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FOREIGN INVESTMENT / 外商投资

China Released a Series of Laws and Regulations to Improve Foreign Investment Administration 国家出台一系列外商投资相关法规及配套政策

2019年12月31日，国务院发布《外商投资法实施条例》（“《实施条例》”），自2020年1月1日起施行。与2019年11月初公布的《外商投资法实施条例（征求意见稿）》（“《征求意见稿》”，具体分析请见我所《每月立法动态》2019年10月和11月刊）相比，《实施条例》：(i)删除了经国务院批准的返程投资可不受外商投资准入负面清单（“负面清单”）限制的规定；(ii)删除了在符合负面清单持股比例限制的前提下，外国投资者可以以设立合伙企业的方式投资相关限制投资领域的规定；(iii)将现有外商投资企业组织形式、组织机构的变更的过渡期截止时间调整为2025年1月1日（而非宽限至2025年6月30日）；以及(iv)明确外商投资企业及定居在国外的中国公民在中国境内的投资将被视为外商投资。但部分市场较为关注的外商投资事项，如VIE结构问题、非权益类投资项目等仍未在《实施条例》中予以明确。

为保障《外商投资法》和《实施条例》的实施，2019年12月末，市场监管总局发布了《关于贯彻落实〈外商投资法〉做好外商投资企业登记注册工作的通知》（“《通知》”），并联合商务部共同发布了《外商投资信息报告办法》（“《报告办法》”，与《通知》合称“配套文件”）。配套文件均自2020年1月1日起施行。根据配套文件，外商投资信息报告制度落地，外商投资企业向商务主管部门报送的初始报告、变更报告、注销报告及年度报告，一般在其向相关企业登记系统和国家企业信用信息公示系统进行工商登记（备案）时同步进行，由市场监管主管部门将相关报告推送至商务主管部门。值得注意的是，该报告制度施行后，负面清单内产业投资的审核权限已由商务主管部门移向市场监管部门及其他有关部门（尽管负面清单仍由商务主管部门参与提出）。

《外商投资法》、《实施条例》及配套制度的出台是我国外商投资政策的又一次重要调整，我国对外商投资的管理将进一步与内资并轨。但广受关注的VIE结构仍旧未被明确定性，而外商投资信息报告制度的实践，特别是因此带来的负面清单内产业投资的审批权限转移仍需进一步的操作细则支撑。

CBIRC Further Relaxed Restrictions on Market Access for Foreign Investments in Insurance Sector 保险业外资准入进一步放宽

为落实2019年9月修订的《外资保险公司管理条例》，中国银行保险监督管理委员会（“银保监会”）于2019年12月6日发布了新修订的《外资保险公司管理条例实施细则》（“《实施细则》”），自发布之日起生效。此外，银保监会办公厅于同日发布了《关于明确取消合资寿险公司外资股比限制时点的通知》（“《通知》”）。

根据《实施细则》和《通知》，自2020年1月1日起，

On December 31, 2019, the State Council issued the *Implementation Regulations of Foreign Investment Law* (the “Implementation Regulations”), which take effect on January 1, 2020. Compared with the draft Implementation Regulations (the “Draft”, please refer to our October & November 2019 issue of *China Regulatory Updates* for details), the Implementation Regulations have: (i) removed the proposed provisions that round-trip investments approved by the State Council may not be subject to restrictions set forth in the *Special Management Measures for the Access of Foreign Investment* (commonly known as the *FDI Negative List*); (ii) deleted the proposed provisions that foreign investors may invest in partnerships in areas where foreign shareholding ratio is restricted; (iii) canceled the proposed 6-month grace period and rescheduled the deadline for foreign-invested enterprises (“FIEs”) to complete structural reforms by January 1, 2025; and (iv) clarified that investments in China by FIEs or Chinese citizens residing overseas will also be deemed foreign investments. However, the Implementation Regulations did not make it clear the legal status of such hot-topic issues as the VIE structures and investments with non-equity-type interests.

To facilitate the implementation of the Foreign Investment Law and the Implementation Regulations, the Chinese government authorities including the State Administration for Market Regulation (“SAMR”) and MOFCOM also released a few supporting documents including the *Notice on Efforts to Implement the Foreign Investment Law and Take FIE Registrations* (the “Notice”) and the *Measures for Information Report on Foreign Investments*, pursuant to which a reporting system of foreign investments based on information sharing is proposed to be established. In general, such information required to file with MOFCOM as initial report, annual report, report of change or de-registration can be shared by SAMR with MOFCOM concurrently with filings made by foreign investors in the applicable *Enterprise Registration System* and the *National Enterprise Credit Information Publicity System*. As a result, the authority of review and approval over foreign investments subjected to the *FDI Negative List* will be transferred from MOFCOM to SAMR and other applicable government agencies.

