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FOREIGN INVESTMENT / 外商投资

China Released Implementing Regulations of Foreign Investment Law for Public Comments 外商投资法实施条例公开征求意见

2019年11月1日，司法部将其与商务部、发展改革委联合起草的《中华人民共和国外商投资法实施条例（征求意见稿）》（“《征求意见稿》”）及其说明全文向社会公布并征求各界意见。作为拟于2020年1月1日起正式施行的《中华人民共和国外商投资法》（“《外商投资法》”）的配套行政法规，《征求意见稿》与《外商投资法》体例基本一致，主要分为总则、投资促进、投资保护、投资管理和附则等5个章节，在上述框架内明确了相关的具体性规范，以保障《外商投资法》的有效实施，进一步优化外商投资环境。《征求意见稿》的重点内容如下：

1. 允许在负面清单对外资有股比要求的领域设立外商投资合伙企业。目前的外商投资准入负面清单规定了对外国投资者的持股比例有限制性规定的领域，不得设立外商投资合伙企业，但《征求意见稿》则允许外国投资者以设立合伙企业方式在该领域进行投资，但合伙协议约定的外国投资者的表决权比例应当符合负面清单关于持股比例的限制性规定。这一规定放宽了负面清单中的相关限制，但鉴于合伙企业通常由执行事务合伙人（尤其是有限合伙企业一般由普通合伙人；通常出资份额较小）执行合伙事务，其表决权较为特殊，在该等领域外国投资者是否不得成为相关外商投资合伙企业的执行事务合伙人等还尚待进一步明确。
2. 符合条件的返程投资可不受负面清单的限制。但该等规定仅适用于中国的主体（不包括外商投资企业）在中国境外设立的全资企业的返程投资，而将境内主体为境外融资目的设立的境外持股平台排除在外；且该等返程投资需要经国务院批准，才可以不受负面清单的相关限制，审批层级过高，极可能导致实践中该等情况无法获批、使得该条规定可能较难实际落地。
3. 明确中国的自然人可以与外国投资者共同设立外商投资企业。根据现行有效的三资企业法（将于2020年1月1日起失效），外国投资者仅可与中国的公司、企业或其他经济组织（而不包括中国自然人）共同举办合营/合作企业。需注意的是，在《外商投资法》取代三资企业法实施后，外商投资企业将适用《公司法》等相关规定，对于中国自然人作为公司股东的限制本就不再有效，但《征求意见稿》的明确规定则进一步避免了实践中可能出现的疑义。
4. 进一步明确新旧法衔接的过渡期及未依法办理变更的法律后果。《征求意见稿》根据《外商投资法》的原则性规定，进一步明确外商投资企业应在《外商投资法》施行后5年内就调整其组织形式、组织机构等依法办理相关的变更手

On November 1, 2019, the Ministry of Justice released for public comments the *Implementing Regulations of the Foreign Investment Law of the People's Republic of China (Draft for Comment)* (the "Draft") co-drafted by itself with the Ministry of Commerce and National Development and Reform Commission. As supporting administrative regulations for the *Foreign Investment Law of the People's Republic of China* (the "Foreign Investment Law") effective from January 1, 2020, the Draft is set to provide more specific rules to implement the Foreign Investment Law and foster a more open and transparent foreign investment environment. Set forth below are some highlights in the Draft:

1. The Draft overrides China's current foreign investment negative list (the "Negative List") that foreign investors may adopt the partnership form to invest in the relevant fields under the Negative List where foreign shareholding ratio is restricted, provided that the foreign investors shall limit their voting rights in such partnership according to the restrictive shareholding ratio in the Negative List. The governance structure in a partnership is very different from the counterpart in a company, and the partnership affairs are usually decided and executed by its executive partner (especially by the general partner when it comes to a limited partnership) notwithstanding the partnership or capital contribution ratio, thus it is not quite reasonable to co-relate the voting rights with the proportion of capital contribution. With such limits, it is yet to be seen whether foreign investors will generally be not allowed to become executive partners of foreign-invested partnerships in the relevant restrictive fields.
2. Eligible round-trip investments will not be subject to the restrictions in the Negative List. However, as (i) such exemption shall only apply to the round-trip investments by overseas enterprises wholly-owned by Chinese individuals or entities (excluding foreign-invested enterprises or FIEs), and does not include overseas entities that have accepted foreign financings (which is much more common in practice); and (ii) the exempted round-trip investments should be approved by the State Council, a high administrative level that seems to involve high uncertainties, it remains to be seen how this provision is to be implemented in practice.
3. The Draft further specifies that the Chinese individuals will be allowed to set up FIEs jointly with foreign investors. According to current laws governing foreign investments (including without limitations to the *Sino-foreign Equity Joint Venture Law*, the *Sino-foreign Contractual Joint Venture Law* and the *Wholly Foreign-owned Enterprise Law*; collectively, the "Current Foreign Investment Laws") to be replaced by the Foreign Investment Law from January 1, 2020, foreign investors can only found joint ventures with Chinese companies, enterprises or other commercial organizations (excluding Chinese individuals). With the termination of the Current Foreign Investment Laws, it makes good sense to specify that the Chinese individuals are now allowed to participate in the joint ventures with the foreign investors according to the *Company Law of the People's Republic of China* (the "Company Law").
4. The Draft further clarifies the transitional period for existing FIEs to comply with the Foreign Investment Law and the relevant legal consequences of failure to do so. According to the Draft, FIEs shall update government registrations

