CHINA
REGULATORY UPDATES

瀚一律師事務所
HAN YI LAW OFFICES

www.hanyilaw.com

June 2016

TABLE OF CONTENTS / 本期内容

CROSS-BORDER FINANCING / 跨境融资

New Cross-Border Financing Policy Expanded Nationwide
中国全面实行全口径跨境融资外债政策

In early 2016, the People's Bank of China ("PBOC") introduced a pilot macro-prudential management system for overall cross-border financing (the "System") applicable to 27 designated banks and all non-financial enterprises registered in four free trade zones in Shanghai, Tianjin, Guangzhou and Fujian (*see the February 2016 issue of our China Regulatory Updates for a brief introduction*). On April 29, PBOC issued the *Circular on Implementing Macro-Prudential Management System for Overall Cross-Border Financing Nationwide* (the "Circular") to extend the System to the whole country. This System has represented a fundamental reform to the long-existed original foreign debt system before the pilot.

According to the Circular, the System is applicable to the cross-border financing activities of financial institutions and other general enterprises incorporated in China (*including both domestic and foreign invested enterprises, but excluding government financing vehicles and real estate enterprises*, the "Borrowers") borrowing RMB or foreign currency from foreign non-residents. Under the System, a Borrower shall make sure its risk-weighted cross-border financing balance (the "Balance") does not exceed its applicable limit of risk-weighted cross-border financing balance (the "Cap") as calculated by the formulas below:

> ***Balance*** *= Σ RMB and Foreign-Currency Cross-Border Financing Balance * Term Risk Factor * Type Risk Factor + Σ Foreign-Currency Cross-Border Financing Balance * Currency Risk Factor*
>
> ***Cap*** *= Capital/Net Assets * Leverage Ratio * Macro-Prudential Adjustment Parameter*
>
> Among which,
>
> Capital/Net Assets equals:
>
> (i) the net assets (*for non-financial enterprises*);
>
> (ii) tier 1 capital (*for banks*); and
>
> (iii) paid-in capital plus capital reserves (*for non-banking financial institutions*).
>
> The initial values of the relevant risk factors are (*PBOC may adjust the values based on its assessment on financial risks*):
>
> (i) Leverage Ratio: 1 (*for non-financial enterprises and non-banking financial institutions*), and 0.8 (*for banks*);
>
> (ii) Macro-Prudential Adjustment Parameter: 1;
>
> (iii) Term Risk Factor: 1 (*loans for more than 1 year (exclusive)*), and 1.5 (*loans for one year or less*);
>
> (iv) Type Risk Factor: 1 for all both in-balance-sheet and off-balance sheet debts; and
>
> (v) Currency Risk Factor: 0.5.

During the transition period yet to be specified, a foreign invested enterprise (FIE) may choose to either adopt this new System or continue to apply the existing "*borrowing gap*" model (*difference between the total investment and the registered capital of an FIE*), which decision once made shall not be easily changed later on without a good reason. Under the "*borrowing gap*" model, the foreign debt cap for an FIE is generally proportional to the amount of its registered capital: e.g., an FIE whose registered capital exceeds USD 5 million may borrow foreign debt at an amount more than its registered capital (*but no more than twice of the registered capital*). Under the System, the Cap for a non-financial enterprise is approximately equal to the amount of its net assets at least for the time being. Thus, FIEs may have different preferences between the two options depending on the levels of their specific registered capital and net assets.

In terms of the fund usage, the Circular requires that the borrowed fund shall be used only for the Borrower's "*own business operations*", but how to interpret the scope of "business operations" (*e.g.*, whether it means registered business scope, especially whether the fund may be used for equity investments) is yet to be further clarified.

In addition, the Circular has replaced the previous approval requirement for foreign debt financing by a simplified prior-filing (*for non-financial enterprises*) or post-filing (*for financial institutions*) system.