The promulgation of the Foreign Investment Law and its supporting documents comes as a substantial reform to the existing foreign investment administration in China, boosting the establishment of a unified management system of both foreign and domestic investments. It is noteworthy though that the legitimacy of the controversial VIE structures remains unclarified. In addition, it is unclear that how the change of approval authority over foreign investments in the *FDI Negative List* will be implemented effectively.

On December 6, 2019, to implement the recently amended *Administrative Regulations on Foreign-Invested Insurance Companies* (the “Regulations”), the China Banking and Insurance Regulatory Commission (or CBIRC) issued, with immediate effect, the *Detailed Rules for the Implementation of the Regulations* (the “Detailed Rules”). On the same day, CBIRC also circulated a *Notice to Clarify the Schedules of Lifting Foreign Equity Ratio Restrictions in Joint-Venture Life Insurance Companies* (the “Notice”).

Pursuant to the Detailed Rules as well as the Notice, the equity ratio capped for foreign investments in a joint-venture life

合资寿险公司（即经营人身保险业务的外资保险公司）的外资持股比例限制正式取消，即外资在寿险公司中的持股比例可达100%，并且外资保险公司的外方股东（即外国保险公司）不再被要求满足“经营年限30年”、“在中国境内设立代表机构2年以上”等条件。《实施细则》与《通知》放宽了保险行业对外资的准入，为境外投资者通过持有境外保险牌照的公司投资中国保险业提供了更多的可能性，但考虑到设立保险公司需要银保监会的审批，相关放宽政策的实践尚待后续观察。

insurance company has officially been removed. Starting January 1, 2020, foreign investors are allowed to hold up to 100% equity interest in life insurance companies. In addition, the Detailed Rules also removed such requirements as that a qualified foreign investor must have a track record of at least 30 years of experience in the insurance business and have maintained a representative office in China for no less than 2 years before it can invest in any Chinese insurance company. Both the Detailed Rules and the Notice aim to provide more opportunities for foreign investors to enter into the insurance market in China, it remains to be seen though as to whether and to what extent such foreign investors could actually benefit from these relaxed access requirements, given the establishment of insurance companies is still subject to prior approvals by CBIRC.

CAPITAL MARKET / 资本市场

China's Top Legislature Modified Securities Law to Fully Implement Registration-Based System for Securities Issuance 全国人大常委会修订《证券法》，全面推行证券发行注册制

2019年12月28日，全国人民代表大会常务委员会审议通过了新修订的《中华人民共和国证券法》（“《证券法》”），自2020年3月1日起施行。以下为《证券法》的部分主要修订内容：

1. **全面推行证券发行注册制。**《证券法》规定证券的公开发行统一适用注册制（“注册制”）且首次公开发行新股时不再对标的公司的“盈利能力”进行要求，但相关注册制的具体实施方案尚待进一步规定；同时，证券上市和终止上市的具体安排改由证券交易所相关规则（而非《证券法》）进行约束。
2. **调整上市公司收购的相关操作。**《证券法》将上市公司收购（含要约收购）相关计算标准涉及的“已发行股份”调整为“已发行的有表决权股份”（“有表决权股份”）；并且进一步加强收购后管理（如持有上市公司有表决权股份达到5%的股东，其所持有表决权股份每增加或减少1%的需进行公告；被收购上市公司股份的锁定期由12个月延长至18个月等）。
3. **强化对内幕交易和短线交易的限制。**《证券法》明确将上市公司收购人或者重大资产交易方及其控股股东、实际控制人、董事、监事和高级管理人员以及其他因职责可能获知内幕信息的人员等纳入“内幕信息的知情人”范围；并且明确将董事、监事、高级管理人员与持有上市公司5%以上股份的自然人的配偶、父母、子女持有的或由他人代持的股票纳入短线交易的限制范围。
4. **大幅提高违法行为的成本。**与此前相比，《证券法》大幅提高违法发行、违法信息披露、短线交易与内幕交易等行为的行政处罚上限。

《证券法》一方面结合近年来证券市场的发展与改革进一步规范证券发行与交易行为，另一方面在原则上确立了A股将全面推进由审批制到注册制的改革。但由于注册制的全面推行和稳定实施尚有待于相关的配套法规（如股票上市规则等）的进一步制定，在《证券法》出台的短期内，证券发行的具体操作仍存在一定的不确定性。

On December 28, 2019, the Standing Committee of the National People's Congress adopted and issued the newly amended *Securities Law of the PRC* (the "New Securities Law"), which will become effective on March 1, 2020. Set forth below are some noteworthy highlights:

1. **Full implementation of registration-based securities issuance system.** The New Securities Law stipulated that the registration-based system (the "Registration System") will be applied universally in China to the public offerings of all kinds of securities, while the profitability requirements for securities issuers upon IPOs will be removed (detailed implementing plans of the Registration System will be formulated by the State Council later on). Listing and delisting of securities will instead be governed by the rules of the applicable stock exchanges.
2. **Adjustments of implementing rules concerning acquisition of listed companies.** When calculating *outstanding shares* involved in the acquisition of a listed company (including via tender offers), only shares with voting rights will be considered pursuant to the New Securities Law. It also reinforced requirements on post-acquisition management. For example, if a shareholder has 5% or more of voting rights, he will be responsible to report every 1% increase or decrease in such voting rights thereafter. In addition, the lock-up period of any shares acquired in the acquisition is extended to 18 months from 12 months as provided by the old rules.
3. **Tightening up of restrictions on insider trading and short-swing trading.** The New Securities Law redefines the *insiders* to include parties in acquisition of listed companies or material asset transactions, their controlling shareholders and/or ultimate controlling parties, directors, supervisors and senior management team members, as well as any other persons who may have access to the inside information as a result of their duties and responsibilities. In addition, shares held by or on behalf of spouses, parents or children of the directors, supervisors, senior management team members or any individual shareholders holding 5% or more shares in a listed company are further subject to short-swing trading restrictions.
4. **Increasing penalty on illegal activities in a significant manner.** Compared with the previous provisions, the New Securities Law has substantially increased the administrative penalties on illegal activities in securities issuance, information disclosure, short-swing trading and insider trading, among others.

The New Securities Law further regulates the issuance and trading of securities based on the recent years' developments and reforms of China's securities market. It also launched the

reform of A-share market to abolish the review and approval based system and to establish the registration based system. The effect of this overhaul remains unclear though in a short period of time as it is subject to the formulation and implementation of supporting laws and regulations.

SSE Officially Released Rules for Reviewing Significant Asset Reorganizations by Listed Companies on SSE STAR Market 《科创板上市公司重大资产重组审核规则》正式发布

2019年11月29日，上海证券交易所（“上交所”）发布了《上海证券交易所科创板上市公司重大资产重组审核规则》（“《重组审核规则》”）。《重组审核规则》与此前公布的征求意见稿（具体分析请见我所《每月立法动态》2019年9月刊）相比并无重大差别，对征求意见稿中禁止跨行业资产重组（协同效应）、重组上市的财务标准等核心条款都予以了保留，但是对重组上市的锁定期要求比征求意见稿中有所收紧。重组上市时标的资产对应的经营实体尚未盈利的，在科创板上市公司重组上市后首次实现盈利前，其控股股东或实际控制人对于因重组上市所取得的股份：在3个完整会计年度内不得减持该等股份，且在此后的2个完整会计年度每年减持该等股份不得超过公司总股本的2%（略严格于科创板首发上市时公司未盈利情况下的锁定期）。

On November 29, 2019, Shanghai Stock Exchange (“SSE”) issued the *Rules for Reviewing Significant Asset Reorganizations by Listed Companies on SSE STAR Market* (the “Rules”). Compared to its draft version for public comments (please refer to our September 2019 issue of *China Regulatory Updates for details*), the Rules retained such key provisions as prohibiting cross-industry asset reorganization (the so called *synergy effect*) and requiring certain financial standards to be met in the case of back-door listings. It is noteworthy though that the requirements of lock-up period in back-door listings have been tightened up. In addition, if the operating entity of the underlying going-public assets has not yet become profitable at the time of a back-door listing, prior to the STAR Market-listed company (the “STAR Company”) making profits for the first time after such back-door listing, neither its controlling shareholder nor its ultimate controlling party may, (i) dispose of any share obtained as a result of the back-door listing within the first three full fiscal years after the registration of the shares; or (ii) dispose of such shares more than 2% of the STAR Company’s total shares per year in the following two full fiscal years (which is slightly stricter than the lock-up period requirements of a STAR Market IPO under similar situations).

PRIVATE FUND / 私募基金

AMAC Updated Private Equity Fund Filing Guidelines 中基协更新《私募投资基金备案须知》

2019年12月23日，中国证券投资基金业协会（“中基协”）发布新版《私募投资基金备案须知》（“《备案须知》”）。根据《备案须知》，中基协 (i) 将可转债、市场化和法制化的债转股等纳入股权投资范围；(ii) 进一步加强了募集机构在基金募集时对投资者出资能力的审核义务，并强调先募集后备案的程序；(iii) 强化了对基金相关利益冲突的预防与管控，如建立关联交易控制机制及限制基金管理人对同类基金的设立；并且(iv) 要求基金的约定存续期不得少于5年。

On December 23, 2019, the Asset Management Association of China (“AMAC”) promulgated the new *Private Equity Fund Filing Guidelines* (the “Guidelines”). Pursuant to the Guidelines, AMAC proposed to: (i) incorporate the convertible bonds and equity converted from debts whether by market practice or by operation of law into the scope of equity investments; (ii) further stress fund raisers’ obligations to inspect the potential investors’ capability during fundraising and the importance of “fundraising first and filing thereafter”; (iii) reinforce the prevention and management of interest conflicts (e.g., requiring PE funds to establish risk-control system of affiliated transactions and restricting similar funds to be raised by the same fund managers, among others); and (iv) require PE funds to operate no less than 5 years.

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