

May 2015



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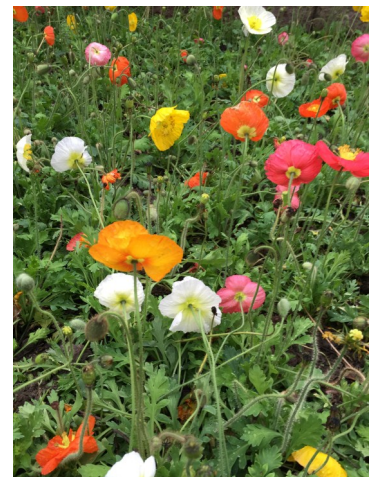
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FOREIGN INVESTMENT / 外商投资

SAFE Issued Circular #19 to Relax Capital Account Forex Settlement Restrictions on a Nationwide Basis 外汇局发布新规在全国放宽外汇资本金结汇规管

The State Administration of Foreign Exchange (“SAFE”) issued the *Circular on Reforming the Administrative Approach Regarding the Settlement of the Foreign Exchange Capital of Foreign-invested Enterprises* (“FIE”) (“Circular #19”) on its website in early April of 2015 to implement, on a nationwide basis, the relaxed capital account forex administration practices (the “Pilot Policy”) which have already been implemented in some 16 pilot areas and the Shanghai Free Trade Zone (“Shanghai FTZ”) since last year.

Once this new Circular #19 becomes effective on June 1, 2015, the previous SAFE Circular #142 (which clearly bans capital account forex settlement by non-investment type of FIEs for onshore equity investment purpose) and its relevant rules will be abolished. This means that, at least from the forex regulation perspective, all types of FIEs are now permitted to use the RMB funds converted from their forex capital to make onshore equity investments. However, just as the Pilot Policy, the new Circular #19 provides that an FIE shall not directly or indirectly use its forex capital and the RMB funds converted therefrom on activities outside of its authorized business scope. During the past year, some local counterparts of SAFE have blocked non-investment FIEs’ applications of capital account forex settlement for onshore equity

investment purpose when implementing the Pilot Policy, and their major basis was that those FIEs’ business scopes failed to cover any “investment” activity. Therefore, it remains to be seen whether local counterparts of SAFE in practice would continue to ban non-investment FIEs (e.g., foreign invested onshore SPVs primarily for financing purpose) to settle their capital account forex for onshore equity investments on the same basis.

Moreover, if the proposed relaxation for capital account forex settlement under the Circular #19 is fully implemented, QFLP entities (qualified foreign-invested equity investment enterprises and equity investment management enterprises) would no longer be subject to the forex conversion quota under the current QFLP policy. In addition, it will be more convenient for FIEs under red-chip structures to convert their offshore-raised funds into RMB funds for onshore acquisitions and reorganizations.

继去年在16个试点地区和上海自贸区开展外商投资企业 (“FIE”) 外汇资本金意愿结汇改革试点 (即《支持中国(上海)自由贸易试验区建设外汇管理实施细则的通知》及操作规程、《国家外汇管理局关于在部分地区开展外商投资企业外汇资本金结汇管理方式改革试点有关问题的通知》, 合称“试点政策”) 之后, 国家外汇局于2015年4月初在其

网站上发布了《关于改革外商投资企业外汇资本金结汇管理方式的通知》 (“19号文”), 将改革试点推广到了全国范围内, 以进一步放松对FIE外汇资本金的监管和限制, 深化外汇管理体制改革的。

19号文将于2015年6月1日起实施, 届时将正式废止规定一般性FIE资本金结汇不得用于境内股权投资的142号文 (即, 《国家外汇管理局综合司关于完善外商投资企业外汇资本金支付结汇管理有关业务操作问题的通知》) 等规定。这意味着在外汇监管法规层面上, 各地方的所有一般性FIE均可以以结汇所得人民币资金开展境内股权投资活动。但是, 19号文同试点政策一样, 仍规定一般性FIE的资本金及结汇所得人民币资金不得直接或间接用于企业经营范围之外的支出。在此前试点政策下的地方实践中, 存在部分地方的外管局以一般性FIE经营范围不含“投资”字样为由, 不允许一般性FIE结汇进行境内股权投资的情形。在19号文沿用试点政策中资本金用途这一限制的情况下, 一般性FIE能否顺利结汇开展境内股权投资, 还有待实践的检验。