继2016年年初将27家全国性银行及上海、天津、广东、福建四大自贸区内的企业纳入宏观审慎跨境融资试点政策之后（*具体内容请参见本所2016年2月刊China Regulatory Updates*），2016年4月29日，中国人民银行（"央行"）发布了《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》（"《通知》"），将全口径跨境融资宏观审慎政策扩张至在全国范围内施行。全口径跨境融资宏观审慎管理政策构建了与微观主体资本或净资产动态挂钩、总量调控的跨境融资宏观审慎管理体系。考虑到《通知》对中国原有外债体系的系统性改革，我们在此对《通知》的重点内容进行简要梳理。

《通知》下的跨境融资是指境内机构从非居民融入本、外币资金的行为，适用于依法在中国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，但是不包括政府融资平台和房地产企业*）。在《通知》体系下，新外债管理政策具有跨境融资内外资一体化、本外币一体化、短期和中长期外债一体化管理以及总量与结构调控并重等特点，即，内资企业将和外商投资企业一样，不论举借外币还是人民币外债，也不论是短期还是中长期外债，都可以依据"跨境融资风险加权余额"（*即本外币跨境融资余额，结合期限、汇率等风险转换因子*）举借外债，该余额不得超过其各自适用的"跨境融资风险加权余额上限"（*即净资产或资本，结合跨境融资杠杆率及宏观审慎调节参数*）。央行可以根据其对金融风险的评估，适时采取总量调控措施（*调整跨境融资杠杆率及宏观审慎调节参数*）及/或结构调控措施（*调整相关风险转换因子*）。

> ***跨境融资风险加权余额*** *= Σ本外币跨境融资余额*期限风险转换因子（中长期为1；短期为1.5）*类别风险转换因子（表内融资为1；表外融资暂定为1）+Σ外币跨境融资余额*汇率风险折算因子（汇率风险折算因子为0.5）。*
>
> 根据公式，短期融资、外币融资将会占用更多的跨境融资额度。值得注意的是，企业集团内部资金往来、贸易信贷和人民币贸易融资、金融机构的境外同业存放、联行及附属机构往来等六类业务不纳入余额计算，且不同类型融资的计算方法也可能有所不同（*比如外币贸易融资按20%纳入余额计算，金融机构向客户提供的内保外贷按公允价值纳入跨境融资风险加权余额计算*）。
>
> ***跨境融资风险加权余额上限*** *=资本或净资产（企业按净资产计，银行类金融机构按一级资本计，非银行金融机构按实收资本或股本+资本公积计）*跨境融资杠杆率（企业和非银行金融机构为1，银行类金融机构为0.8）*宏观审慎调节参数（暂定为1）。*
>
> 即，目前企业的额度上限基本等于其1倍的净资产，银行类金融机构的额度为其一级资本的0.8倍。

为实现平稳的过渡，外商投资企业可以选择依据《通知》适用新政策或适用原来的"投注差"外债管理政策（*过渡期限长短和具体安排，将另行制定方案*），但一经选定，原则上不再更改。

在原“投注差”管理模式下，外债额度基本上是依据企业的注册资本确定的，而注册资本超过500万美元的，可以获得的外债额度即可以超过注册资本的1倍（最多可达2倍）。因此，视企业的注册资本及净资产的具体情况，其选择偏好很可能会有所不同。

对于资金用途，《通知》要求，企业融入的资金的应用于“自身的生产经营活动”，而对此该如何界定、是否必须用于企业经营范围内的事项、是否可以用于股权投资等还尚需有关部门进一步明确。此外，《通知》取消了外债事前审批，而改为事前签约备案（针对企业）或事后备案（针对金融机构）。

ONLINE AUDIO-VISUAL MEDIA / 网络视听

SAPPRFT Regulates IPTV, Private Network Mobile TV and OTT TV Services
广电总局规范IPTV、专网手机电视及互联网电视服务

The *State Administration of Press, Publication, Radio, Film and Television* (“SAPPRFT”) recently issued the new *Administrative Measures on Services of Audio-Visual Programs Transmitted through Private Networks or Directional Transmission* (the “Measures”), replacing the *Administrative Measures on the Audio-Visual Programs Transmitted through the Internet or Other Information Networks* (the “Old Measures”) in effect since 2004. The Measures, together with the existing *Administrative Provisions on Internet Audio-Visual Program Services*, constitute SAPPRFT’s administration over audio-visual program services transmitted through various networks: the former one is generally applicable to private network or directional audio-visual program services (*mainly through IPTV, private network mobile TV and OTT TV*), while the latter one is applicable to those provided through the Internet (*mainly through audio/visual websites and apps*).

