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TABLE OF CONTENTS / 本期内容

PE/VC INVESTMENTS / 私募股权投资

A New Judicial Precedent Is Set to Validate Target Company's VAM
Obligation / 对赌协议下公司回购条款有效性的新判例 2

FOREIGN INVESTMENTS / 外商投资

China Released 2019 Version of Foreign Investment Catalogue / 2019年
版外商投资准入负面清单及鼓励外商投资产业目录发布 2

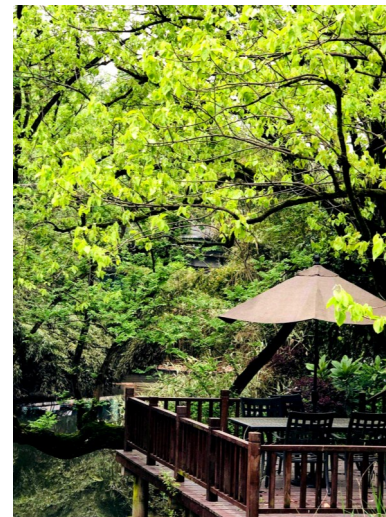
TAX / 税收

CSRC Clarified Standards of Venture Capital Funds Eligible for Tax
Incentives / 证监会明确享受税收优惠政策的创业投资基金标准 3

CAPITAL MARKET / 资本市场

SSE Launched STAR Market and *Shanghai-London Stock Connect* / 科创
板和沪伦通相继开通 3

CSRC Solicits Public Comments on Draft Amended Measures Involving
Material Asset Restructuring of Listed Companies / 证监会就修改上市
公司重大资产重组管理办法征求意见 4



PE/VC INVESTMENTS / 私募股权投资

A New Judicial Precedent Is Set to Validate Target Company's VAM Obligation 对赌协议下公司回购条款有效性的新判例

2019年6月3日，江苏省高级人民法院（“江苏高院”）公布了江苏华工创业投资有限公司（“华工”）与扬州锻压机床股份有限公司（“公司”）及公司原股东关于请求公司回购股份纠纷（“华工案”）的再审判决（(2019)苏民再62号）。与最高人民法院（“最高院”）于2012年做出的“海富案”（(2012)民提字11号，“海富案”，具体分析请见我刊《每月立法动态》2013年1月刊）中的观点不同，华工案的再审判决认定股东与公司的对赌协议有效，公司应履行其在对赌协议下的股份回购义务。

在华工案中，华工作为投资人与公司及公司原股东签订投资协议，约定若公司未能按时实现IPO，则华工有权要求其按照8%的年回报率回购华工所持有公司股份（“回购条款”）。再审中，江苏高院认定回购条款有效，认为其系各方针对商业风险安排的真实意思表示，不脱离公司经营业绩的正常规律，也不存在法定的合同无效情形。同时，江苏高院还认可公司从程序上和清偿能力上都具备履行回购条款的可能性，该履行不会损害公司股东及债权人的利益，而华工的股东地位同样不应损害其作为公司债权人的权利。

不同于海富案所确立的司法观点，即股东与公司间的对赌条款使得股东可以获得脱离公司经营业绩的相对固定的收益，损害了公司及公司债权人的利益，因而对赌条款无效，华工案并不当然地否认股东与公司之间对赌条款的效力，而是强调商事领域的意思自治，在判断相关对赌安排合法且可行的情况下判决公司履行回购义务。实践中对海富案存在不少争议，在仲裁领域，最近几年相关仲裁机构已经在若干案例中开始采纳与华工案类似的观点，但在司法体系中，相关法院基本上都遵循最高院在海富案中对对赌安排设定的先例。华工案为我国关于对赌条款有效性的司法实践提供了新的方向，但因其由江苏高院（而不是最高院）做出，其能否取代海富案的裁判观点而成为日后司法实践的主流尚有较大不确定性。我们亦将进一步跟进相关司法实践。

On June 3, 2019, the Jiangsu High People's Court ("Jiangsu High Court") published the retrial judgment on a dispute among Jiangsu Huagong Venture Capital Co., Ltd ("Huagong"), Yangzhou Forging Machine Tool Co., Ltd (the "Company") and the Company's existing shareholders in respect of the Company's share repurchase obligation ((2019) Su Min Zai No. 62], the "Huagong Case"). Contrary to the long-standing view in the Haifu precedent ruled by the Supreme People's Court (the "Supreme Court") in 2012 ((2012) Min Ti Zi No. 11, the "Haifu Case", please refer to our January 2013 issue of *China Regulatory Updates* for details), the Jiangsu High Court noticeably validated the Company's obligation to repurchase shares from its shareholder under the valuation adjustment mechanism ("VAM") agreement.

