

July 2020



TABLE OF CONTENTS / 本期内容

FOREIGN INVESTMENT & CAPITAL MARKET / 外商投资及 资本市场

MOFCOM Seeks Public Comments on Revised Rules for Strategic
Foreign Investments in Listed Companies / 商务部就修改《外国投
资者对上市公司战略投资管理办法》公开征求意见 2

FOREIGN INVESTMENT / 外商投资

China Unveils 2020 Negative List for Foreign Investments / 2020年
版外商投资准入负面清单发布 3

CAPITAL MARKET / 资本市场

Registration-Based System Officially Launched for GEM Board /
创业板注册制正式出台 4



FOREIGN INVESTMENT & CAPITAL MARKET / 外商投资及资本市场

MOFCOM Seeks Public Comments on Revised Rules for Strategic Foreign Investments in Listed Companies 商务部就修改《外国投资者对上市公司战略投资管理办法》公开征求意见

2020年6月18日，商务部等六部委联合发布《外国投资者对上市公司战略投资管理办法（修订草案公开征求意见稿）》（“《征求意见稿》”）向社会公开征求意见。《外国投资者对上市公司战略投资管理办法》（“《战投办法》”）自2005年颁布以来，仅于2015年就审批程序进行过微调，而相关市场、法律政策环境已经发生了很大的变化，《战投办法》的一些条款已难以满足实践中的交易需求。相关部门虽于2013年和2018年就调整《战投办法》两度发布征求意见稿（具体分析请见我所《每月立法动态》2018年8月刊），实践中也出现了突破该等监管规定、与商务部门“一事一议”的案例，但制度化的调整一直未能顺利落地。本次《征求意见稿》的发布，有望顺应实践需求，对《战投办法》进行实质性的修订完善，并实现与《外商投资法》等现行法律法规的衔接。

《征求意见稿》提出的主要修订内容如下：

1. **缩短锁定期**：将外国投资者战略投资取得的A股上市公司股份的锁定期由《战投办法》规定的3年缩短至12个月，同时规定《证券法》及其相关规定对锁定期有更长期限规定的，从其规定（例如，外国投资者通过参与上市公司定向发行新股方式进行战略投资，应适用18个月的锁定期）。
2. **降低持股比例**：取消外国投资者首次投资完成后持股比例不得低于10%的要求，但明确以协议转让取得或者以要约收购预定收购的股份比例不得低于5%。上述调整与《上市公司收购管理办法》、沪深交易所业务规则规定的相关股份比例要求一致。
3. **扩大投资方式**：(i)明确在协议转让和定向发行新股外，要约收购也属于外资战投方式之一；以及(ii)就跨境换股这一对价支付方式，《征求意见稿》突破《关于外国投资者并购境内企业的规定》的相关限制，允许外国投资者以其持有的或以其增发的境外非上市公司的股份作为外资战投的对价（但外资战投通过协议转让方式实施的，境外标的仍应为境外上市公司）。
4. **降低投资者资质要求**：(i)降低了对非控股股东的外国投资者或其全资投资者的资产总额要求（从《战投办法》要求的在境外拥有1亿美元资产或管理5亿美元资产，降至拥有5000万美元资产或管理3亿美元资产，且并未限定为在境外资产）；以及(ii)明确符合条件的外国自然人可以成为外国投资者。
5. **调整监管方式**：《征求意见稿》将商务部门对外资战投的事前审批制度改为事后信息报告制

On June 18, 2020, the Ministry of Commerce (“MOFCOM”), together with five other relevant authorities, jointly released for public comments the *Draft Amendments to the Administrative Measures for Strategic Investments in Listed Companies by Foreign Investors* (the “Draft”). The Draft aims to address major developments in the market and legal practices in the past 15 years. In 2013 and 2018, two rounds of draft amendments were brought up but did not get through. In 2015, minor adjustments were made to government approval procedures. In practice, preferential treatments on lock-up periods or shareholding ratio requirements were given to foreign strategic investments on a case by case basis.

