

# CHINA REGULATORY UPDATES

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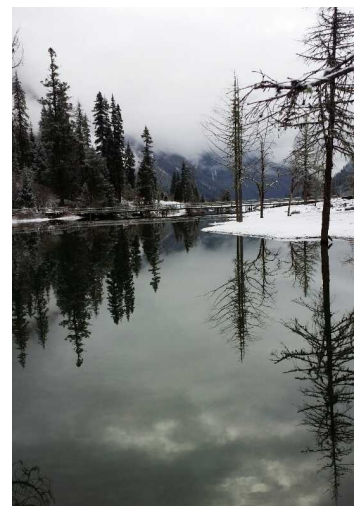
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## FOREIGN INVESTMENT / 外商投资

### NDRC Solicited Public Comments on Amended Catalogue for Guidance of Foreign Investment Industries (DRAFT) 国家发改委就《外商投资产业指导目录》修订稿公开征求意见

Recently, the National Development and Reform Commission ("NDRC"), together with the Ministry of Commerce ("MOFCOM") and other relevant authorities have initiated a revision of the 2011 version of *Catalogue for Guidance of Foreign Investment Industries* (the "Catalogue") and published a draft amended version (the "Draft") for public comments between November 4 and December 3, 2014. The Draft encourages foreign investments in industrial sectors related to high-tech, advanced manufacturing, energy conservation and environmental protection, modern services, creative industry and new energy, etc. In general, the Draft tends to allow the market to play a decisive role in allocating resources for industries not involving national economic security or public interest. This revision not only copies and promotes the experience of the Shanghai Free Trade Zone pilot project as a whole, but also further relaxes certain industrial investment restrictions as provided in the *Negative List* (please refer to our July 2014 and October 2013 Issues of *China Regulatory Updates* for more information).

It is noteworthy that medical institution was once categorized as "restricted" in the 2007 Catalogue but then moved to "permitted" under the current 2011 Catalogue. On July 25, 2014, the National Health and Family Planning Commission and MOFCOM jointly released the *Circular on Pilot Programs of Establishing Wholly Foreign-Owned Hospitals*, allowing foreign investors to establish wholly foreign-owned hospitals in seven designated provinces and cities (please refer to our September, 2014 Issue of *China Regulatory Updates* for more information). However, the Draft moves medical institution back to the

"restricted" category and limits its form to Sino-foreign cooperative joint venture, which indicates that the restriction on foreign investments in medical institutions probably won't be fully relaxed in the near future.

Furthermore, the Draft for the first time explicitly categorizes the manufacturing of whole auto vehicles, special-purpose vehicles and motorcycles as "restricted" and requires that the Chinese ownership shall be no less than 50%. The Draft further provides that the same foreign investor shall not establish more than two joint ventures that manufacture the same type of whole auto vehicles. However, such restriction on number of joint ventures shall not apply when foreign investor acquires or merges other domestic automobile manufacturers together with its Chinese joint venture partner. The manufacturing of whole auto vehicles used to be categorized as "encouraged" in the 2007 Catalogue and was then moved to "permitted" under the current 2011 Catalogue. The Draft adds this industrial sector into the "restricted" category, which signals the authorities' intent to gradually tighten up the regulation of foreign investment in automobile manufacturing and to further protect domestic automobile industry. Meanwhile, the equity cap on foreign investment in the manufacturing of whole auto vehicles will probably not be lifted in the short run.

This Draft reflects Chinese government's commitment and effort to further reform the regulatory regime for entry of foreign investments. Meanwhile, series of major reform measures on foreign investments are likely to be released in the near future, with which we will further follow up.

日前, 国家发改委会同商务部等部门对

《外商投资产业指导目录(2011年修订)》(“《目录》”)进行了修订, 形成《目录》修订稿, 于2014年11月4日至12月3日期间向社会公开征求意见。修订稿鼓励外商投资高新技术、先进制造、节能环保、现代服务、创意产业、新能源等领域, 对于不涉及国家经济安全或公共利益的行业倾向于让市场发挥其在资源配置中的决定性作用。本次修订全面复制推广了上海自贸区的试点经验, 在一些投资目录的放开上甚至超过了上海自贸区的“负面清单”(相关内容请参见我所2014年7月及2013年10月刊 *China Regulatory Updates*)。