续，最晚也应在2025年6月30日前办理完毕，否则企业登记机关将不予办理该企业的其他登记事项，并可以将相关情形在企业信息公示系统中公示。

值得注意的是，《征求意见稿》规定，外商投资企业合营、合作各方在合同中约定的收益分配方法、剩余财产分配方法等，在合营、合作期限内可以继续按照约定办理。收益分配方法、剩余财产分配方法是现有三资企业法和《外国投资法》的主要不同之处之一，因涉及核心经济利益，更容易引起中外双方的分歧。《征求意见稿》给予了相应的灵活性，有利于解决和缓和中外双方因落实《外商投资法》而可能产生的核心矛盾。

《征求意见稿》未提及广受关注的VIE结构问题，也未就如何落实外商投资信息报告等《外商投资法》的一些重要未决事项进行明确。《外商投资法》不足2个月即将正式实施，除了《征求意见稿》，我们相信会有更多的配套规定随之出台，我们会持续关注并及时提供相应的更新。

SAFE Relaxed Forex Restrictions on FIEs' Domestic Investments 国家外汇管理局取消非投资性外商投资企业资本金境内股权投资限制

2019年10月25日，国家外汇管理局接连发布了《国家外汇管理局关于进一步促进跨境贸易投资便利化的通知》（汇发〔2019〕28号，“28号文”；自公布之日起生效）及《国家外汇管理局关于精简外汇账户的通知》（汇发〔2019〕29号，“29号文”；自2020年2月1日起生效）。

28号文的最大亮点为取消了非投资性外商投资企业资本金境内股权投资限制。其重要意义在于允许经营范围中没有“投资”字样的非投资性外商投资企业在不违反现行外商投资准入负面清单及境内所投资项目真实、合规的前提下，依法以外汇资本金进行境内股权投资。在28号文出台前，非投资性外商投资企业仅可使用企业自有流动资金进行对外投资，而资本金则不允许结汇用来进行境内股权投资。

该等开放措施对于外国投资者来说乃重大利好，使得外国投资者能够采取更加灵活的措施投资中国企业，也使得境内外商投资企业可直接作为控股平台公司来投资并持股其他集团公司。

此外，28号文还进一步扩大了贸易及资本项目下外汇收支的便利化试点，简化了相关的收支手续，结合29号文对部分外汇账户进行清理整合以进一步减少账户种类的举措，进一步传达了国家要优化外汇管理、促进跨境贸易投资便利的决心。

China Deepened Reforms for Various Financial Sectors 金融业全面加强改革举措

近年来，国家密集修订并出台了一系列金融方面的法律法规与对外开放的政策制度，充分显示了国家金融改革的决心和速度，主要包括：

regarding corporate governance and etc. according to the Foreign Investment Law within 5 years after its implementation (and in no case later than June 30, 2025), or the competent government authority will not accept any registration application of such enterprises and may further publish the noncompliance in the enterprise information publicity system.

Notwithstanding the above, the Draft has noticeably specified that during the joint venture periods, FIEs may choose to follow their existing joint venture agreements as to the profit and liquidation assets distribution mechanisms, which is one of the major discrepancies between the Current Foreign Investment Laws and the Foreign Investment Law. This is an important clarification as it avoids the Sino-foreign parties to re-negotiate distribution mechanisms, in a hope to facilitate the implementation of the Foreign Investment Law.

The Draft remains silent on several important issues such as the controversial variable interest entity (VIE) structure or implementation rules for foreign investment information reporting system. With the Foreign Investment Law to become effective in less than 2 months, we expect more supporting rules will be issued accordingly, on which we will continue to monitor.

On October 25, 2019, the State Administration of Foreign Exchange issued the *Circular of the State Administration of Foreign Exchange on Further Promoting Cross-border Trade and Investment Facilitation* (Hui Fa (2019) No. 28, the “Circular 28”) with immediately effect, as well as the *Circular of the State Administration of Foreign Exchange on Streamlining Foreign Exchange Accounts* (Hui Fa (2019) No. 29, the “Circular 29”) to take effect from February 1, 2020.

The Circular 28 has remarkably lifted restrictions on the FIEs whose business scopes do not include “investment” to lawfully make domestic equity investments utilizing capital contributed by foreign investors on the premise of compliance with the Negative List and other regulations involving the relevant domestic investments. Before the issuance of the Circular 28, FIEs with no “investment” in their business scopes are generally not allowed to use capital funds for domestic equity investments.