According to the Measures, services of transmitting audio-visual programs through private networks or directionally (the “Services”) mainly include content provision, integration and broadcast control, transmission and distribution, etc., among which: (i) the content provision services shall be provided by central news stations and the local prefecture-level (*or a higher level*) radio and television broadcasting stations , (ii) the integration and broadcast control services shall be provided by the provincial level (*or a higher level*) radio and television broadcasting stations, and (iii) the transmission and distribution services shall be provided by qualified infrastructure network operation entities. The providers of the Services (“Service Providers”) shall be solely owned or controlled by the state, and no private enterprise (*including FIEs*) is allowed to provide the Services. However, they may conduct such affiliated or supporting businesses as production, purchase and sale of programs, advertising, marketing, business cooperation, settlement of receipts and payments, and technology services through a joint venture or cooperation with qualified non-state-owned market entities, and the relevant agreement shall be filed with the competent governmental authorities within 15 days from the date of such an agreement.

Consistent with the Old Measures, the authorities will review the qualification of the Service Providers in accordance with a *penetration* principle, which prohibits any involvement of foreign investment in the Service Provider’s shareholding structure at any level. Private or foreign investors interested in taking part of the Services may consider collaborating with the Service Providers by the above-mentioned joint venture or cooperation arrangements.

国家新闻出版广电总局（“广电总局”）于近日发布《专网及定向传播视听节目服务管理规定》（“6号令”），同时废止了2004年发布的《互联网等信息网络传播视听节目管理办法》（“39号令”）。6号令与此前的《互联网视听节目服务管理规定》（“56号令”）共同构成了广电总局对网络传播视听节目服务的监管体系，前者适用于向公众提供的专网及定向视听节目服务，主要包括交互式互联网电视（IPTV）、专网手机电视以及互联网电视，后者适用于通过互联网公网向公众提供的视听节目服务，主要包括视音频网站、视音频客户端软件。

根据6号令，专网及定向传播视听节目服务主要包括内容提供、集成播控、传输分发等服务，其中，内容提供服务的主体为地市级以上广电播出机构或中央新闻单位，集成播控服务的主体为省级以上广电播出机构，传输分发服务的主体为具有合法的基础网络运营资质的单位。申请从事专网及定向传播视听节目服务的主体必须为国有独资或国有控股单位，民营企业、外商独资、中外合资、中外合作机构不得进入。专网及定向传播视听节目服务单位（“服务单位”）可以采用合资、合作模式开展节目生产购销、广告投放、市场推广、商业合作、收付结算、技术服务等经营性业务，并应当在签订合资、合作协议后15日内向原发证机关备案。

与39号令相同，发证机关对6号令下的申请主体的资质审查将实行穿透原则，这意味着申请主体的直接或间接股东均不得含有外资成分，意欲参与该等服务的外资及民营企业可以考虑通过与服务单位合资、合作的形式开展6号令开放的经营性业务。

ANTI-MONOPOLY / 反垄断

NDRC Solicits Public Comments on Draft Exemption of Monopoly Agreements
发改委就垄断协议豁免指南征求意见

On May 12, 2016, the National Development and Reform Commission (“NDRC”) published the *Guidelines on the Exemption of Monopoly Agreements (Draft for Comment)* (the “Guidelines”), providing conditions and procedures for the exemption of monopoly agreements as outlined under the PRC *Anti-Monopoly Law*.

