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TABLE OF CONTENTS / 本期内容

CROSS-BORDER CAPITAL FLOWS / 跨境资本流动

PBOC and SAFE Issued Regulations on Cross-Border Capital Flows / 2
央行及外管局发布跨境资本流动管理相关规定

FOREIGN INVESTMENT / 外商投资

State Council Further Relaxed Foreign Investment Restrictions / 吸引外
资新政发布 3

PE&VC / 私募股权和创业投资

Interim Administrative Measures for Government-sponsored Industry
Investment Funds Released / 《政府出资产业投资基金管理暂行办法》
发布 4

STATE-OWNED ASSETS / 国有资产管理

SASAC Draws Investments Red Lines for Central SOEs / 国资委划定央
企投资行为红线 5



CROSS-BORDER CAPITAL FLOWS / 跨境资本流动

PBOC and SAFE Issued Regulations on Cross-Border Capital Flows 央行及外管局发布跨境资本流动管理相关规定

人民币汇率波动、资金出境欲望强烈的背景下，“控流出、扩流入”成为近期跨境资本流动的主导政策。在2016年年末有关部门实行收紧境外投资及放款的“控流出”政策后，近日，中国人民银行（“央行”）和国家外汇管理局（“外管局”）分别下发了《关于全口径跨境融资宏观审慎管理有关事宜的通知》（银发〔2017〕9号）（“9号文”；《中国人民银行关于扩大全口径跨境融资宏观审慎管理试点的通知》（银发〔2016〕18号）和《中国人民银行关于在全国范围内实施全口径跨境融资宏观审慎管理的通知》（银发〔2016〕132号）（“132号文”）同时废止）以及《关于进一步推进外汇管理改革完善真实合规性审核的通知》（汇发〔2017〕3号）（“《通知》”），主要从以下方面进一步落实“控流出、扩流入”政策。9号文和《通知》均自发布之日起施行。

1. 扩流入

● 扩大企业和金融机构跨境融资的额度

为扩大境内相关实体的跨境融资额度，吸引资金流入，9号文在境内成立的金融机构和企业（包括内资企业和外商投资企业，但不包括政府融资平台和房地产企业）的基础上新增外国银行（包括港澳台地区的银行）境内分行作为适用主体。在跨境融资的杠杆率方面，9号文将企业跨境融资的杠杆率由原先的1调整为2，意味着企业的跨境融资额度上限由132号文下的1倍净资产扩大为了2倍净资产。

同时，9号文扩大了不占用跨境融资余额额度的业务类型、缩小了占用余额额度因素的计算比例，该等修改的主要内容包括：(i) 除了原132号文中企业和金融机构因境外机构投资境内债券市场产生的人民币被动负债和境外主体存放在金融机构的人民币存款外，外币被动负债和外币存款也排除计算；同时新增排除计算的两种业务类型——QFII和RQFII存放在金融机构的托管资金，及境外机构存放在金融机构托管账户的境内发行人民币债券（即熊猫债）募集资金；(ii) 企业从境外金融机构获取的外币贸易融资将完全不占用额度（原132号文下按20%纳入余额计算）；(iii) 排除计算金融机构因境外同业拆借产生的对外负债；以及(iv) 将原132号文下全额计算的金融机构内保外贷一项调整为按20%计算。

● 允许内保外贷项下资金调回境内使用

根据外管局的《通知》，经向外管局办理外债登记，债务人可通过向境内进行放贷、股权投资等方式将担保项下资金直接或间接调回境内使用。该条彻底扭转了《跨境担保外汇管理规

Amid worries about surging capital outflow, “outflow control” and “inflow expansion” have become recent focuses for cross-border capital regulation by the PRC government. Following the tightening-up of control over outbound investments and lending activities at the end of 2016, the State Administration of Foreign Exchange (“SAFE”) and the People’s Bank of China (“PBOC”) have recently promulgated the *Circular on Further Promoting the Reform of Foreign Exchange Management and Improving the Verification of Authenticity Compliance (Hui Fa (2017) No. 3)* (the “SAFE Circular”) and the *Circular on Issues Concerning the Macro-prudential Management of Overall Cross-border Financing (Yin Fa (2017) No. 9)* (“Circular 9”) (to supersede two earlier rules released in 2016, namely the *Circular on the Expansion of the Pilot Program for the Macro-Prudential Management of Overall Cross-border Financing (Yin Fa (2016) No. 18)* and the *Circular on Implementing the Macro-prudential Management of Overall Cross-border Financing Nationwide (Yin Fa (2016) No. 132)* (“Circular 132”)), respectively. Each circular has become effective upon promulgation.