值得注意的是, 在2007年的《目录》中, 医疗机构为限制类产业, 随后在现行2011年的《目录》中被移出成为允许类。今年7月25日, 卫计委、商务部联合发布了《关于开展设立外资独资医院试点工作的通知》(相关内容请参见我所2014年9月, 刊 *China Regulatory Updates*), 允许境外投资者通过新设或并购的方式在指定的七省市设立外资独资医院。而此次征求意见稿将医疗机构再次列入限制类且限于中外合作, 这可能意味着对外商投资医疗机构的限制短期内不会放开。

此外, 《目录》修订稿首次将汽车整车、专用汽车和摩托车制造明确列为限制类, 并规定中方股比不低于50%, 同一家外商可在国内建立两家以下生产同类整车产品的合资企业, 但如与中方合资伙伴联合兼并国内其他汽车生产企业可不受两家的限制。汽车整车制造在2007年的《目录》中属于鼓励类项目, 现行2011年《目录》将其从鼓励类移出成为允许类项目。此次修订稿将其明确纳入限制类, 反映了监管部门逐步收紧外商投资整车制造产业的趋势以及对自主品牌汽车产业发展的保护。同时, 对整车合资的股比限制在短期内可能不会放开。

本次修订稿反映了中国政府深化改革外资准入领域管理体制的决心和努力, 同时近期可能会出台一系列外商投资领域法律监管的重大改革举措, 我们将持续保持关注。

### Two Ministries Issued Announced to Encourage Foreign Investors to Establish For-Profit Elderly Care Institutions in China 两部门发文鼓励外国投资者在华设立营利性养老机构

On November 24, 2014, MOFCOM and the Ministry of Civil Affairs jointly released an administrative announcement encouraging foreign investors to establish for-profit elderly care institutions in the form of a WFOE or a JV in China. Foreign investments in this area will generally only be subject to approvals by provincial level MOFCOM offices. To be legally engaged in elderly care services, a

properly established foreign invested enterprise has to first apply for and obtain a license to establish elderly care institutions according to the *Authorization Measures on Establishment of Elderly Care Institutions* and other relevant regulations. The announcement explicitly stipulates that for-profit elderly care institutions founded by foreign investors are permitted to

invest in other domestic industries related to elderly care services. It encourages foreign investors to invest in and develop large scale elderly care businesses through franchising and branding strategies and participate in corporate restructuring process of public elderly care institutions providing for-profit services to the general public. To further promote the establishment of for-profit elderly care



institutions, the Chinese government will provide equal preferential tax treatments and reduced level of administrative and institutional fees and charges to both foreign investors and domestic PRC investors in this area. To safeguard against any abuse of elderly care resources, the announcement clearly states that no local government may approve the establishment of any foreign invested real estate enterprise that is based on un-authorized change of the purpose of use of a construction land zoned for elderly care facilities, the construction occupancy rate or other land use conditions. No foreign invested for-profit elderly care institution may however be engaged in house-for-pension or similar businesses. As it is quite common that many elderly care

institutions also provide some medical and health care services to senior citizens, the announcement expressly requires that foreign invested elderly care institutions should complete the necessary application and approval procedures according to applicable rules and policies in order to be engaged in the provision of medical and health care services.

商务部、民政部于2014年11月24日联合发布公告,鼓励外国投资者在华独立或与中国公司、企业和其他经济组织合资、合作举办营利性养老机构,由拟设机构所在地省级商务主管部门审批。外商投资企业注册登记后,应当按照《养老机构设立许可办法》等有关规定,依法申请并取得养老机构设立许可证。获得上述许可和依法批准登记前,外国投资者不得开展养老服务业务。公

告明确规定,外商投资营利性养老机构可以从事与养老服务有关的境内投资,鼓励外国投资者发展养老机构规模化、连锁化经营,开发优质养老机构品牌,参与专门面向社会提供经营性服务的公办养老机构的企业化改制。在举办营利性养老机构上,外商投资与国内资本投资享有同等的税收优惠政策和行政事业性收费减免政策。为防止对养老资源的滥用,公告明确规定,各地不得批准通过改变养老设施建设用地用途、容积率等使用条件而设立的外商投资房地产企业。外商投资营利性养老机构不得经营住宅贴现养老等业务。此外,针对养老机构多提供医疗卫生服务的情况,公告也明确规定,外商投资营利性养老机构业务范围中包括医疗卫生服务的,应按有关政策规定履行报批手续。