如果19号文下FIE资本金结汇政策能够真正实现, 那么外国投资者根据各地QFLP政策参与投资、设立的外商投资股权投资企业或外商投资股权投资管理企业, 其外汇资本金结汇用于股权投资应将不再受QFLP政策下的结汇额度限制。此外, 红筹架构下的FIE也应可以通过将外汇资本金结汇的方式, 更简便地将其在境外融资取得的资金用于境内股权收购和重组。

ANTI-MONOPOLY / 反垄断

SAIC Issued Rules to Prohibit Abuse of Intellectual Property Rights to Eliminate or Restrain Competition 工商总局发文禁止滥用知识产权排除、限制竞争行为

On April 7, 2015, the State Administration for Industry and Commerce (“SAIC”) released the *Provisions on the Prohibition of the Abuse of Intellectual Property Rights (IPR) to Eliminate or Restrain Competition* (the “Provisions”) with effect from August 1, 2015.

The Provisions have defined the concepts of “abuse of IPR to eliminate or restrain competition” and “relevant market”, clearly prohibited undertakings from concluding monopoly agreements by exercising IPR or to abuse their dominant market positions to eliminate or restrain competition when exercising IPR, and also clarified the relevant

determination rules and standards. Furthermore, the Provisions have specified relevant issues concerning patent pools and essential patents involved in industry standards.

The Provisions are the first set of regulatory documents specifically applicable to IPR-related anti-monopoly issues in China. However, this regulation does not cover rules regarding concentration of undertakings or price-related monopoly, as those fields fall under the administration by the Ministry of Commerce (“MOFCOM”) and the National Development and Reform Commission (“NDRC”). As a result, undertakings shall also take into

consideration of the regulatory documents issued by other authorities, judicial interpretations and judicial precedents in addition to the Provisions when assessing legal risks on abuse of IPR to eliminate or restrain competition.

2015年4月7日, 国家工商总局发布《关于禁止滥用知识产权排除、限制竞争行为的规定》 (“规定”), 并自2015年8月1日起施行。

具体而言, 《规定》解释了涉及滥用知识产权排除、限制竞争行为和相关市场的概念, 禁止经营者利用行使知识产权的方式达成垄断协议或者在行使知识产权的过程中滥用其市场支配地位, 同时明确了相关认定规则, 还对知识产权领

域的实践中存在的专利联营和行业标准中所涉必要专利的问题进行了规定。

需要注意的是，虽然《规定》是我国首部专门规定知识产权领域反垄断问题的规范性文件，但是由于我国反垄断执法工作由工商总局、国家发改委和商务部

按照不同的领域分别负责，该部由工商总局颁布的《规定》中未涉及与滥用知识产权有关的经营者集中问题（由**商务部主管**）和价格垄断问题（由**发展和改革委员会主管**），因此投资人在判断目标公司对某项知识产权的使用是否存在

违反反垄断相关规定的风险时，除了该《规定》的要求以外，还需要结合其他相关法律法规、司法解释和法院判例等做出综合判断。

FTZ UPDATES / 自贸区近期动态

Shanghai FTZ Expanded to Further Promote Reform and Opening up 上海自贸区扩容，继续深化改革与开放

On April 8, 2015, the State Council issued the *Plan for Further Promoting the Reform and Opening up of Shanghai FTZ* ("the Shanghai FTZ Plan 2015" or "the Plan") to expand the Shanghai FTZ to include Lujiazui Financial District, Jinqiao Development Zone and Zhangjiang High-Tech Park and to extend the application of certain Shanghai FTZ policies to the entire Pudong New Area.

Compared to the Shanghai FTZ plan issued in 2013, the Plan requires further improvement of the current Shanghai FTZ policies such as those

regarding the Negative List system, enterprise annual filings and company registration procedures. The Plan also urges active exploration of institutional innovations in more fields in an effort to open up the Shanghai FTZ to the highest degree.

