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To: Our Clients and Friends

Re: Major PRC Regulatory Updates on Shanghai FTZ

I. Overview

The China (Shanghai) Pilot Free Trade Zone (“Shanghai FTZ” or the “FTZ”) has been officially established on September 29, 2013, following the approval by the PRC¹ State Council on August 22, 2013.

Geographically, the FTZ integrated the existing four bonded areas in Shanghai (i.e., *Shanghai Waigaoqiao Free Trade Zone*, *Shanghai Waigaoqiao Logistics Center*, *Yangshan Bonded Port* and *Shanghai Pudong Airport Free Trade Zone*) with a total area of approximately 28.78 square kilometers (approximately 11 square miles) that may further expand in the future.

Immediately before the establishment of the FTZ, the PRC State Council has released the *General Plan for Shanghai FTZ* (the “General Plan”), according to which, in order to create an even freer and more liberal investment environment in Shanghai FTZ, a comprehensive economic reform in terms of transformation of government functions, financial system, trading services, foreign investment and taxation, among others, is proposed to be experimented based on international standards in the FTZ.

Except for expressly setting out a list of six service sectors that will be further opened up to foreign investors, the General Plan only laid out the outline of reforms in such other areas as foreign exchange (or “forex”) and finance, leaving the detailed implementing rules to be promulgated and further refined by other competent government authorities.

Upon and after the establishment of Shanghai FTZ, the relevant PRC central government authorities (including the State Administration for Industry and Commerce or “SAIC”, the State Administration of Taxation or “SAT”, the People’s Bank of China or “PBOC”, among others) and the Shanghai Municipal People’s Government (the “Shanghai Government”) have formulated and released several supporting rules and policies to further implement the reform principles provided under the General Plan.

¹ Solely for the purpose of this memorandum, “China” or the “PRC” refers to the People’s Republic of China, excluding Hong Kong, Macau and Taiwan.

With the promulgation of the General Plan and other supporting documents, the framework of FTZ's policies have generally been established.

II. Major Regulatory Development in Shanghai FTZ

1. Foreign Direct Investment

(a) Further Opening up of Some Six Service Sectors to Foreign Investors

Pursuant to the General Plan, some eighteen industries in six service sectors (i.e., *financial services, business and trading services, professional services, social services, shipping services and cultural services*) are further opened up to foreign investors in Shanghai FTZ. Certain qualification requirements on foreign investors, limits on foreign shareholding ratio and restrictions on the scope of businesses in which foreign investors may engage, among others, in these sectors are abolished or suspended for implementation. In addition, the General Plan also encourages multinational companies to establish, in the FTZ, their Asia-Pacific regional headquarters and/or operating centers with integrated functions of trading, logistics, settlement and etc.

Further, the detailed opening up policies in such areas as medical institutions and value added telecommunication services in FTZ has also been provided recently. For instance, according to *the Interim Administrative Measures on Wholly Foreign Owned Medical Institutions in Shanghai FTZ* issued by the General Office of the Shanghai Government on November 13, 2013, eligible foreign medical institutions and their affiliates (*including those from Hong Kong, Macau and Taiwan*) are allowed to establish wholly owned for-profit medical institutions in Shanghai FTZ. Whereas outside of the FTZ, except that qualified services providers from Hong Kong, Macau or Taiwan may establish wholly owned hospitals in China and wholly owned sanatoriums or outpatient clinics in Guangdong province, as a general rule, foreign investors currently are only allowed to own no more than 70% equity interest in a PRC medical institution.

For foreign investments in value-added telecommunication services, pursuant to the *Opinions on Further Opening up of Value-added Telecommunication Services in Shanghai FTZ* (the "Opinions") jointly issued by the Ministry of Industry and Information Technology and the Shanghai Government on January 7, 2014, foreign investors are now permitted to own over 50% equity interest in such service fields as "application stores" and information storage-and-forwarding business in FTZ. Additionally, service sectors including call center services, onshore services for multiple-party communications, Internet access services and onshore Internet VPN services will for the first time in mainland China, be opened to foreign investors within the FTZ, and foreign investors will be allowed to own up to 55% equity interest in the e-commerce businesses. Furthermore, in order to engage in the value added telecommunication services provided by the Opinions, the underlying entities should be registered in the FTZ with their service equipment and facilities also located therein. While Internet access services are required to be operated within the FTZ, other value added telecommunication services may be provided to customers outside of the FTZ.

(b) Adoption of Negative List System for Foreign Investment

So far, general administration of foreign investments in mainland China is mainly based on the *Catalogue for Guidance of Foreign Investment Industries* ((the "Catalogue", *as amended from time to time*), pursuant to which industries for foreign investments are essentially divided into some four categories, i.e., the encouraged, restricted, prohibited and permitted areas (the "Catalogue System"). Under the Catalogue System, basically all foreign investment projects are subject

to prior examination and approvals by competent offices of the PRC Ministry of Commerce (or MOFCOM). Now in Shanghai FTZ, a so-called “Negative List” management system is adopted on an experimental basis. Under the *Negative List* system, only areas prohibited or restricted for foreign investments will be singled out for government’s approval, while unless otherwise required by the PRC State Council, foreign investments in all other areas will simply be subject to filing and registrations with government authorities and will essentially be treated as domestic Chinese investors in the FTZ. Meanwhile, PRC national security review system is also proposed to be improved in Shanghai FTZ, under which FDI and M&A related national security will be reviewed by local authorities within the FTZ directly (rather than submitted to respective central government authorities in Beijing) on an experimental basis.

In accordance with the *Special Administrative Measures (Negative List) on Foreign Investments in Shanghai FTZ (2013)* (the “Negative List”) promulgated by Shanghai Government on September 30, 2013, approximately 190 sub-categories of some 18 categories under the applicable PRC economic and industrial classifications are spelt out in the Negative List, accounting for less than 1/5 of the total 1,069 sub-categories under the classified national economic industries, which means that over 80% of foreign investment projects in the FTZ will no longer be subject to government approval system but the simplified registration and filing requirements.