## CAPITAL MARKET / 资本市场

### State Council Canceled Foreign Exchange Approval Requirement for Settlement of Funds Raised through Offshore Listing 国务院取消境外上市募集资金调回结汇审批

On November 24, the State Council published the *Catalogue for Cancelled and Delegated Administrative Approval Items* on its website. The fourth item of this document cancels the approval requirement (*which was applicable under the old rules of the State Administration of Foreign Exchange or SAFE*) for settlement of the foreign exchange funds raised through and repatriated from offshore listings. This cancellation will shorten Chinese companies' waiting time for using funds raised through offshore listings, increase the efficiency of capital

utilization, and encourage more companies to seek financing opportunities from overseas markets. However, due to the fact that most companies use indirect listing mode for offshore IPO while the direct offshore listing mode is mainly adopted by the PRC state-owned enterprises, the number of companies that will benefit from this new policy would be limited. Furthermore, as SAFE has not published any detailed implementing rules yet, it remains to be seen whether there will be any further requirement such as a filing.

国务院于11月24日在其网站上发布《国务院决定取消和下放管理层级的行政审批项目目录》,其中第四项为取消原由国家外汇管理局(“外汇局”)及其分局实施的境外上市外资股项下境外募集资金调回结汇审批。该项行政审批的取消缩短了境外上市的中国企业利用境外募集资金的时限,有利于提高资金利用效率,鼓励更多企业进行海外融资。但由于目前企业境外上市多采取间接上市的形式,直接上市的主要为国有企业,因此受益的企业数量有限。此外,由于外管局的具体实施细则尚未公布,后续是否有类似备案的要求有待进一步明确。

### Three Authorities Jointly Issued Tax Circulars for Shanghai-Hong Kong Stock Connect Program, QFII and RQFII 三部门联合公布沪港通试点及QFII、RQFII企业所得税政策

Upon approval by the State Council, the Ministry of Finance, the State Administration of Taxation and the China Securities Regulatory Commission jointly released the *Circular on Tax Policy Relating to the Pilot Inter-connected Mechanism for Trading on the Shanghai and Hong Kong Stock Markets* along with the *Circular on Issues Relating to Temporary Exemption of Enterprise Income Tax (“EIT”) on Gains from Transfer of Equity Investment Assets Obtained within China by QFIIs and RQFIIs*, which clarify the income tax, business tax and stamp duty policies relating to the Shanghai-Hong Kong Stock Connect Program (the “Program”) and income tax policy relating to QFII and RQFII. Between November 17, 2014 and November 16,

2017, incomes derived by mainland PRC investors from the transfer of shares listed on the Hong Kong Stock Exchange (“HKEX”) will be exempted from individual income tax. Since November 17, 2014, incomes derived by Hong Kong investors (including enterprises and individuals) from the transfer of A-shares listed on the Shanghai Stock Exchange (“SSE”) will tentatively be exempted from income tax and business tax. Hong Kong investors shall still pay stamp duty for security (stock) trading in accordance with currently effective mainland PRC tax laws and regulations if they trade, inherit or donate A-shares listed on SSE through the Program, while mainland PRC investors shall pay stamp duty in accordance with currently effective Hong Kong tax laws

and regulations if they trade, inherit or donate shares listed on HKEX through the Program. In addition, since November 17, 2014, incomes derived by QFIIs (*Qualified Foreign Institutional Investors*) and RQFIIs (*RMB Qualified Foreign Institutional Investors*) from the transfer of equity investment assets (such as stocks) within the PRC will be tentatively exempted from EIT. The above tax policies will play a positive role in supporting the smooth implementation of the Program and in promoting the two-way opening-up and healthy development of the mainland PRC and Hong Kong capital markets.