In the Huagong Case, Huagong entered into an investment agreement with the Company and its existing shareholders, according to which Huagong as an investor may request the Company to repurchase its shares in the Company with an 8% annual rate of return if the Company fails to consummate an IPO within a certain time period (the "Repurchase Clause"). During the retrial, the Jiangsu High Court held that the Repurchase Clause is valid on the grounds that: (i) it reflected the real intention of the parties as to commercial risk allocation that does not deviate from the company's ordinary business operations; and (ii) it did not constitute any statutory invalidity situation under the applicable PRC laws. Meanwhile, the Jiangsu High Court also believed that the Company is able to perform the Repurchase Clause both financially and procedurally, and that such performance will not harm the interests of other shareholders and creditors of the Company. It further held that Huagong's shareholder status should not jeopardize its rights as a creditor of the Company.

In the landmark judgment of the Haifu Case, the Supreme Court maintained that a VAM clause obliged the target company to repurchase shares from its shareholder(s) is invalid because the shareholder(s) would be protected with fixed returns irrelevant to the target's business performance, jeopardizing the interests of the target company and its creditors. In the Huagong Case however, the court emphasized the parties' autonomy and took a remarkably different view. There have been quite some debates over the merits of the Haifu Case in practice, and in recent years some arbitration awards started to adopt a similar view as that in the Huagong Case. Yet in China's judicial system, the courts generally followed the Haifu Case since its effectiveness. The Huagong Case is likely the first judicial precedent to explicitly validate the target's VAM obligation, and doubtlessly provides an important new direction for China's judicial practices in this regard. Yet as this judgment is made by the Jiangsu High Court (as opposed to the Supreme Court), whether it will replace the Haifu Case and become the judicial practice mainstream in the future will remain to be seen.

FOREIGN INVESTMENTS / 外商投资

China Released 2019 Version of Foreign Investment Catalogue 2019年版外商投资准入负面清单及鼓励外商投资产业目录发布

2019年6月30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）（2019年版）》（“2019年版负面清单”）、《自由贸易试验

On June 30, 2019, the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM") jointly issued the *Special Administrative Measures on Access of Foreign Investment (Negative List) (2019 Edition)*

区外商投资准入特别管理措施（负面清单）（2019年版）》（“2019年版自贸区负面清单”）和《鼓励外商投资产业目录（2019年版）》（“2019年版鼓励类目录”），自2019年7月30日起施行。

与2018年版负面清单相比，2019年版负面清单进一步精简了清单长度，将清单条目由48条减至40条，取消对特定矿产勘查及开采等领域的禁止并放宽对船舶代理、城市燃气和热力、电影院、演出经纪机构、增值电信业务、油气勘探开发等领域的限制，部分限制行业不再强调中方控股权。特别地，市场较为关注的增值电信业务领域进一步放开，取消国内多方通信、存储转发、呼叫中心3项业务对外资的限制。而自贸区继续先行先试，2019年版自贸区负面清单在2019年版负面清单的基础上进一步取消对水产品捕捞的禁止并放宽对出版物印刷的限制。

2019年版鼓励类目录较大幅度增加了鼓励外商投资的领域，特别是电子信息设备、现代医药产业、新材料产业等高端制造业。属于2019年版鼓励类目录的外商投资项目，可以依照法律、行政法规或者国务院的规定享受税收、土地等优惠待遇。

(the “2019 Negative List”), the *Special Administrative Measures on Access of Foreign Investment in the Free Trade Zones (Negative List) (2019 Edition)* (the “2019 FTZ Negative List”) and the *Catalogue of Encouraged Foreign Investment Industries (2019 Edition)* (the “2019 Encouraged Catalogue”), all will take effect from July 30, 2019.

Compared with the 2018 Negative List, the 2019 Negative List is further shortened to 40 items (*cutting 8 items from 48*). The 2019 Negative List removes restrictions in several sectors including the exploration and mining of certain minerals, and relaxes requirements in a variety of industries involving shipping agent, urban gas and heat services, cinema, performance brokerage, value-added telecoms as well as exploration and development of gas and oil. Further, it also rescinds the majority holding or dominance requirement by the Chinese party involving certain industries. In particular, in the more concerned the value-added telecoms sector, restrictions in the domestic multi-party communications, store-and-forward and call center services will be lifted. The 2019 FTZ Negative List further removes restrictions in the fishing of aquatic products and relaxes requirements in the publication printing.

The 2019 Encouraged Catalogue substantially increases encouraged sectors, especially in the high-end manufacturing industries (*such as electronic and information equipment, modern pharmaceutical and new material industries*). Foreign investments under the 2019 Encouraged Catalogue will be eligible for preferential treatment in terms of tax and land usage subject to the applicable laws, administrative regulations or other rules by the State Council.