Compared with the currently effective Catalogue (*2011 Version*), the applicable Negative List covered almost all prohibited foreign investment areas provided in the Catalogue. It also provided in the Negative List that such fields as wholesale of salt, auction of cultural relics, operation of cultural relic shops, direct or indirect engagement in online games and Internet data center services that are not expressly banned by the Catalogue but actually prohibited in practice for foreign investments are not permitted in Shanghai FTZ either. In addition, the Negative List spelt out specific requirements on several restricted foreign investment areas (such as the financial service sector) based on the Catalogue and further provided detailed restrictive requirements on foreign investments in such industries as automobile manufacturing and air transportation that are generally encouraged or permitted by the Catalogue.

Overall, however, the Negative List is not unexpectedly revolutionary. The relevant government authorities indicated that they will manage to gradually narrow down the Negative List from time to time, to further liberalize foreign investments in the relevant areas.

(c) Simplification of Administrative Procedures for Foreign Investments

With respect to the foreign investment entry administration in the FTZ, for those outside of the Negative List, only such basic information as foreign investors’ qualifications and business areas/industries of the proposed investments will need to be filed and recorded with the competent MOFCOM office. Since the focus of the government’s administration will be shift from project pre-approval to supervision of investment process and post-investment operation, the filing and registration system presumably will work more efficiently. For foreign investments within the Negative List, the pre-approval system still applies and the competent MOFCOM office will substantively review and examine the investors’ qualifications, proposed investment areas/industries, investment amount, capital contribution methods, constitutional documents of the investee companies, among others, which process could be quite time consuming depending on the complexity and transaction amount of the investment concerned.

With respect to corporate registrations, a so-called “one-stop acceptance window” (i.e., an application acceptance and processing mechanism which integrated functions of various local government authorities such as SAIC, SAT, the forex bureau and the quality supervision bureau) is adopted in the FTZ, under which completing a company registration procedure may only take several working days.

2. Outbound Investments

Outbound investments by entities established within the FTZ are generally encouraged by the General Plan.

In accordance with the *Procedures of Filing Administration in Shanghai FTZ for Outbound Investments* promulgated by the Shanghai Government on September 29, 2013, except for certain outbound investments (such as investments in overseas energy/mining projects or to a destination country or region without diplomatic relationship with China, establishment of overseas SPV and etc.) that will still be subject to pre-approvals of competent government authorities, other outbound investments will simply be subject to a filing and registration requirement with the FTZ’s administration committee. This filing and registration process could be accomplished within just a few working days in the FTZ, in contrast to some 4-8 weeks that approvals for an outbound investment will usually take outside of the FTZ.

In addition, the General Plan also promoted a general idea of establishing PE/VC funds and funds of funds (or FOFs) within the FTZ with a focus on overseas equity investments.

3. Reform of Company Registration System

(a) Requirements on Paid-in Registered Capital Is Removed

To facilitate reforms in Shanghai FTZ, the SAIC promulgated the *Several Opinions on Supporting the Establishment of Shanghai FTZ* (the “Opinions”) on September 29, 2013, according to which the FTZ SAIC office is authorized to carry out filing and registration formalities for foreign-invested enterprises (or FIEs) registered in the FTZ. In addition, pursuant to the Opinions, except otherwise required by applicable PRC laws or administrative regulations, no paid-in capital or minimum registered capital amount (e.g., RMB30,000 for a limited liability company or RMB5 million for a company limited by shares) will ever be required for corporate entities to be established within the FTZ. Consequently, the paid-in capital amount will no longer be recorded on a company’s business license, nor shall any capital verification report be required for company registration. The amount and schedule of capital contributions to a company will instead be determined by shareholders in the articles of association of the company. It is noteworthy that this company registered capital reform has also been adopted by the recently amended *PRC Company Law*, pursuant to which, starting from March 1, 2014, all domestically funded corporate entities will substantially follow the same registration requirements no matter they are registered within or outside of the FTZ. However, for foreign invested enterprises or FIEs that are established outside of the FTZ, the paid-in capital requirements may still need to be followed until applicable laws and regulations governing FIEs are amended.

(b) Publication of Enterprises’ Annual Reports to Be Adopted on Trial Basis

Since March 2014, annual inspections on enterprises in the FTZ will not be subject to any administrative review or examination. Instead, a so-called “publication system of enterprises’ annual reports” will be implemented, under

which enterprises will only need to submit annual reports to the FTZ SAIC office through an information publication system in a required period of time. All annual reports submitted through such system will be open to the general public, while the enterprises shall be responsible for the authenticity and legality of their annual reports. In addition, the FTZ SAIC office will build up a list of abnormal enterprises to publicize names of the enterprises that failed to timely submit their annual reports. In general, compared with the enterprise annual inspection system outside of the FTZ, the enterprise annual inspection formalities within the FTZ will be greatly simplified.

(c) “Register Inside and Operate Outside of FTZ”

Subject to the General Plan which provided that all FTZ opening-up policies will only apply to enterprises physically registered within the FTZ, their subsidiary or investee entities established outside of the FTZ cannot enjoy any FTZ preferential treatment so far. Nevertheless, in order to demonstrate the effects of FTZ financial innovations and further opening-ups in service sectors, the local Shanghai government authorities reportedly is exploring experiments that would arguably allow enterprises registered in the FTZ to operate virtually outside of the FTZ within the territory of Shanghai in the near future.

4. Reforms in Financial Sectors

In terms of financial reforms in the FTZ, rules and policies concerning banking, insurance, investment and financing, forex and other areas have already been promulgated which include, among others, the General Plan, the *Circular of China Banking Regulatory Commission on Issues Concerning Banking Supervision in Shanghai FTZ* (the “CBRC Circular”), the relevant reply of the China Insurance Regulatory Commission (the “CIRC Reply”, *specific name of this CIRC reply somehow is not yet available to general public*), the *Capital Market Policies and Measures to Support and Promote Shanghai FTZ* (the “CSRC Measures”), and the *Opinions of the People’s Bank of China on Financial Support in Shanghai FTZ* (the “PBOC Opinions”).