According to the Guidelines, after the competent anti-monopoly authority initiates an investigation but before it issues any pre-penalty notice (*or during the appeal period specified therein*), the relevant business

operators and industry associations may submit an exemption application. The competent authority shall make the final decision based on the relevant factors according to the *Anti-Monopoly Law* and the Guidelines, and may further seek opinions from other institutions and the public, which decision shall be disclosed to the general public.

The Guidelines have also noticeably introduced a pre-agreement exemption consulting system, according to which the relevant business operators and associations may seek non-binding opinions from the anti-monopoly authority on whether a potentially important or influential agreement they contemplate to enter into is qualified for an exemption. The authority may at its own discretion decide whether to accept such a consultation. Note that such a consultation opinion, even if made, is not legally binding: the applicant may nevertheless conclude the agreement in question despite of a negative opinion from the authority, and the authority can still initiate an investigation in the future even if it grants a positive opinion during the consultation. In practice however, the consultation opinion is likely to be general consistent with the final decision and will therefore serve as an important guidance to business operators.

The release of Guidelines is a part of the recent efforts by the anti-monopoly authorities to improve their administration on monopoly agreements, including, for example, introduction of the leniency and undertaking programs. With the increasingly tightened anti-monopoly administration environment, investors in China may need to be more careful of their business activities that may trigger the authority's anti-monopoly reviews in their future business operations.

5月12日，国家发改委就《关于垄断协议豁免一般性条件和程序的指南》（“《指南》”）草案公开征求意见。《指南》对《反垄断法》第15条豁免垄断协议的适用条件和程序作出了具体规定，增加了豁免制度的可操作性。

根据《指南》，相关经营者、行业协会提出豁免申请的时间为反垄断执法机构调查后收到行政处罚事先告知书前，或者在行政处罚事先告知书设定的陈述、申辩期内。反垄断执法机构应根据《反垄断法》和《指南》列举的主要考虑因素进行判断，并可向相关部门和公众征求意见，作出予以豁免或者不予豁免的决定，并将豁免决定向社会公布。

《指南》同时设置了豁免咨询制度。在达成相关协议前，相关经营者、行业协会可以就拟达成的且影响范围广、重要程度高的协议是否符合豁免情形向反垄断执法机构提出豁免咨询，反垄断执法机构可自行决定是否受理，且其作出的咨询意见不影响申请人实施协议，也不影响执法机构在协议实施后对其进行反垄断调查，换言之，咨询意见不具有法律效力。尽管如此，作为官方执法机构给出的咨询意见，其实践参考价值不容小觑。

近月来，反垄断执法机构起草了包括宽大制度、经营者承诺制度在内的一系列反垄断制度指南草案，足见我国对反垄断执法的重视程度日渐提高。经营者在未来经营过程中应更加谨慎地对待可能涉及到的垄断问题。

CAPITAL MARKET / 资本市场

China's New Third Board to Launch Market Division, Private Institutions Resumed Listing and Allowed as Market Makers
新三板正式出台分层方案、允许金融类企业挂牌、做市商扩围至私募机构

On May 27, 2016, to meet different requirements of micro, small and medium-sized companies at different development stages, the National Equities Exchange and Quotations (*NEEQ or more commonly known as the New Third Board, China's over-the-counter share trading market*) officially released the *Trial Administrative Measures on the Division of Listed Companies* (the "Measures") to divide companies listed on the *New Third Board* into two separate markets, i.e., the innovative market and the basic market. Companies listed on the innovative market shall meet higher standards on corporate governance, information disclosure, among others, while they may be provided with more pilot innovative opportunities which are yet to be spelt out. The market division will be officially launched on June 27.

A company can be listed on the innovative market if it meets any of the three standards focusing on profitability, revenue and market capitalization, respectively, in addition to other requirements:

Standard I: continuous profitability for the last two years with the average annual net profit of no less than RMB20 million; weighted average rate of return on average net assets is no less than 10% for the last two years;

Standard II: average operating income is not less than RMB40 million in the past two years with compound annual growth rate of no less than 50%; share capital is not less than RMB20 million;

Standard III: in the recent 60 days with market-making transfers, the average market capitalization is not less than RMB600 million; the year-end shareholders' equity is not less than RMB50 million; at least 6 market makers and 50 qualified investors.