1. Inflow Expansion

● Expanded Cross-border Financing Quotas

Circular 9 has extended application of macro-prudential management system for cross-border financing to cover all financial institutions (*including previously excluded onshore branches of foreign banks*) and non-financial enterprises (*including domestic enterprises and foreign invested enterprises but still excluding government financing vehicles and real estate enterprises*) incorporated in China. Circular 9 has further increased the cross-border financing leverage ratio for non-financial enterprises from 1 (*under Circular 132*) to 2, and thus a non-financial enterprise will now be able to raise offshore financing for up to twice of its net assets.

In addition, Circular 9 has added more categories of debt nature funds that could be excluded when calculating the risk-weighted cross-border financing balance (the “Balance”): (i) in addition to passive bonds and deposits in RMB, those in a foreign currency are also excluded; in the meantime, two new types of funds, i.e., custodial deposits with an onshore financial institution by a QFII or RQFII, and RMB bond proceeds raised by an offshore institution (*i.e., the so-called Panda Bonds*) and deposits in an escrow account at a financing institution will also be excluded from the Balance; (ii) foreign currency trade financing from an offshore financial institution will be fully excluded (*as opposed to 20% of the financing amount cutting into the Balance under Circular 132*); (iii) inter-bank borrowings from offshore entities are excluded from calculation; and (iv) only 20% of contingent debts from financial institutions providing *Nei Bao Wai Dai* will be weighed against the Balance (*as opposed to the full fair market value calculated under Circular 132*).

● *Nei Bao Wai Dai* Funds Allowed to Be Repatriated Back to China

Before the promulgation of the SAFE Circular, an offshore debtor is not allowed to directly or indirectly repatriate offshore funds raised under an onshore-backed security or a *Nei Bao Wai Dai* structure to China either by providing loans or making equity investments. The newly released SAFE Circular, however, allows such capital repatriation after registration with competent SAFE office. This new

定》（汇发〔2014〕29号）中“未经外汇局批准，债务人不得通过向境内进行借贷、股权投资或证券投资等方式将担保项下资金直接或间接调回境内使用”的规定。该项规定同时便利了境内企业的境外债券发行、外商直接投资股权收购等跨境投融资活动。

2. 控流出

● 加强境外直接投资真实性审核

2016年年末曾传闻多项境外直接投资的限制措施，此次《通知》强调严格监管真实性合规性审核，以在实践操作中加强资本流出管理。

《通知》明确，对于境外直接投资，境内机构除应按规定提交相关审核材料外，还应向银行说明投资资金来源与资金用途（使用计划）情况，提供董事会决议（或合伙人决议）、合同或其他真实性证明材料。

● 完善利润汇出管理

《通知》强调继续执行按真实交易原则审核等值5万美元以上利润汇出业务相关材料的管理政策，并明确利润汇出前应先依法弥补以前年度亏损。

● 明确本外币境外放款全口径管理

《通知》明确了对境内机构境外放款业务实行本外币一体化的宏观审慎管理，境内机构本外币境外放款余额合计最高不得超过其上年度经审计财务报表中所有者权益的30%。

rule is expected to facilitate more cross-border investments and financing activities.

2. Outflow Control

● Authenticity Verification on Outbound Investments

The SAFE Circular has further emphasized the authenticity verification on overseas investments to strengthen capital outflow control. For example, in the case of overseas direct investments, domestic institutions should, in addition to submitting the required application materials, explain to the banks as to the sources and use plan of the investment funds, and provide the board resolutions (*or an equivalent document*), contracts or other supporting documents.

● Administrations on Outbound Profit Remittance

The SAFE Circular has reiterated that, for any outbound profit remittance application exceeding the equivalent of USD50,000, the banks should review the application materials under the *real transaction* principle. It has also clarified that only after the losses from the previous years have been duly made up can the profits be remitted outbound.

● Overall Management of Offshore Lending

The SAFE Circular has provided the macro-prudential management for offshore lending activities by a domestic entity in either RMB or a foreign currency. The total outstanding balance for offshore lendings provided by a domestic company (in RMB and any foreign currency) should not exceed 30% of the owner's equity indicated in the company's audited financial statements for the previous year.