(a) **Banking Services**

According to the General Plan and the CBRC Circular, qualified foreign banks are allowed to establish subsidiaries, branch offices, special institutions and/or Sino-foreign joint venture banks in the FTZ. Meanwhile, qualified investors from domestic private sectors are also encouraged to establish, at their own costs and risks, banks, financial leasing companies, consumer financing companies and other financial institutions in the FTZ and to become shareholders of Sino-foreign joint venture banks.

In terms of bank account management, the PBOC Opinions introduced an innovative system under which bank accounts are categorized for management and operation so as to facilitate the cross-border financing and investments while in the meantime curbing hot money inflows via Shanghai FTZ and protecting the real economy from strikes by international hot money speculations. Specifically,

- (i) Residents, including natural persons and enterprises, in the FTZ may open *Resident RMB/Foreign Currency Free Trade Account* (the “Resident FTA”), while non-FTZ residents may open *Non-Resident RMB/Foreign Currency Free Trade Account* (the “Non-resident FTA”);
- (ii) Free fund flows are allowed among Resident FTAs and between Resident FTAs and Non-resident FTAs, offshore accounts and/or other onshore

non-resident accounts outside of the FTZ;

- (iii) Cross-border financing and undertakings may be carried out under Resident FTAs or Non-resident FTAs;
- (iv) Fund flows between a Resident FTA opened by a non-financial entity and its other bank settlement accounts (*except for those opened with onshore banks outside of the FTZ*) for current account transactions, repayment of loans, industrial investments and other qualified cross-border trading activities are allowed; and
- (v) Fund flows between Resident FTAs and onshore bank settlement accounts outside of the FTZ will be treated as cross-border fund flows from the perspective of forex administration.

It is noteworthy that the aforementioned item (iv) is also interpreted as a transitional and tentative step towards RMB convertibility under capital accounts which we will have a further discussion below under section 3(a) of Part III hereof. It is expected that implementing rules on irregular fund flow monitoring, penalties and etc. will be further promulgated by PBOC and/or other competent government authorities.

(b) Insurance Services

According to the CIRC Reply, it has developed some eight primary policies to support the FTZ, which include, among others, the permission of establishment of foreign-invested specialized health insurance institutions in the FTZ, development of cross-border RMB-denominated reinsurance business, outbound investments by insurance institutions registered in the FTZ, development of shipping insurance business and liability insurance business.

(c) Financing and Investments

In order to further facilitate trading, financing and investments and to deepen opening up in the financial sector in the FTZ, the CSRC Measures and the PBOC Opinions have specified series of policies based on the General Plan. Major highlights include, among others:

(i) Cross-Border Investments by Individuals

According to the PBOC Opinions, qualified individuals working in the FTZ may conduct outbound investments (including among others, securities investment and investment in foreign private companies) and remit out of China legitimate after-tax incomes. In addition, qualified foreign individuals working in the FTZ may also open non-resident individual account in the FTZ for onshore investments in China in line with applicable PRC laws. However, qualification requirements in this connection are yet to be formulated by PBOC and/or other competent government authorities.

(ii) Overseas Financing

According to the PBOC Opinions, enterprises (whether domestically or foreign-funded), non-banking financial institutions and other economic organizations registered in the FTZ may borrow RMB or foreign currencies from overseas entities. In terms of borrowing overseas RMB loans, this will arguably expand FTZ enterprises' fund sourcing basis and help reduce potential forex losses, while except for a few trial areas specifically approved by the PRC government, domestically funded enterprises outside of the FTZ

are generally not allowed to borrow overseas RMB funds,. However, issues such as whether there is any quota for overseas RMB borrowing and how the borrowings should be operated from the forex administration perspective will need to be further clarified by PBOC or its designated agencies. It is also noteworthy that pursuant to the PBOC Opinions, proceeds of overseas RMB borrowings shall not be used for investments in securities, derivatives or extension of entrusted loans.

(iii) Forex Administration

The PBOC Opinions proposed various measures to improve the forex administration within the FTZ, among which simplification of procedures for direct investments with the following major highlights is specifically noteworthy:

- ✓ forex registrations and change registrations under direct investments are delegated to banks and no longer subject to SAFE's review and approval; and
- ✓ entities in the FTZ are allowed to keep or settle their foreign currencies under direct investment account based on their own willingness so long as the authenticity of the underlying transactions could be ensured and the relevant information will be completely collected.

Currently outside of the FTZ, foreign-invested enterprises are required to complete forex registrations and change registrations (*if any recorded information such as company name, scope of business and registered address is ever altered*) with the competent local SAFE office. Additionally, to make outbound investments, onshore PRC entities (*no matter foreign invested or domestically funded*) are required to complete forex registrations with competent local SAFE office before they come to banks for RMB settlements. Now according to the PBOC Opinions, banking financial institutions in Shanghai may conduct cross-border RMB settlements for entities in the FTZ (*except for those subject to Customs' special monitoring*) under current account and direct investment account based on the three principles of "knowing your client, knowing your business and due diligence". From this point of view, forex formalities for outbound investments in the FTZ are significantly simplified. It is noteworthy though that detailed implementing rules for cross-border RMB settlement involving individuals are yet to be promulgated.

In addition, the PBOC Opinions also outlined several policies to further streamline forex administrations in such aspects as removal of SAFE approvals over financial leasing companies' overseas leasing business, simplification of outbound financing and payment procedures for pre-payments in large-scale financial leasing projects and cancelation of SAFE pre-approvals for outbound payment of secured interests by entities in the FTZ.

5. Tax

In terms of taxation, the General Plan put forward several reformative policies including those on income tax under investments with non-monetary assets and individual income tax under equity incentive plans to stimulate investments.