Highlights of the Draft include, among others:

1. **Shortening lock-up periods**. According to the Draft, the lock-up periods on strategic foreign investors would be cut down from 3 years to 12 months or a longer period as required by the *Securities Law* and other regulations (for instance, strategic investments through private placements should be subject to an 18-month lock-up period).
2. **Removing minimum shareholding requirement**. The Draft cancels the 10% shareholding threshold for strategic foreign investments but still requires a minimum of 5% shareholding ratio in share transfers through agreements or tender offers which is consistent with the requirements under the *Administrative Measures on the Acquisition of Listed Companies* and the applicable rules of Shanghai Stock Exchange and Shenzhen Stock Exchange.
3. **Expanding investment channels**. Strategic investments by foreign investors will be allowed through tender offers, and the foreign investors may also use equity interests in unlisted overseas companies for a cross-border share swap unless such investment is made through agreements.
4. **Lifting qualification requirements on certain foreign investors**. (i) For foreign shareholders to obtain a non-controlling shareholder position, they are currently required to own or manage the overseas assets of no less than USD100 million or USD500 million. The Draft proposes to lower such thresholds to USD50 million and USD300 million respectively, allowing onshore China assets to be calculated into as well; and (ii) Qualified foreign natural persons may also be recognized as strategic investors.
5. **Implementing information reporting system**. Strategic investments by foreign investors will no longer be subject to prior approvals by MOFCOM. Instead, they will only need to file reports of information after the strategic investment is completed.
6. **Clarifying scope of application**. The Strategic Investment Measures may be used as a reference for strategic foreign investments in companies listed on the New Third Board (or the NEEQ exchange), but do not apply to investments by QFIs or RQFIs, or through the Stock Connect schemes between the Hong Kong, Shanghai and Shenzhen Stock

度，以实现与现行外商投资法律法规和政策的衔接。

6. **明确适用范围**：明确外国投资者对新三板挂牌公司实施战略投资可参照适用《战投办法》，但合格境外机构投资者（QFII）和人民币合格境外机构投资者（RQFII）对上市公司投资、外国投资者通过沪港通、深港通等方式取得A股股份等情形不适用该办法。

《征求意见稿》大幅放松了外资战投的限制、有望为境外投资者投资A股上市公司提供良好的政策土壤（特别是结合今年2月发布的再融资新规（具体分析请见我所2020年2月16日发布的《证监会发布再融资新规、多举措鼓励PIPE》））。我们期待该等修订能够早日落地执行，也将对此进行持续关注。

FOREIGN INVESTMENT / 外商投资

China Unveils 2020 Negative List for Foreign Investments 2020年版外商投资准入负面清单发布

2020年6月24日，国家发改委、商务部联合发布了《外商投资准入特别管理措施（负面清单）（2020年版）》（“2020年版负面清单”）、和《自由贸易试验区外商投资准入特别管理措施（负面清单）（2020年版）》（“2020年版自贸区负面清单”），自2020年7月23日起施行。

与2019年版负面清单相比，2020年版负面清单进一步精简了清单长度，将清单条目由40条减至33条，取消对放射性矿产冶炼加工、核燃料生产以及空中交通管制的禁止，放宽对金融业、商用车制造、城市供水管网建设经营、小麦种子生产等领域的限制（其中，对金融业的限制已于2020年4月1日提前全面放开），部分限制行业不再强调中方控股权，新增外商不得参与建设、运营机场塔台的规定。而自贸区继续先行先试，2020年版自贸区负面清单在2019年版自贸区负面清单及2020年版负面清单的基础上，进一步取消对外商投资中药饮片的禁止性规定，并允许外商独资设立学制类职业教育机构。值得注意的是，2020年版负面清单及2020年版自贸区负面清单均增加了负面清单豁免规定，即经国务院有关主管部门审核并报国务院批准，特定外商投资可以不适用负面清单中的相关规定。这一原则性的豁免规定在实操层面的适用情况有待后续观察。

此外，根据中共中央、国务院于2020年6月1日发布的《海南自由贸易港建设总体方案》，未来将出台海南自由贸易港的外商投资准入负面清单，将对市场较为关注的增值电信业务和基础电信业务等的外资准入限制具有较大的突破，我们也将保持持续关注。

Exchanges.