Setting up an FIE that has “investment” in its business scope is usually cumbersome. The Circular 28 permits foreign investors to adopt more flexible foreign investment structures (such as that an FIE can now act as a holding platform to invest into other domestic group companies) which may have material impact on the foreign investments.

In addition, the Circular 28 has expanded the pilot areas to simplify foreign exchange receipts and payments procedures under both the trade and capital accounts. The Circular 29 has integrated certain required foreign exchange accounts to further streamline account management. Both circulars are expected to help improve foreign exchange management in China and facilitate cross-border trade and investment convenience.

The Chinese government authorities have recently adopted various rules and regulations to speed up the reforms in the relevant financial sectors, including among others:

1. 10月15日,《国务院关于修改<中华人民共和国外资保险公司管理条例>和<中华人民共和国外资银行管理条例>的决定》公布并施行。就外资保险公司而言,取消申请设立外资保险公司的外国保险公司应当经营保险业务30年以上,且在中国境内已经设立代表机构2年以上的条件;允许外国保险集团公司在我国境内投资设立外资保险公司,允许境外金融机构入股外资保险公司。就外资银行而言,取消拟设外商独资银行的唯一或者控股股东、拟设中外合资银行的外方唯一或者主要股东、拟设分行的外国银行在提出设立申请前1年年末总资产的条件,取消拟设中外合资银行的中方唯一或者主要股东应当为金融机构的条件;并放宽对外资银行业务的限制,允许其从事代理发行、代理兑付、承销政府债券以及代理收付款项业务,并取消对外资银行开办人民币业务的审批。
 2. 10月18日,中国证监会发布了《关于修改上市公司重大资产重组管理办法的决定》鼓励并购重组,自发布之日起施行。其修改内容主要包括:取消重组上市认定标准中的“净利润”指标;将“累计首次原则”计算期间从此前60个月进一步缩短至36个月(即控制权变更3年之后再注入新实控人资产不再构成重组上市);允许符合国家战略的高新技术产业和战略性新兴产业相关资产在创业板重组上市;恢复重组上市配套融资;以及加强重大资产重组业绩承诺监管措施,并加大问责力度。
 3. 证监会近期明确将取消证券基金期货公司外资股比限制时点从原定的2021年提前到明年,即(i)自2020年1月起,取消期货公司外资股比限制,符合条件的境外投资者持有期货公司股权比例可至100%;(ii)自2020年4月1日起,在全国范围内取消基金管理公司外资股比限制;以及(iii)自2020年12月1日起,在全国范围内取消证券公司外资股比限制。
1. On October 15, the State Council promulgated, with immediate effect, the *Decision of Revising the Administrative Regulations of the People's Republic of China on Foreign-invested Insurance Companies and the Administrative Regulations of the People's Republic of China on Foreign-invested Banks*. As to the establishment of foreign-invested insurance companies, the foreign insurance parent company is no longer required to have a track record of 30 years in the insurance business nor a representative office in China for no less than 2 years. Further, foreign insurance group companies and other financial institutions may establish foreign-invested insurance companies in China. As for foreign banks, the sole or controlling or principal foreign shareholder of a foreign invested bank or the relevant foreign bank of a branch office in China does not need to have specific total assets at the end of the preceding year prior to the establishment of the foreign-invested bank or branch. The sole or principal Chinese shareholder of a new Sino-foreign joint venture bank is not required to be a financial institution any longer. Restrictions on the business scope are further relaxed. For example, foreign-invested banks' involvement in the RMB business no longer requires government approval.
 2. On October 18, the China Securities Regulatory Commission ("CSRC") issued the *Decision on Revising the Administrative Measures for the Material Asset Reorganization of Listed Companies*, effective immediately. The revisions mainly includes, among others: (i) the "net profit" criteria is removed from the definition of reorganizational back-door listing; (ii) the period calculating cumulative assets injected into a public company for the purpose of the definition of a back-door listing is further shortened from 60 months to 36 months so that new assets injected by the new controller into a public company after 3 years since its change of control will not be considered as back-door listing; (iii) assets of the high-tech industries and strategic emerging industries in line with national strategies may now list on the GEM through back-door listing as well; (iv) supporting financing of restructuring has been restored; and (v) regulation over performance commitments involving major asset restructuring and consequent liabilities are tightened up.
 3. CSRC has also released a series of measures recently to speed up relaxation of foreign investments in relevant financial institutions, including among others: (i) from January 2020, the restriction on foreign shareholding ratio of future companies will be officially removed and eligible foreign investors may from then hold 100% shares of future companies; (ii) from April 1, 2020 and December 1, 2020, the restrictions on foreign shareholding ratios of fund management companies and securities companies respectively will be lifted nationwide.

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