To implement the General Plan, the PRC Ministry of Finance and SAT jointly issued the *Circular on Issues Concerning Policies for Enterprise Income Tax on Restructurings including Investments with Non-Monetary Assets in Shanghai FTZ* (the

“Circular”) on November 15, 2013. According to the Circular, enterprises registered and operated within the FTZ may calculate and pay enterprise income tax (or EIT) by installments within less than 5 years for incomes derived from appreciation of assets value under investments with non-monetary assets or other asset restructuring transactions. The Circular addressed concerns of enterprises undertaking investments with non-monetary assets or other asset restructurings that may immediately subject them to a significant tax payment obligation for an appreciated asset value before they can gain any real cash. It is also noteworthy that this Circular is only applicable to establishment of new corporate entities and acquisition of controlling stakes or substantial operating assets of other entities with non-monetary assets.

With respect to such other proposed tax policies mentioned by the General Plan as the deferred payment of individual income tax for investments by individual shareholders with non-monetary assets, the installment payment of individual income tax for equity incentive plans, and those favorable tax treatment to outbound equity investments and offshore businesses, the details are expected to be clarified by SAT and/or other competent government authorities in the near future.

III. Comparison and FTZ Outlook

1. Comparison with *Shenzhen Qianhai*

Before the establishment of Shanghai FTZ, there have been established several experimental areas or special economic zones with more or less features of free trade zones throughout the country, for examples, Qianhai-Hong Kong Modern Service Industry Cooperation Zone in Shenzhen (“Shenzhen Qianhai” or “Qianhai”) and Hengqin New Area in Zhuhai. After the successful establishment of Shanghai FTZ, several other Chinese cities and provinces including Guangdong, Tianjing and etc. also submitted applications to the State Council for setting up their own pilot free trade zones. As of the date hereof, over ten applications thereof have reportedly been generally endorsed by the State Council. Based on the publicized governmental papers, Shenzhen Qianhai and Shanghai FTZ seem to have shared some similar polices, but also differentiated from each other with their own advantages. For illustrative and general reference purposes, we discuss briefly below the major difference between Shenzhen Qianhai and Shanghai FTZ.

➤ *Advantages of Shenzhen Qianhai*

Shenzhen Qianhai offered some preferential tax treatments and designated supports to equity investment funds and talented individuals that are not yet available in Shanghai FTZ. For examples, qualified enterprises in Qianhai may enjoy a reduced EIT rate of 15%, while FOFs, foreign-invested equity investment funds as well as qualified overseas elites and talents may enjoy favorable treatments if they come to Qianhai. However, since the qualifications for enterprises to enjoy reduced EIT rate and the specific plans for PE/VC investors and talented people to enjoy favorable treatments somehow have not been promulgated, there has not been great inflow of investments in Qianhai so far.

➤ *Advantages of Shanghai FTZ*

Shanghai FTZ initiated a much more comprehensive reform in financial sectors than those in Shenzhen Qianhai, which include but not limited to foreign currency and RMB settlement, forex administration, classification of bank accounts for management, overseas financing by domestically funded entities. In terms of tax incentive, although Shanghai FTZ did not adopt any favorable income tax rate, its policy on deferred EIT payment for qualified assets restructurings could somehow be beneficial to some enterprises.

Differentiated from Shenzhen Qianhai in virtue of functions, orientations and etc., Shanghai FTZ also implemented a series of reforms in the areas of foreign investment and outbound investment, among which the *Negative List* system for FDI and streamlined administration system for both FDI and outbound investments are innovations and breakthroughs in China.

More importantly, the promulgated and released FTZ rules by the PRC central ministries and local Shanghai government authorities have generally refined the outlines of the General Plan and presented a rather clear picture to investors and other market players so that they could arguably in a better position to envision their businesses and developments in the FTZ.

2. Potential Benefits of FTZ Policies to Investors

Generally speaking, investors could potentially benefit from the FTZ policies in terms of the following aspects:

- (i) the *Negative List* management system is generally favorable to foreign investments;
- (ii) the further simplified and streamlined administration system of FDI/outbound investment registration, forex, and etc. will facilitate investments and save investors' time and costs;
- (iii) the abolishment of minimum and paid-in registered capital, the adoption of deferred EIT payment under eligible asset restructurings and etc. could potentially ease investors from restrains of cash flow shortage; and
- (iv) the permission of establishment of foreign and private bank institutions in the FTZ and borrowing of offshore RMBs by domestic FTZ entities, the encouragement of legitimate financial innovations in the FTZ and etc. could arguably revitalize capitals from private sectors and in the meanwhile introduce rather cost-efficient financing choices to investors.

3. Expected Future Developments in FTZ

Note that as mentioned above, while FTZ policies have overall been in a good shape now, implementing rules in such aspects as forex, financial and tax reforms are yet to be further promulgated. Specifically, reforms in terms of RMB free conversion, reduction of EIT rate and etc. that used to be heavily discussed and highly expected by the public before the promulgation of the General Plan, have not been touched by any government papers yet. Nevertheless, it is still wildly anticipated that,

- (i) conversion of RMB funds for capital account activities could expect a breakthrough somewhere in 2014 with first batch of detailed implementing rules to be promulgated before end of first quarter of 2014; and
- (ii) a reduced EIT rate on eligible businesses and other preferential tax treatments in the FTZ could still be expected as it is further built up towards a more popular free trade and offshore finance center.

* * *

The above is a brief introduction and analysis of regulatory highlights in Shanghai FTZ reforms as of the date hereof, which hopefully will serve as a useful reference to you. This memorandum is for your information and general reference purposes only

and may not be relied as PRC legal opinion in any event.

As always, if you have any question or comments, please do not hesitate to contact us at inquiry@hanyilaw.com for a further discussion.

