国家税务总局完善股权激励和技术入股有关所得税政策

Recently, the Ministry of Finance and the State Administration of Taxation have jointly issued the *Circular on Improving the Income Tax Policies relating to Equity Incentives and Capital Contribution with Technologies* (the “Circular”) and the *Announcement on Issues concerning the Collection*

and Administration of Income Tax on Equity Incentives and Capital Contribution with Technologies (the “Announcement”), which have become effective on September 1.

Under the Circular, employees of unlisted companies will not be taxed when they are granted with stock/

equity options, restricted stocks or share awards. Instead, their income tax (at a tax rate of 20%) will be deferred and taxed later when they transfer the stock/equity acquired under the equity incentive plan, provided that the companies have made filing with competent tax

authorities pursuant to the Announcement before the 15th day of the following month after such equity incentives are granted. Note that, such tax preferential treatment only applies to those who meet the following requirements: (i) the equity incentives shall be granted to key technicians and senior executives as determined by the board or shareholder meeting of the company; (ii) the number of employees to be granted with such equity incentives shall be no more than 30% of the average employee number of the company during the most recent 6 months; (iii) the employees shall hold the stock/equity options or restricted stocks for at least 3 years after they are granted and at least 1 year after such options are exercised or such restricted stocks become tradable, and the period between the grant date and the exercise date of the stock/equity options shall be no more than 10 years; similarly, share awards shall be held for at least 3 years since the grant date; and (iv) the company intending to grant equity incentives shall not fall into such specific industries listed under the Circular as real estate industry and entertainment industry.

As to stock options, restricted stocks and share awards granted by a listed company to eligible individuals, if such company has made filing with competent tax authority in accordance with the Announcement before the 15th day of the following month after the equity incentives are granted, then the deadline for tax payment by such individuals could be extended from 6

months to 12 months since such options are exercised, the restricted stocks become tradable, or the share awards are granted.

The Circular also allows enterprises or individuals to defer the payment of their income tax on capital contribution with technologies until they transfer the corresponding shares, as long as the companies to be invested have made filings with competent tax authority pursuant to the Announcement before the 15th day of the following month after the capital contribution is completed. The tax base for the income tax is the share transfer income minus the original value of the technology and reasonable tax fees.

The issuance of the Circular and the Announcement further lifts the tax burden relating to equity incentives and capital contribution with technologies, which supports the growth of startups, especially innovative enterprises, through helping them to attract more talents and further alleviating their financial stress.

近日，财政部、国家税务总局联合发布《关于完善股权激励和技术入股有关所得税政策的通知》（“《通知》”）和《关于股权激励和技术入股所得税征管问题的公告》（“《公告》”），自2016年9月1日起实施。

根据《通知》，境内非上市公司授予本公司员工的股票期权、股权期权、限制性股票和股权激励，员工可暂不纳税，递延至转让该股权时按20%税率纳税，但公司应于员工获得该等股权激励获得之次月15日内根据《公告》的要求向主管税务机关进行备案，并满足《通知》

规定的其他前提条件：如激励对象应为公司董事会或股东（大）会决定的技术骨干和高级管理人员，且激励对象人数累计不得超过本公司最近6个月在职职工平均人数的30%；股票（权）期权、限制性股票自授予日起应持有满3年，且自行权日起/解禁后持有满1年；股票（权）期权自授予日至行权日的时间不得超过10年；股权激励自获得奖励之日起应持有满3年等。此外，属于特定行业（如房地产业、娱乐业等）的企业不能享受该等税收优惠。

对于上市公司授予个人的股票期权、限制性股票和股权激励，如公司在授予股权激励之次月15日内按照《公告》的要求向主管税务机关备案，个人纳税期限可自股票期权行权、限制性股票解禁或取得股权激励之日起6个月内延长至12个月内。

关于技术入股，企业或个人可以选择递延纳税政策。如被投资公司在其取得技术成果并支付股权之次月15日内按照《公告》的要求向主管税务机关备案，投资入股时可暂不纳税，递延至转让股权时按股权转让收入减去技术成果原值和合理税费后的差额计算缴纳所得税。

《通知》的出台进一步降低了股权激励和技术入股的相关税收负担，有利于企业吸引和留住尖端人才，同时缓解企业的财务压力，帮助中小企业，尤其是创新型中小企业更好地发展。

These updates are intended for information purpose only and are not a legal advice or a substitute for legal consultation for any particular case or circumstance. © Han Yi Law Offices All rights reserved.

For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

Shanghai Office
Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800
Fax: (86-21) 6083-9811



Beijing Office
Suite B-1503
15 West Chaoyang Park Road
Beijing 100026, China
Tel: (86-10) 5867-0155
Fax: (86-10) 5867-0155