TAX / 税收

CSRC Clarified Standards of Venture Capital Funds Eligible for Tax Incentives 证监会明确享受税收优惠政策的创业投资基金标准

根据《关于创业投资企业和天使投资个人有关税收政策的通知》（*具体分析请见我所《每月立法动态》2018年6月刊*），在发改委或中国证券投资基金业协会备案的创业投资企业可以申请相关税收优惠政策。证监会作为出具符合创业投资企业条件的证明材料的主体之一，于2019年6月19日发布了相关私募基金监管问答（“《监管问答》”），对拟申请相关税收优惠政策的创业投资基金标准及申请流程予以明确。根据《监管问答》，拟申请税收优惠待遇的创业投资基金除需满足证监会和中国证券投资基金业协会有关私募基金的管理规范外，还应在实缴资本、存续期限、管理团队、投资范围等方面符合一定要求（*该等要求与发改委对创业投资企业的备案要求基本一致*）。

According to the *Circular on Tax Rules for Venture Capital Enterprises and Individual Angel Investors* (*please refer to our June 2018 issue of China Regulatory Updates for details*), venture capital enterprises registered with NDRC or the Asset Management Association of China (“AMAC”) may apply for relevant tax incentives. On June 19, 2019, the China Securities Regulatory Commission (“CSRC”), one of government agencies to determine eligibility of the venture capital enterprises for the above purpose, issued Q&As on the regulation of private equity funds (the “Regulation Q&As”) to clarify that certain eligibility standards for tax incentives and the relevant application procedures. According to the Regulation Q&As, in addition to the satisfaction of various private equity fund regulations released by CSRC and AMAC, venture capital funds should also meet certain other requirements in terms of paid-in capital, operating term, management team, investment scope, etc. (*which are basically consistent with the requirements of NDRC for the filing of venture capital enterprises*).

CAPITAL MARKET / 资本市场

SSE Launched STAR Market and Shanghai-London Stock Connect 科创板和沪伦通相继开通

2019年6月13日，上海证券交易所（“上交所”）科创板（*具体分析请见我所《每月立法动态》2019年3月刊*）正式开板，截至2019年6月28日已有共31家公司获批发行。

On June 13, 2019, the Shanghai Stock Exchange (“SSE”) officially launched the SSE STAR Market (*please refer to our March 2019 issue of China Regulatory Updates for details*). As of June 28, 2019, 31 companies have been granted green light for public offerings in this highly anticipated market.

2019年6月17日，上交所与伦敦证券交易所（“伦交

On June 17, 2019, SSE and London Stock Exchange (“LSE”)

所”）互联互通存托凭证业务（“沪伦通”）正式启动。根据中国证监会和英国金融行为监管局发布的沪伦通《联合公告》，沪伦通包括两个业务方向：(i)东向业务，即伦交所上市公司以其已发行在外的股票为基础证券在中国境内发行存托凭证（CDRs）并在上交所主板上市交易，以及(ii)西向业务，即上交所上市公司以其已发行在外的股票或新增股票为基础证券在境外发行存托凭证（GDRs）并在伦交所主板上市交易。

科创板和沪伦通的开通进一步活跃了我国的资本市场，为投资人提供了新的投资退出渠道，并为我国与境外资本市场的联通提供了新的方案。

officially launched the depository receipt business under the stock connect scheme between SSE and LSE (the “Shanghai-London Stock Connect”), allowing listed companies of the two markets to cross-list depository receipts. According to the *Joint Announcement* issued by CSRC and the Financial Conduct Authority of the United Kingdom, the Shanghai-London Stock Connect includes two business directions: (i) the eastbound business, under which eligible companies listed on LSE can issue China Depository Receipts (“CDRs”) representing existing shares to the Chinese investors and apply for them to be listed on the Main Board of the SSE, and (ii) the westbound business, under which eligible companies listed on the SSE can issue Global Depository Receipts (“GDRs”) representing existing shares or newly issued shares to the global investors and apply for them to be listed on LSE’s Main Market.

The launches of SSE STAR Market and the Shanghai-London Stock Connect are likely to further boost China’s capital market, provide investors with new exit channels, and offer new connection scheme between domestic and overseas capital markets.

CSRC Solicits Public Comments on Draft Amended Measures Involving Material Asset Restructuring of Listed Companies 证监会就修改上市公司重大资产重组管理办法征求意见

2019年6月20日，证监会就《关于修改〈上市公司重大资产重组管理办法〉的决定》（“草案”）向社会公开征求意见。

为促进上市公司的资源整合和产业升级，草案拟放松对重组上市（即借壳上市）的部分限制，主要包括：

(i)取消重组上市认定标准中的“净利润”指标；(ii)将“累计首次原则”（即自上市公司控制权发生变更以来，上市公司向收购人及其关联人购买的资产累计首次达到相关标准）的计算期间由60个月缩短至36个月；(iii)允许对创业板的公司重组上市；并且(iv)允许在重组上市的同时进行配套融资。

On June 20, 2019, CSRC solicited public comments on the *Decision on Revision of the Measures on Material Assets Restructuring of Listed Companies* (the “Draft”).

In order to promote resource integration and industrial upgrading involving listed companies, the Draft proposed to relax some restrictions on material assets restructuring (i.e., backdoor listing), including among others: (i) removing the “net profit” indicator from the criteria of a qualified backdoor listing; (ii) shortening the calculation period under the “initial aggregate principle” (i.e., the period from the date of change of control of listed companies, to the date that the accumulated assets purchased by the listed companies from the acquirers and their affiliates first meet relevant standards) from 60 months to 36 months; (iii) allowing material assets restructuring of ChiNext-listed companies; and (iv) permitting simultaneous financing of the company together with the implementation of the proposed material assets restructuring.

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For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编：200235
电话：(86-21) 6083-9800



Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800