An innovative-market listed company shall meet at least one of the three maintenance standards, which similarly focus on profitability, revenue and market capitalization with the financial indicators generally less stringent than the entry standards, to avoid being re-categorized to the basic market. As predicated by the market, out of the over 7,000 companies currently listed on the *New Third Board*, almost 1,000 companies are qualified to list on the innovative market.

On the same date, NEEQ released the *Notice on the Listing of Financial Institutions* (the "Notice") and resumed its approval of qualified financial institutions to list on the *New Third Board* which had been suspended since December 2015. Financial institutions regulated by the PBOC, the China Banking Regulatory Commission, the China Securities Regulatory Commission ("CSRC"), and the China Insurance Regulatory Commission, and possess the relevant financial certificates may list on the *New Third Board* at the current standards applicable to other companies (*but may need to apply differentiated disclosure requirements*); while private fund management institutions (*excluding private securities investment funds in general*) shall meet 8 additional requirements, for example, (i) incorporated for at least 5 years with at least 1 fund has exited; (ii) the average amount of managed funds (*paid in capital*) shall be at least RMB2 billion and RMB 5

billion for venture capital and private equity institutions; (iii) they shall have been filed with the *Asset Management Association of China* ("AMAC"); and (iv) at least 80% of their total income comes from the management fee and other performance payment, among others.

CSRC has also confirmed that private equity firms and private securities investment funds are to be allowed to conduct market-making business on the NEEQ market, a positive move being seen to expand the seriously inadequate number of market makers, break the current dominance by securities firms as the NEEQ market makers, and to improve the pricing of the NEEQ market in general.

为了更好地满足中小微企业的差异化需求，5月27日，全国中小企业股份转让系统（新三板"）发布《挂牌公司分层管理办法（试行）》（"《分层管理办法》"），将新三板分为创新层和基础层，并针对创新层和基础层挂牌公司采取差异化的制度安排：创新层挂牌公司将适用较高的公司治理及监管要求，但同时可能会享受更多后续制度创新和服务创新的机会。分层措施将于6月27日起正式实施。

新三板设置了盈利、营业收入和市值3套并行的创新层标准，以适应"成长型、创业型、创新型"的不同企业的不同需求，具体包括：(i) *标准一*：两年连续盈利、年平均净利润不少于2000万元、且最近两年加权平均净资产收益率平均不低于10%；(ii) *标准二*：最近两年营业收入平均不低于4,000万元、年均复合增长率不低于50%、且股本不少于2,000万股；(iii) *标准三*：最近有成交的60个做市转让日的平均市值不少于6亿元、最近一年年末股东权益不少于5,000万元、做市商家数不少于6家、合格投资者不少于50人。同时，创新层挂牌公司需满足至少一项维持标准，维持标准也是按照盈利、营业收入和市值三套标准，但指标低于准入要求。按照市场预测，在目前新三板挂牌的7,000余家公司中，约近1,000家企业满足创新层标准。

同日，全国股转系统发布《关于金融类企业挂牌融资有关事项的通知》（"《金融企业挂牌通知》"），自2015年底证监会暂停金融类企业在新三板挂牌后，再次允许金融类企业挂牌。《金融企业挂牌通知》对受中国人民银行、中国银监会、中国证监会、中国保监会（"一行三会"）监管并持有相应《金融许可证》等证牌的企业按现行挂牌条件进行挂牌，对其日常监管将进一步完善差异化的信息披露安排；对于私募机构（不包括私募证券基金），则新增8个方面的挂牌条件，比如持续运营5年以上、且至少存在一支管理基金已实现退出，创业投资类和私募股权类私募机构最近3年年均实缴资产管理规模应分别在20亿元和50亿元以上，需已在中国证券基金业协会完成登记备案，管理费收入与业绩报酬之和须占收入来源的80%以上等等。