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关于：上海自贸区改革要点及热点综述

一、上海自贸区概况

2013年8月22日，中国（上海）自由贸易试验区（“上海自贸区”或“自贸区”）经国务院正式批准设立，并于9月29日正式挂牌宣布成立。

上海自贸区总面积约为28.78平方公里（约11平方英里），地理范围涵盖现有的上海外高桥保税区、上海外高桥保税物流园区、洋山保税港区和上海浦东机场综合保税区等四个海关特殊监管区域，其范围今后有可能还会继续扩大。

自贸区挂牌前两日，国务院对外公布《中国（上海）自由贸易试验区总体方案》（“《总体方案》”）。根据该《总体方案》，上海自贸区内将进行包括政府职能转变、金融制度、贸易服务、外商投资和税收政策等全方位的经济改革，按照国际化的标准营造自由与宽松的投资环境。

《总体方案》除明确列出有关六大服务领域进一步对外资开放的具体清单外，仅就其他方面提出了总体规划和要求，操作层面的具体规范则主要由上海市人民政府进一步细化并对外公布。

自贸区挂牌当日及第二天，国家工商总局和上海市人民政府等先后公布了涉及自贸区管理的首批政策细则。此后，国家税务总局、中国人民银行等部门也相继公布了支持自贸区建设的相关文件。

综合《总体方案》及已经公布的相关文件来看，上海自贸区的大体政策已基本确定。

二、上海自贸区的改革要点及热点

1. 外商投资

(a) 六大服务领域扩大对外资开放的程度

《总体方案》明确规定，在自贸区内，涉及六大服务领域（即金融服务、商贸服务、专业服务、社会服务、航运服务以及文化服务领域）的十八个行业将对外资进一步开放，包括暂停或取消部分投资者资质要求、外资股比限制、经营范围限制等。此外，《总体方案》还鼓励跨国公司在区内建立其亚太地区总部，建立整合贸易、物流、结算等功能的营运中心等。

目前，上海自贸区已出台了部分行业对外资开放的具体措施，包括引人注目的外商独资医疗机构和增值电信业务等。就设立外商独资医疗机构，根据上海市人民政府办公厅于2013年11月13日发布的《中国（上海）自由贸易试验区外商独资医疗机构管理暂行办法》，符合条件的外国（包括港澳台）医疗机构及其控制的关联机构将被允许在上海自贸区内以独资的形式设置营利性医疗机构。而在自贸区外，根据现有规定，除港澳台服务提供者可在广东省设立独资疗养院、门诊部及在全国地级以上城市设立独资医院以外，外国投资者目前在中国大陆（除个别试点地区（如北京通州））还只能以中外合资或合作的形式设立医疗机构，且持股比例不得高于70%。增值电信业务方面，工业和信息化部与上海市人民政府于2014年1月6日联合发布了《关于中国（上海）自由贸易试验区进一步对外开放增值电信业务的意见》，决定在试验区内试点进一步对外开放增值电信业务。其中，信息服务业务中的应用

商店及存储转发类业务的外资股比将试点突破 50%，新增试点开放呼叫中心业务、国内多方通信服务业务、因特网接入服务业务、国内因特网虚拟专用网业务等四项业务，并将在线数据处理与交易处理业务中“经营类电子商务”的外资股比上限提高至 55%。同时，该意见还规定，申请经营上述电信业务的企业注册地和服务设施须设在自贸区内，除因特网接入服务业务以外的其他业务的服务范围可以面向全国。

(b) 启用“负面清单”模式

到目前为止，中国对外商投资的管理一直采用的是《外商投资产业指导目录》模式，即，列明鼓励、限制、禁止外资进入的行业，基本上所有外商投资项目均需要获得商务主管部门的事先审批。而根据《总体方案》，上海自贸区将探索“负面清单”管理模式，对于清单之外的领域，按照内外资一致的原则，将外商投资项目由核准制改为备案制（但国务院规定对国内投资项目保留核准的除外），由上海市负责办理。与此同时，自贸区内将逐步完善国家安全审查制度，在区内试点开展涉及外资的国家安全审查。

根据上海市人民政府于 2013 年 9 月 30 日发布的《中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）（2013 年）》（“《负面清单》”），按照中国现有的国民经济分类标准，共有 18 个门类约 190 个小类被列入在自贸区内需要实行准入管理的外商投资项目，约占目前国民经济行业全部 1,069 个小类的 17.8%，这意味着超过 80%的外商投资项目将由核准制改为备案制。

我们注意到，与现行《外商投资产业指导目录（2011 年版）》（“《产业目录》”）相比，《负面清单》几乎涵盖了《产业目录》下所有禁止类的条目，并明确将个别未被《产业目录》明确列为“禁止类”，但在实践中实际“禁止”外商投资的领域（比如：盐的批发、文物拍卖、文物商店、直接或间接从事和参与网络游戏运营服务、经营因特网数据中心业务等）列入《负面清单》下禁止外商在区内投资的领域。此外，《负面清单》对《产业目录》中的“限制类”条目进行了较大幅度的细化和调整，列明了具体领域对外商投资项目的限制性要求（比如就金融服务业而言，《负面清单》针对具体的业务类型明确了不同的外资比例限制），同时对根据《产业目录》属于鼓励类或允许类的部分行业（比如汽车整车生产、航空运输公司等）提出了更为明确细致的限制性要求。

从总体上看，《负面清单》所列条目及规定的限制性措施与《产业目录》所列限制类和禁止类项目相比，并未出现市场之前预期的重大突破，不过有关部门亦表示，将在今后《负面清单》的更新版本中逐步缩减条目，进一步放开在行业上对外商投资的限制。

(c) 简化外商投资管理流程及手续

对于《负面清单》以外的投资项目，在自贸区备案管理模式下，商务主管部门将只就投资主体的资格、拟投资的领域/行业等基本信息进行备案，投资管理由事先审批转为事中及事后监管，这将大幅缩短办理时限；而《负面清单》以内的外商投资仍需按核准制管理，商务主管部门需要对投资主体的资格、投资领域/行业、投资金额、出资方式、拟设公司合同/章程等事项的真实性、合法性进行审查，所需时间将因项目而异。

企业登记方面，自贸区内的工商、税务、外汇、质检等部门采取“一口受理”的模式，在材料齐全的情况下，可以使企业完成设立登记的时间由原来的 30 个工作日缩短到最短 4 个工作日。