The Draft proposes to ease the regulatory requirements and regulations on strategic foreign investments in a significant manner. Boosted also by the new refinancing rules promulgated earlier this year (*please refer to our Memo on the New Refinancing Rules and How It May Promote Private Investments in Public Equities published on February 16, 2020 for detailed analyses*), it is expected that a more inviting environment will be provided for foreign investments in the Chinese capital market. We will continue to monitor and update major regulatory developments in this connection.

On June 24, 2020, the National Development and Reform Commission (“NDRC”) and MOFCOM jointly issued the *Special Administrative Measures on Access of Foreign Investments (the Negative List - 2020 Edition)* (the “2020 Negative List”), as well as the *Special Administrative Measures on Access of Foreign Investments in the Free Trade Zones (the Negative List - 2020 Edition)* (the “2020 FTZ Negative List”). Both will take effect on July 23, 2020.

Compared with its 2019 version which contains approximately 40 areas prohibited or restricted for foreign investments, the 2020 Negative List is further cut down to 33 items. For example, the 2020 Negative List removes bans on foreign investments in such sectors as smelting and processing of radioactive minerals, production of nuclear fuels and air traffic controls (except for building and operating airport control towers which currently is still prohibited for foreign investments). Moreover, foreign shareholding ratio caps are removed or lifted from a variety of industries including financial services, manufacture of commercial vehicles, construction and operation of water supply and drainage pipelines, as well as wheat seeds productions.

The 2020 FTZ Negative List further allows foreign investors to manufacture sliced traditional Chinese medicines and establish wholly-owned vocational education institutions. It is also noteworthy that according to both of the 2020 Negative List and the 2020 FTZ Negative List, foreign investments reviewed and approved by the State Council can be exempted from restrictions under any negative list. It remains to be seen though how this exemption will be implemented in practice.

In addition, according to the *Overall Plan for Building Hainan Free Trade Port* (“HFTP”) issued by the Central Committee of the Communist Party and the State Council on June 1, 2020, HFTP will have a more flexible negative list. Hopefully, the island will further open up to foreign investors with breakthroughs in the value-added and basic telecommunications service sectors. As always, we will monitor further developments in this area.

CAPITAL MARKET / 资本市场

Registration-Based System Officially Launched for GEM Board 创业板注册制正式出台

2020年6月12日，中国证券监督管理委员会（“中国证监会”）和深圳证券交易所（“深交所”）正式发布创业板改革并试点注册制的相关制度规定及配套规则（“创业板规则”），创业板注册制正式出台。在完成在审企业的申请接收后，深交所自2020年6月30日起开始接收新申报企业的首次公开发行股票等申请。

正式发布的创业板规则在征求意见稿（具体分析请见我所《每月立法动态》2020年5月&6月刊）的基础上进行了个别调整并增加了相关细则，主要包括：(i)进一步明确创业板定位，设置原则上不支持在创业板发行上市的行业负面清单（含12类传统行业）；(ii)调整红筹企业“股本总额”的计算口径，明确上市条件中“营业收入快速增长”的具体标准以及带有约定赎回权等优先权利的优先股转换为普通股的相关安排；以及(iii)修改完善审核与注册时限，自发行上市申请文件受理之日起，深交所审核与中国证监会注册的时间总计不超过三个月（征求意见稿中规定深交所审核的时限为三个月），与《证券法》中的时限要求保持一致。

On June 12, 2020, the China Securities Regulatory Commission (“CSRC”) and the Shenzhen Stock Exchange (“SZSE”) released a series of regulations and supporting rules to officially launch the registration-based system on the Growth Enterprise Market or the GEM board (the “GEM Rules”). Starting June 30, 2020, SZSE begins to accept new IPO applications.

Based on the draft documents circulated in April 2020 (please refer to our May & June 2020 issue of *China Regulatory Updates for details*), the GEM Rules have made various further adjustments, including among others: (i) setting up a negative list to exclude industries not eligible for listing on the GEM board to better address its position and functions; (ii) modifying methods to calculate the *total shares of red chip enterprises*, providing detailed guidance to determine if the “rapid growth in operating incomes” is met for listing, and specifying how to convert preferred shares with redemption right and other priority rights into ordinary shares; and (iii) requesting the review and registration process generally to be completed within 3 months by SZSE and CSRC after an application is accepted, reconciling with the requirements under the *Securities Law*.

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