此外，中国证监会新闻发布会明确将开展私募机构参与新三板做市业务试点。该项试点有利于扩展严重不足的做市商数量、打破由券商垄断的做市商市场局面、并进而有利于市场对新三板公司进行更好地定价。

FOREIGN INVESTMENT / 外商投资

Pilot Filing System Adopted for Investments by Hong Kong/Macau Service Providers
港澳服务提供者在内地投资服务贸易领域试行备案制管理

The Ministry of Commerce ("MOFCOM") recently issued the *Pilot Measures on the Filing Administration on Hong Kong/Macau Service Providers' Investments in Mainland China* (the "Measures") to adopt a pilot filing system for investments in certain service industries by Hong Kong/Macau service providers from June 1, 2016. The Measures are issued to implement the *Closer Economic Partnership Arrangement (or CEPA) - Service Trade Agreements* between the mainland China and Hong Kong/Macau (the "Agreements") both signed in November 2015.

The Hong Kong/Macau invested enterprises ("Invested Enterprises"), as defined under the Measures, are companies incorporated in the mainland China by Hong Kong/Macau service providers ("Service Providers"), i.e., permanent residents and legal persons registered and having been in substantial business operations for at least 3 years in Hong Kong/Macau and engaged only in service sectors as provided under the Agreements (*excluding companies engaged in telecommunications, culture sectors or financial industry*). In contrast to the current approval system for most foreign investments (*except for the trial filing program in the four free trade zones other than investments provided under the "negative list"*), a Service Provider or Invested Enterprise will only need to file their application through MOFCOM's foreign investment filing system online and will later get a receipt from the competent local MOFCOM office when they shall submit a simplified package of application documents. The filing receipt will replace the current *Certificates of Approval* for an applicant to go through the follow-on government procedures.

Note that the filing authorities are still expected to review the application documents and may demand additional information as they see appropriate, though it remains to be seen how hard they will exercise their discretion power. Further, joint investments by the Service Providers and other foreign investors, and equity transfer from the Service Providers to other foreign investors are still subject to the current approval system. This filing pilot program will not affect other parallel review systems such as those on national security and/or business concentrations from the anti-trust perspective.

为落实2015年11月订立的《〈内地与香港关于建立更紧密经贸关系的安排〉服务贸易协议》以及《〈内地与澳门关于建立更紧密经贸关系的安排〉服务贸易协议》（合称"《协议》"），商务部于近日出台《港澳服务提供者在内地投资备案管理办法（试行）》（"《办法》"）（商务部2016年第20号公告），自6月1日起，将对港澳投资企业的设立及变更试行备案制管理。

适用《办法》的港澳投资企业是指《协议》定义的港澳服务提供者（*包括港澳永久性居民以及在港澳注册或登记设立并从事实质性商业经营3年以上的法人*）在内地投资的仅从事《协议》对港澳开放的服务贸易领域（*不包括电信、文化领域的公司及金融机构*）的公司（*不包括其他组织形式*）。不同于现行的外商投资审批制度（*在自贸区设立涉及负面清单之外的行业除外*），港澳服务提供者或港澳投资企业将通过商务部外商投资备案信息系统在线办理备案，备案完成后向省级商务部门（"备案机构"）领取《港澳服务提供者投资企业设立（变更）备案回执》（"《备案回执》"），领取同时需提交授权委托书、主体资格证明、合同章程等文件

（*但不包括决议文件*）。《备案回执》（*不再是《批准证书》*）是办理后续手续的商务部门凭证。

需要注意的是，备案机构仍将对备案申请进行核查并可以要求补充提交信息方准予完成备案，这在实践中是否可能会转变为变相审批尚待观察。此外，港澳服务提供者与非港澳服务提供者的其他境外投资者共同投资，或港澳服务提供者将其在港澳投资企业中的股权权益转让给非港澳服务提供者的其他境外投资者，以及港澳投资企业安全审查、经营者集中审查等仍需按现行审批制度办理。

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