2. 对外投资/跨境投资

《总体方案》除在相关领域进一步向外国投资者开放中国市场外，也鼓励区内各类投资主体开展境外投资活动。区内企业向境外投资开办企业原则上以备案制为主，由上海负责。

根据上海市人民政府于 2013 年 9 月 30 日印发的《上海自贸区境外投资开办企业备案管理办法》，除一些特殊的境外投资（比如前往与中国未建交国家（地区）、设立境外特殊目的公司、能源矿产类境外投资等）外，自贸区的管委会将负责区内企业境外投资一般项目的备案管理，管委会将在 5 个工作日内出具境外投资项目、境外开办企业备案意见。而在区外，按照目前的规定，企业对外投资通常需要取得相关商务部门及/或发改委的批准，而每个部门的核准时限通常需要 20 个工作日。

此外，《总体方案》还鼓励在自贸区内设立专业从事境外股权投资的项目公司，支持有条件的投资者设立境外投资股权投资母基金，但具体的支持鼓励措施等尚待相关实施细则的出台。

3. 公司注册登记制度改革

(a) 试行注册资本认缴登记制

作为上海自贸区改革的配套措施之一，国家工商行政管理总局于 2013 年 9 月 29 日公布了《关于支持中国（上海）自由贸易试验区建设的若干意见》（“《意见》”），授权自贸区工商部门负责外资登记管理。此外，根据《意见》，自贸区内试行有条件的注册资本认缴登记制，即，除法律法规另有规定的外，公司实收注册资本不再登记，也无需提交验资报告，并且除法律、行政法规或国务院另有特别规定外，在区内取消《公司法》关于有限责任公司最低注册资本人民币 3 万元、一人有限责任公司最低注册资本 10 万元及股份有限公司最低注册资本 500 万元的限制，以及公司设立时全体股东（发起人）的首次出资额及比例、缴足出资的期限及货币出资占注册资本比例等限制。值得注意的是，上述《意见》引入的公司注册资本改革措施已被纳入 2013 年 12 月 28 日通过的《公司法》修正案，自 2014 年 3 月 1 日起，自贸区内内外资公司注册登记的操作将趋于一致，但对于自贸区外的外商投资企业而言，在“三资企业法”修订之前基本上仍应执行现有的分期实缴资本制。

(b) 试行年度报告公示制

自 2014 年 3 月开始，自贸区内企业的年检将不再通过行政审核的方式，而改为“年度报告公示制”，即，由企业按年度在规定的期限内，通过市场主体信用信息公示系统向工商部门报送年度报告，并向社会公示，任何单位和个人均可查询，企业对年度报告的真实性、合法性负责。工商部门将建立经营异常名录制度，通过市场主体信用信息公示系统记载未按规定期限公示年度报告的企业。与区外现行的企业年检制度相比，区内企业的年检手续得以大幅简化。

(c) 关于“区内注册区外运作”的问题

根据自贸区官方网站提供的公开信息，除《总体方案》和其他规范性文件中规定必须在自贸试验区内经营和提供服务的领域外，自贸区内的企业可以根据相关法律法规到区外进行再投资或开展业务。而《总体方案》规定，其列出的各项开放措施只适用于注册在中国（上海）自由贸易试验区内企业。有投资者担心，这意味着区内企业在区外设立的分支机构或进行的投资将无法享受区内的特殊政策。

对此，上海方面已发出信号，自贸区企业或可在上海市内实现区内注册区外运作。浦东新区区委书记沈晓明于 2013 年 11 月公开表示，（企业）注册在自贸区内，但实际运作也可以在浦东、在自贸区以外。我们将争取探索设立分支机构、开展业务联动等形式，将试验区内金融创新、服务业开放等领域的试点效应向区外释放。据此我们理解，区内企业在区外设立的分支机构或到区外进行再投资目前恐怕还无法享受区内的政策，至于日后是否可以享受，还有待实践的摸索和相关法规、政策的落实。

4. 金融

截至目前，自贸区已出台的金融政策主要涉及银行、保险、投融资、外汇等方面，具体包括《总体方案》和银监会、保监会、证监会及人民银行各自发布的配套文件，比如《中国银监会关于中国（上海）自由贸易试验区银行业监管有关问题的通知》（“《银监会通知》”）、保监会作出的相关批复（*批复的具体名称暂未对外公布*，“《保监会批复》”）、证监会《资本市场支持促进中国（上海）自由贸易试验区若干政策措施》（“《证监会措施》”）以及《中国人民银行关于金融支持中国（上海）自由贸易试验区建设的意见》（“《央行意见》”）等。

(a) 银行服务

根据《总体方案》和《银监会通知》，符合条件的外资银行可以在区内设立子行、分行、专营机构和中外合资银行，同时，符合条件的民营资本也可以在区内设立自担风险的民营银行、金融租赁公司和消费金融公司等金融机构，并可在区内参股中外合资银行。

在银行账户管理方面，《央行意见》创新设立了一套分账管理体系，拟在实现跨境投融资汇兑便利的同时，防范“热钱”借道自贸区流入境内，避免国际资本流动冲击实体经济。具体而言，

- (i) 试验区内的居民（包括自然人和企业）可设立本外币自由贸易账户（“居民自由贸易账户”），非居民可在试验区内银行开立本外币非居民自由贸易账户（“非居民自由贸易账户”）；
- (ii) 居民自由贸易账户与境外账户、区外的境内非居民账户、非居民自由贸易账户以及其他居民自由贸易账户之间的资金可自由划转；
- (iii) 居民自由贸易账户及非居民自由贸易账户可办理跨境融资、担保等业务；
- (iv) 同一非金融机构主体的居民区内自由贸易账户与其他银行结算账户（区外境内账户除外）之间因经常项目下业务、偿还贷款、实业投资以及其他符合规定的跨境交易需要可办理资金划转；以及
- (v) 居民自由贸易账户与境内区外的银行结算账户之间产生的资金流动视同跨境业务管理。

值得注意的是，上述第(iv)项与人民币资本项目可兑换这一改革密切相关（*进一步介绍请参见下文第三部分之3(a)“人民币资本项目可兑换”*），监管的难度较大，估计有关部门可能会制订细则明确监管主体、文件审核和监管尺度等内容。

(b) 保险服务

根据《保监会批复》，保监会共有八项措施支持上海自贸区建设，主要包括允许试点设立外资专业健康保险机构、人民币跨境再保险、区内保险机构境外投资试点以及航运保险、责任保险等。相关配套细则目前暂未出台。