经国务院批准,日前财政部、国家税务总局和证监会联合下发了《关于沪港股票市场交易互联互通机制试点有关税收政策的通知》和《关于QFII和RQFII取

得中国境内的股票等权益性投资资产转让所得暂免征收企业所得税问题的通知》，对沪港通试点涉及的所得税、营业税和证券（股票）交易印花税等税收政策以及QFII、RQFII所得税政策问题予以明确。自2014年11月17日起至2017年11月16日止，对内地个人投资者通过沪港通投资香港联交所上市股票取得的转让差价所得，三年内暂免征收个人所得税。自2014年11月17日起，

对香港市场投资者（包括企业和个人）投资上交所上市A股取得的转让差价所得，暂免征收所得税；对香港市场投资者（包括单位和个人）通过沪港通买卖上交所上市A股取得的差价收入，暂免征收营业税；香港市场投资者通过沪港通买卖、继承、赠与上交所上市A股，按内地现行税制规定缴纳证券（股票）交易印花税；内地投资者通过沪港通买卖、继承、赠与联交所上市股票，按照

香港特别行政区现行税法规定缴纳印花税。此外，自2014年11月17日起，对QFII（合格境外机构投资者）、RQFII（人民币合格境外机构投资者）取得来源于中国境内的股票等权益性投资资产转让所得，暂免征收企业所得税。上述税收政策对支持沪港通试点顺利开展，促进中国内地与香港资本市场双向开放和健康发展将发挥积极作用。

## Chinese Stock Exchanges Launched Pilot Business of Privately Placed Bonds for M&As and Reorganizations 沪深证券交易所开展并购重组私募债券试点

On November 5, 2014, SSE and the Shenzhen Stock Exchange ("SZSE") released the *Notice of Relevant Issues concerning Launch of Pilot Business of Privately Placed Bonds for Mergers, Acquisitions and Reorganizations* (the "Notice") on their respective websites, which marks the official launch of this pilot business. According to the Notice, privately placed bonds for M&As and reorganizations are defined as corporation bonds with principal and interest to be repaid within agreed periods, which shall be issued and transferred within the PRC in a non-public way by corporate legal persons for the purpose of carrying out M&As and reorganization activities. At the initial pilot stage, as a temporary arrangement the issuers of such bonds do not include companies listed on SSE/SZSE. Compared with the privately placed bonds for small and medium-sized enterprises, the privately placed bonds for M&As and reorganizations no longer require issuers to be small or medium enterprises. However, the funds raised from such bonds shall be used to support M&A and reorganization

activities, including paying relevant considerations, replacing M&A and reorganization loans, etc. In order to protect investors' interests and to minimize risks, the qualified investors to subscribe for and transfer such bonds should be financial institutions that are established upon the approval by competent financial regulatory authorities, QFIIs, RQFIIs or other qualified investors recognized by SSE or SZSE. Also, the total number of investors for each issue of bonds shall not exceed 200. Ordinary investors may participate in such M&A and reorganization bond business through subscribing for relevant investment products issued by the aforementioned financial institutions. Since the launch of privately placed bonds of small and medium-sized enterprises in 2012, SSE has developed a sound service mechanism for filing, transfer and information disclosure of such bonds, which shall be implemented as reference rules when handling the privately placed bonds for M&As and reorganizations.

2014年11月5日，上交所与深交所各自网站上发布了《关于开展并购重组私

募债券业务试点有关事项的通知》（“《通知》”），正式启动并购重组私募债券试点工作。根据《通知》，并购债是指在中国境内注册的公司制法人开展并购重组活动，在中国境内以非公开方式发行和转让，约定在一定期限还本付息的公司债券。试点初期，并购重组私募债券的发行人暂不包括在沪深证券交易所上市的公司。与中小企业私募债券相比，并购债突破了私募债券发行主体需为中小企业的限制，但其募集资金应当用于支持企业并购重组活动，包括支付并购重组交易对价、替换并购重组贷款等。为保护投资者利益，规避风险，债券认购和转让的合格投资者应为经有关金融监管部门批准设立的金融机构，合格境外机构投资者（QFII），人民币合格境外机构投资者（RQFII），或经沪、深证券交易所认可的其他合格投资者等，且每期并购重组私募债券的投资者不得超过200人；普通投资者可以通过购买上述金融机构发行的理财产品来参与并购重组私募债业务。自2012年推出中小企业私募债券以来，上交所已经建立了一套完善的私募债券备案、转让、信息披露的服务机制，此次并购重组私募债券也将参照私募债券的有关业务流程办理。

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