FOREIGN INVESTMENT / 外商投资

State Council Further Relaxed Foreign Investment Restrictions 吸引外资新政发布

为进一步积极利用外资，国务院于2017年1月17日发布了《国务院关于扩大对外开放积极利用外资若干措施的通知》（国发〔2017〕5号）（“《通知》”）。《通知》的主要内容包括：

1. 进一步扩大对外开放，修订《外商投资产业指导目录》（“目录”）及相关政策法规，放宽服务业、制造业、采矿业等领域外资准入限制，具体而言：
 - 服务业：重点放宽银行类金融机构、证券公司、证券投资基金管理公司、期货公司、保险机构、保险中介机构外资准入限制，并推进电信、互联网、文化、教育、交通运输等领域有序开放。我们注意到，在2016年12月公布的目录修订版征求意见稿（“征求意见稿”）中，各项的放宽具体措施大多尚未在征求意见稿中体现，新版《外商投资产业指导目录》是否会随着《通知》所制定的扩大对外开放的基调中予以一定程度的反映和进一步完善，尚值得观察。
 - 制造业：重点取消轨道交通设备制造、摩托车制造、燃料乙醇生产、油脂加工等领域外资准

On January 17, 2017, the State Council released the *Circular on Several Measures Concerning the Expansion of Opening-up and Active Use of Foreign Capitals* (Guo Fa (2017) No.5) (the “Circular”), in an effort to further lift restrictions on foreign investments in China. The highlights of the Circular include:

1. to amend the *Catalogue of Industries for Guiding Foreign Investment* (the “Catalogue”) and other related regulations to relax the restrictions on foreign access to such sectors as service, manufacturing, among others. For example,
 - Service sector. The Circular has pledged to further relax foreign access restrictions on the financial industry (*specifically, banking and financial institutions, securities companies, securities investment fund management companies, futures companies, insurance institutions and insurance intermediaries*), and to further open up such sectors as telecommunications, internet, culture, education, and transportation in an orderly manner. Note that, in December 2016, the National Development and Reform Commission (the “NDRC”) and Ministry of Commerce (the “MOFCOM”) have released a revised version (*draft for comments*) of the Catalogue (the “Draft Catalogue”), which draft is generally silent on relaxation measures for most of the aforesaid sectors. It's yet to be

- 入限制。上述提及各项的放宽措施均已在征求意见稿有所体现。
2. 进一步创造公平竞争环境：《通知》要求，各部门制定外资政策不得擅自增加对外商投资企业的限制；在业务牌照和资质申请、标准制定、政府采购、融资渠道、注册登记、知识产权保护等方面，对内外资企业实行统一标准，促进各类企业公平参与。
 3. 进一步加强吸引外资工作：与国务院2014年以来连续发文要求地方政府清理规范其制定的税收等优惠的总体政策不同，《通知》允许地方政府在法定权限范围内制定出台招商引资优惠政策，对就业、经济发展、技术创新贡献大的项目予以支持。这一政策的变化在未来的地方实践中将如何具体执行，尤其是地方政府的“法定权限”范围有多大值得关注。积极支持中西部、东北地区吸引外资，修订《中西部地区外商投资优势产业目录》（发改委目前正在修订该目录，预计将于近期发布），对西部地区继续实行企业所得税优惠政策。
- seen if further revisions will be made to the Draft Catalogue for the sake of the Circular.
- Manufacturing sector. The Circular asked for the removal of foreign access restrictions on the manufacturing of railway transportation equipment and motorcycles, production of fuel ethanol, grease processing and other fields. Specific measures on the aforesaid items have been generally reflected in the Draft Catalogue.
2. to further promote a fair competition environment for both domestic and foreign-invested enterprises (or FIEs). The Circular has emphasized that no government agency is allowed to willfully impose any additional restriction on FIEs. A uniform regulatory regime should be applied to both domestic and FIEs in license and qualification applications, standards establishment, government procurement, financing channel, registration and filing, and intellectual property protection to allow for an equitable participation of all types of market players.
 3. Other efforts to attract foreign investments. Different from State Council's efforts to clean up local preferential treatments since 2014, the Circular allows local governments to offer specific preferential treatments "within their statutory authorities" to attract investments important to local employment, economic development and technological innovation. It's yet to be noted the scope of the "statutory authorities" of the local governments and how the Circular will be implemented in this specific connection in the future. The *Catalogue of Dominant Industries for Foreign Investment in the Central and Western Regions* is being revised, and the corporate income tax preferential policies currently adopted in the western region will be implemented continuously.