(c) 投融资

在投融资方面，《证监会措施》和《央行意见》明确了一系列政策，旨在进一步促进贸易投资便利化和扩大金融对外开放，其中有以下几点值得关注：

(i) 个人跨境投资

根据《央行意见》，在区内就业并符合条件的个人可按规定开展包括证券投资在内的各类境外投资，个人在区内获得的合法所得可在完税后向外支付，而在区内就业并符合条件的境外个人可按规定在区内金融机构开立非居民个人境内投资专户，按规定开展包括证券投资在内的各类境内投资。该内容与《证监会措施》中“区内个人双向投资于境内外证券期货市场”的内容一致。

上述规定意味着区内个人可不再通过合格境内机构投资者（QDII）或合格境外机构投资者（QFII）而自行进行证券投资或其他投资。不过需要注意的是，根据上述规定，可进行双向投资的个人需在区内就业并符合一定的条件，但何谓“在区内就业”以及相关条件如何、是否有投资额度的限制等，尚待主管部门对外公布细则。

(ii) 对外融资

根据《央行意见》，注册在上海自贸区内的中外资企业、非银行金融机构以及其他经济组织可从境外融入本外币资金。该项政策的意义在于，自贸区内也将放开对于内资企业举借人民币外债的限制，因为根据目前我国有关规定，除个别试点地区或经特别批准的内资企业外，其他内资企业尚无法从境外借入人民币资金。对该项限制的放开将有助于扩宽区内内资企业的资金来源，并降低其融资时的汇兑损失风险。不过是否有额度限制、具体如何操作等问题尚待细则出台加以明确。此外，《央行意见》对区内中外资企业举借人民币外债的资金用途也作出了限制，明确规定不得用于投资有价证券、衍生产品和发放委托贷款。

(iii) 外汇监管

《央行意见》提出了若干项有关外汇管理改革的措施，其中对于直接投资外汇监管流程的简化较为引人关注，包括：

- ✓ 将直接投资项下外汇登记及变更登记下放至银行直接办理；及
- ✓ 在保证交易真实性和数据采集完整的前提下，允许区内外商直接投资项下的外汇资金根据当事人自己的意愿结汇。

根据现有规定，外商投资企业应至注册地外管局办理外汇登记并领取登记凭证，当其名称、地址、经营范围等登记事项发生变更时应及时到外管局办理登记变更手续。此外，境内机构（包括内外资企业）对外直接投资时，也需向注册地外管局办理外汇登记、领取登记凭证，并在规定情形下办理相应的登记变更手续。而《央行意见》通过下放权限到银行的方式，简化了自贸区内直接投资项下的外汇登记及变更登记的流程。根据《央行意见》，上海地区银行业金融机构可在“了解你的客户”、“了解你的业务”和“尽职审查”三原则的基础上，凭区内机构（出口货物贸易人民币结算企业重点监管名单内的企业除外）和个人客户提交的收付款指令，直接办理经常项目以及直接投资项下的跨境人民币结算业务。不过就个人跨境人民币结算业务而言，目前尚未出台具体的操作办法，但自贸区的该项业务若操作成功也可能会推广至全国。

除此之外，《央行意见》还提到了几项简化外汇监管流程的内容，比如取消外管局对金融类租赁公司境外租赁等境外债权业务的逐笔审批而实行登记管理，简化飞机、船舶等大型融资租赁项目中有关预付货款的境外融资、付汇等手续，取消外管局对区内企业向境外支付担保费的核准而由区内企业直接到银行办理担保费购付汇手续等。

5. 税收

税收方面，《总体方案》提出了若干项改革政策，其中促进投资的政策主要涉及非货币性资产对外投资所得税和股权激励个人所得税两项。

2013年11月15日，财政部和国家税务总局发布了《关于中国（上海）自由贸易试验区内企业以非货币性资产对外投资等资产重组行为有关企业所得税政策问题的通知》。根据该通知，在自贸区注册并在区内经营、实行查账征收的居民企业，因以非货币性资产对外投资等资产重组行为而产生的资产评估增值部分，可在不超过5年的期限内，分期均匀计入相应年度的应纳税所得额，按规定计算缴纳企业所得税。

上述政策将有助于解决投资重组中的企业暂无现金流收入却要缴纳大额所得税的问题。不过需要注意的是，该通知所称“非货币性资产对外投资等资产重组行为”，仅指企业以非货币性资产出资设立新公司、取得对被收购企业构成控制的股权收购或对另一家企业实质性经营性资产的收购，而以非货币性资产进行的其他一般性对外投资则不能享受递延纳税优惠。

至于《总体方案》提及的个人股东非货币性资产对外投资资产评估增值部分的个人所得税递延纳税，获得股权激励的个人分期缴纳个人所得税，以及其他“适应境外股权投资和离岸业务发展的”税收政策具体是什么、该如何操作，都有待具体规定的出台。

三、比较与展望

1. 上海自贸区与深圳前海的比较

早在上海自贸区成立之前，全国范围内就已经出现了形形色色的带有自由贸易区性质的试验区或特区，比如深圳前海深港现代服务业合作区（“深圳前海”或“前海”）、珠海横琴新区等。在上海自贸区成立之后，又有不少地区开始了自贸区的申报工作。据报道，2014年1月下旬，天津、广东等十几个地方自贸区的申请获得国务院的批复，进入多部委联合调研阶段。其中，在已出台初步政策方案的地区中，深圳前海因与上海自贸

区在改革的领域上有所重合，且两者的若干政策又各有优势，因此，我们在此对二者作出以下简要的对比分析，供阁下参考。

➤ **深圳前海的优势**

对投资人而言，相比上海自贸区，深圳前海的优势主要体现在税收优惠和对股权投资基金的扶持两个方面。具体而言，即《国务院关于支持深圳前海深港现代服务业合作区开发开放有关政策的批复》明确提到，对前海符合条件的企业减按 15% 的税率征收企业所得税，对符合要求的境外高端人才和紧缺人才以及在前海设立的股权投资母基金和外资股权投资基金予以扶持等。该等优惠及扶持政策对于企业和个人，特别是股权投资企业和特殊人才而言显然具有很大的吸引力，而它们并未出现在上海自贸区的有关文件中。