PE&VC / 私募股权和创业投资

Interim Administrative Measures for Government-sponsored Industry Investment Funds Released

《政府出资产业投资基金管理暂行办法》发布

2017年1月13日，国家发展与改革委员会（“发改委”）发布了《政府出资产业投资基金管理暂行办法》（发改财金规〔2016〕2800号）（“《办法》”），对政府出资产业投资基金的募集、投资、管理、退出等环节的操作机制进行了规范，并建立了相关监管体系。《办法》自2017年4月1日起施行。

《办法》所称政府出资产业投资基金，是指有政府出资，主要投资于非公开交易企业股权的股权投资基金和创业投资基金。政府向产业投资基金出资，可以采取全部由政府出资、与社会资本共同出资或向符合条件的已有产业投资基金投资等形式。《办法》对政府出资产业投资基金的投资者、基金管理人和托管人的资质作出了规定，并对基金的投资方向、投资对象和投资额均提出了明确要求和限制，并明确禁止名股实债。

在政府出资产业投资基金的监管方面，《办法》规定，政府出资产业投资基金作为“私募”基金的特殊类别，需在基金募集完毕后20个工作日内在发改委

On January 13, 2017, NDRC issued the *Interim Measures for the Administration of Government-sponsored Industry Investment Funds* (NDRC Financial Regulation (2016) No. 2800) (the "Measures"), which have provided supervision and administration regulations on fund-raising, investment, management and exit for the government-sponsored industry investment funds (the "Funds"). The Measures will take effect on April 1, 2017.

Under the Measures, the Funds refer to the private equity investment funds and venture capital funds with capital contributions from government authorities, focusing on equity investments in non-public enterprises. According to the Measures, government authorities are allowed to make investments in wholly government-funded funds, or co-funded funds with capital contributions from private investors and qualified existing industrial investment funds. The Measures have specified the qualifications of investors, managers and custodians for the Funds, as well as requirements and limitations on investment direction, specific targets and investment cap for a single investment. They have also prohibited debt financing activities engaged by the Funds in the form of equity investments.

On the supervision and administration of the Funds, the Measures have stipulated that, as a special type of private equity

的“信用信息登记系统”中进行登记，并接受发改委或各地方发改委对于基金“产业政策符合性”审查。基金管理人亦需进行该等登记。除了《办法》实施后新设的政府出资产业投资基金及管理人外，《办法》实施前已设立的基金及其管理人，亦需按照《办法》进行前述登记，登记期限为《办法》实施后的2个月内。此外，《办法》还通过建立基金和基金管理人绩效评价体系和基金行业信用评价体系进一步加强对政府出资产业投资基金的监督管理。

需注意的是，此前，政府出资产业投资基金主要受财政部及其直属机构、各级地方政府、证监会及中国证券基金业协会的监督和管理，而随着《办法》的出台，政府出资产业投资基金还要满足发改委的监管要求。未来实践中各监管部门在履行各自的监管职能时是否会存在冲突，以及如何相互配合和协调的问题，有待进一步观察。此外，如何保证政府出资产业投资基金进行市场化运作、以及政府出资部分和社会资本部分同股同权、共担风险等问题仍需实践进一步探索。

funds, the Funds should be registered within 20 business days upon completion of fund-raising in the credit information registration system set up by NDRC and be subject to the industrial policy compliance review by NDRC or its competent local counterparties. The managers of the Funds are also required to make registrations with competent NDRC offices under the Measures. The Measures further supervise the Funds through fund performance assessment system and fund industry credit evaluation system.

The Funds are mainly regulated by the Ministry of Finance and its subordinate departments, China Securities Regulatory Commission, Assets Management Association of China and relevant local governments before the release of the Measures, and should now be additionally subject to the regulation by NDRC. It remains to be seen whether there will be any regulation conflict among the various regulatory authorities and how they will coordinate with each other in the case of a conflict. In addition, practical issues such as how to ensure the market-oriented operation of the Funds and how to procure that the government investors and the private investors of the Funds will enjoy and assume the associated rights and risks in a fair manner still need to be explored in the future.

STATE-OWNED ASSETS / 国有资产管理

SASAC Draws Investments Red Lines for Central SOEs 国资委划定央企投资行为红线

2017年1月18日，国务院国有资产监督管理委员会（“国资委”）发布了《中央企业投资监督管理办法》（国资委令第34号）（“《境内投资办法》”）和《中央企业境外投资监督管理办法》（国资委令第35号）（“《境外投资办法》”）；与《境内投资办法》，合称“《办法》”），旨在从中央企业（“央企”）境内外投资项目的投向、程序、风险控制、回报管理等方面完善央企投资监督管理体系。

《办法》是国资委对其2006年发布的《中央企业投资监督管理暂行办法》（国资委令第16号）和2012年发布的《中央企业境外投资监督管理暂行办法》（国资委令第28号）所进行的修订和完善，自公布之日起施行。

《办法》的最大特点是设立了中央企业（“央企”）境内投资和境外投资的负面清单制度（该等负面清单目前尚未发布），将央企投资项目按类别划分为“禁止类”和“特别监管类”，列入“禁止类”的投资项目，央企一律不得投资；列入“特别监管类”的，则需要国资委审核；负面清单之外的其他投资项目，由企业自主决策、自担责任。同时，《办法》要求央企在国资委发布的负面清单基础上，结合企业实际，制定本企业更为严格、具体的投资项目负面清单。由于列入特别监管类的项目将由国资委进行实质审核（尤其对于境外投资，其将从项目风险、股权结构、资本实力、收益水平、竞争秩序、退出条件等角度进行全面审核），央企投资此类项目的过程可能变得更为复

With an aim to better manage risk and capital return of the domestic and outbound investments made by the central state-owned enterprises (the “Central SOEs”), on January 18, 2017, the State-owned Assets Supervision and Administration Commission (“SASAC”) released the *Measures for the Supervision and Administration of Investments Made by the Central SOEs* (SASAC Order No.34) (the “Domestic Investments Measures”) and the *Measures for the Supervision and Administration of Outbound Investments Made by Central SOEs* (SASAC Order No.35) (the “Outbound Investments Measures”; collectively with the “Domestic Investments Measures”, the “Measures”) to replace two earlier regulations released by SASAC in 2006 and 2012 respectively (i.e., the *Interim Measures for the Supervision and Administration of Investments Made by the Central SOEs* (SASAC Order No.16) and the *Interim Measures for the Supervision and Administration of Outbound Investments Made by the Central SOEs* (SASAC Order No.28)). The Measures have become effective from the date of promulgation.

The Measures have introduced a negative list administration system for the Central SOEs’ investments in both domestic and oversea markets. Two negative lists applicable to the Central SOEs’ domestic and outbound investments respectively will be issued by SASAC later, each expected to include “prohibited” and “special regulatory” categories. The Central SOEs are not allowed to make any investment falling into the “prohibited category”, and their investments included in the “special regulatory category” should be subject to substantive review and approval by SASAC, a procedure expected to be cumbersome and time-consuming. Investments outside the negative lists are generally free to be made. Further, the Measures have required each central SOE to formulate a more stringent and specific negative list for itself based on the official ones and in light of its practical situation. Note that the Outbound Investments

杂。此外，在监管方式与境内投资基本一致的前提下，《境外投资办法》对央企境外投资提出了更为严格的要求，明确规定央企原则上不得在境外从事非主业投资。

同时，《办法》强调对投资进行事前、事中、事后全过程监管：通过年度投资计划备案等方式加强事前规范，通过重大投资项目随机检查、定期报告等方式进行事中监控，通过项目后评价、事后问责等强化事后管理。可预期的是，《办法》的实施将有利于央企规范投资行为，防止国有资产流失，实现国有资本保值增值。

Measures have generally imposed more stringent regulatory requirements such as that a Central SOE, in principle, should not make any outbound investment which falls outside its primary business scope. In addition, an outbound investment is more likely to be reviewed by SASAC in a more comprehensive way from various perspectives including project risk, ownership structure, capital strength, profit projection, competition, exit opportunities, among others.

The Measures stress regulations on the Central SOEs throughout the whole investment process, including *ex ante* regulation through fillings of annual investment plans, in-process monitoring through random inspections and periodic reports of major investments, and *ex post* regulation through post project evaluation and *ex post* accountability system. It is anticipated that the implementation of the Measures will help standardize the investment behaviors of the Central SOEs, prevent loss, maintain and increase the value of the state-owned assets.

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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