但值得注意的是，前海目前尚未公布可以享受上述优惠税率的企业的具体条件，也未公布对于股权投资基金、母基金及特殊个人的具体扶持政策，这在很大程度上也直接影响了投资者，尤其是境外投资者在当地投入资金的进程。

➤ **上海自贸区的优势**

在金融领域，上海自贸区政策的涵盖面较深圳前海而言更加广泛，包括了人民币资本项目可兑换、外汇管理改革、账户分账管理、放开内资企业人民币外债等。在税收方面，尽管上海自贸区暂未实行任何所得税税率优惠，但在非货币性资产投资方面已经出台了较为具体的递延纳税规定，而该等规定对于企业现金流的减压作用也值得关注。

除金融和税收领域外，由于上海自贸区和深圳前海在定位和作用上的差异，上海自贸区还在境内外投资领域实行了一系列改革，其中“负面清单”和境内外投资备案制度更是对于我国相关领域实行了多年的管理措施的重大突破，也将更加有利于境内外投资者的投资活动。

另外很重要的一点是，虽然自贸区仍有部分政策尚未出台具体的操作细则，但各中央部委及上海市政府已出台的系列文件已使得自贸区《总体方案》中的各项政策较为明朗，普遍认为这在很大程度上给予了投资者更大的信心，并将有利于投资者对在自贸区的投资前景作出更准确的判断。

2. 自贸区政策可能对境内外投资人产生的影响

自国务院批准设立上海自贸区以来，一系列促进贸易及投资便利化和扩大金融对外开放的政策已经出台，其中不少政策给境内外投资人带来了机遇，主要体现在以下几个方面：

(a) 《负面清单》总体而言有利于外商投资

“负面清单”管理模式的采用以及清单外外商投资项目由核准制向备案制的转变，将使得外资准入更加透明和便捷。在将来《负面清单》的内容进一步缩减的情况下，外资可投资的范围将会进一步扩大，对吸引境外资本将起到积极作用。

(b) 境内外双向投资受鼓励，行政管理流程得以简化

前文提到的一些自贸区政策，比如当事人可以径直到银行办理直接投资项下的跨境

人民币结算和外汇登记手续等，使得投资更加便利，也节省了投资人原先在投资过程中应对行政监管的成本。此外，境外投资采取备案制、同一境内非金融机构投资人的居民自由贸易账户与其他账户之间因实业投资可办理划转、放开个人跨境投资限制等政策，无疑将在鼓励外商投资的同时，也促使本土的投资人将视野延伸至境外，开拓全球范围内的投资。

(c) 企业现金压力可获不同程度缓解

区内企业设立采用注册资本认缴制、取消注册资本相关限制、非货币性资产对外投资所得可以递延纳税等政策可在不同程度上缓解投资人的现金压力，使投资人有更大的资金调配空间，也有助于扩大投资范围。

(d) 融资成本有望下降

在金融机构贷款利率已于 2013 年下半年放开的情况下，允许外资银行进驻自贸区以及民营资本在区内自主设立自担风险的商业银行而不只是被动参股，可能会进一步加速银行之间在贷款业务上的竞争，外资银行更为成熟的信用评价和风险管理体系将有助于他们在保障盈利能力的同时推出更低的贷款利率，从而为投资人提供具有更高性价比的融资渠道。同时，对内资企业而言，被允许举借人民币外债也将拓宽其融资渠道，并且降低举借外币外债时不可避免的汇率风险，也将有助于其进行各项人民币投资。

3. 自贸区未来政策展望

尽管自贸区的政策目前已基本成型并逐步明朗，但仍有不少具体措施尚不够明确，比如上文提及的金融、税收等领域的若干项政策等，还需要中央部委和上海地方政府出台具体的实施细则和操作规范。另外，就自贸区《总体方案》出台之前即被热议的一些领域的改革，从目前出台的文件来看，尚不明确甚至从未提及，我们在此稍作点评并作出展望。

(a) 人民币资本项目可兑换有望在 2014 年取得实质性进展

人民币资本项目可兑换是从自贸区成立之前至今一直被广泛议论的话题。尽管《总体方案》和《央行意见》都使用了将推进人民币资本项目可兑换的措辞，不过迄今为止都还没有任何政府文件直接涉及该项内容。据了解目前最新的进展是，上海市的常务副市长已明确公开表示，2014 年第一季度将会有针对自贸区人民币资本项目可兑换的操作细则出台，该问题也将在 2014 年取得实质性进展。

(b) 企业所得税税率仍有望降低

早在《总体方案》出台之前即有媒体报道，自贸区拟对部分企业的某些业务按照 15% 的优惠税率征收企业所得税。然而到目前为止，无论是《总体方案》还是国家税务总局的文件均未提及任何企业所得税税率优惠的政策。我们理解，未给予上海自贸区企业所得税税率优惠的原因，可能是设立自贸区的目的主要是深化改革和制度创新而非简单地发放政策红利，而且中央可能也有避免自贸区明显的税收优势会对其他地区的经济发展造成冲击的考虑。

不过自贸区在税收方面的改革应不会就此止步，比如区内离岸金融业务的税收优惠政策就很可能在不远的将来被采行，原因在于该项业务的税收优惠对于国内其他地区的税制并不会产生重大不利影响，但同时又能够增强自贸区较之其他国家或地区

（比如新加坡、香港等）离岸业务的竞争力。对此，我们也将继续予以关注。

* * *

以上是我们对上海自贸区截至本备忘录出具之日的改革要点和热点问题的梳理及简要分析，希望对阁下有所裨益。本备忘录仅供阁下作一般性参考，并不能视为我们就相关事项出具的任何法律意见。

如阁下对本备忘录之内容有任何疑问，敬请随时与我所联系（inquiry@hanyilaw.com）。

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