As to the financial policy, the Plan indicates that relevant authorities will later initiate the approval procedure of a detailed plan, with which we will further follow up.

2015年4月8日，国务院发布《进一步深化中国（上海）自由贸易试验区改革开放方案》（“《上海自贸区2015方

案》”或“《方案》”），将陆家嘴金融片区、金桥开发片区和张江高科技片区纳入到上海自贸区，并允许部分区内政策在一定条件下适用整个浦东新区，进一步扩大了上海自贸区的影响范围。

具体内容方面，与上海自贸区2013年的总体方案相比，《方案》要求继续完善区内现行的相关政策，比如负面清单制度、企业年度报告公示、企业注册登记等制度，同时在更大领域积极探索制度创新，并力争使上海自贸区成为开放度最高的自由贸易园区。

另外，关于最受关注的金融领域，《方案》表明相关具体方案将由相关部门另行报批。我们将持续给予关注。

FTZs in Guangdong, Fujian and Tianjin Launched with Their Respective General Plans Released 粤闽津三地自贸区挂牌，各自总体方案出台

The State Council released general plans for pilot FTZs in Guangdong, Fujian and Tianjin on April 8, 2015, and these three FTZs have been officially launched since April 21.

According to said general plans, these new FTZs have similar reform directions and fields as those of Shanghai FTZ. Moreover, some current policies implemented in Shanghai FTZ or under the Shanghai FTZ Plan 2015, such as the Negative List system, relaxation of foreign investment restrictions, opening up and innovation of financial field and upgrades of cross-border trade, are also adopted in new FTZs. However, these FTZs also have their respective objectives and corresponding innovation measures due to their distinctive strategic positions. Specifically, Guangdong FTZ focuses on promoting economic cooperation between the mainland, Hong Kong and Macau, especially in healthcare and pharmaceutical industry. Fujian FTZ places emphasis on accelerating process of trade and investment liberalization with Taiwan, and thus further opens up service trade sectors,

such as telecommunication, transportation, commerce and trade, construction, engineering technology and professional services, to Taiwan service providers. Tianjin FTZ strives to become an open platform for collaborative development of Beijing, Tianjin and Hebei, and is likely to provide more innovation policies for leasing industry.

It is noteworthy that the general plans of both Guangdong FTZ and Tianjin FTZ expressly permit or encourage foreign-invested fund managers to sponsor and manage RMB equity funds and venture capital funds. It is the first time that such statement appears in an FTZ regulatory document and we will closely follow up with the relevant preferential policies and detailed rules to be issued in the future.

2015年4月8日，国务院发布广东、福建、天津三地的自由贸易试验区总体方案。4月21日，三大新自贸区于同日挂牌成立。

根据上述各项总体方案，三大新自贸区在改革的方向和领域上与上海自贸区基本一致，部分改革措施也与上海自贸区

现行的或在《上海自贸区2015方案》下的相关措施类似，比如改革外商投资管理模式、放宽外资准入、金融领域开放创新和跨境贸易升级等。但各自贸区因其不同的战略定位，从而有着各自的总体目标和具有特色的创新措施。具体而言，广东自贸区主要立足推动内地与港澳经济深度合作，其与港澳服务提供者之间在医疗和医药领域的合作是该区的一大特色；福建自贸区侧重推进与台湾地区投资贸易自由化的进程，特别是在电信、运输、商贸、建筑、工程技术、专业技术等方面的服务贸易领域对台湾地区的提供者进一步扩大开放；天津自贸区则力争成为京津冀协同发展的对外开放平台，而其在租赁业领域很可能将会提供更多、更先进的创新政策。

特别值得投资人注意的是，广东和天津自贸区在其各自的总体方案中都明确提到将鼓励或允许外资股权投资、创业投资机构发起管理人民币股权投资和创业投资基金，这在我国现有四个自贸区的规范性文件中尚属首次出现。对于该两大自贸区可能出台的相关具体优惠、便利政策，我们将持续保持关注。

First Batch of Policies Applicable to All Four FTZs Released 适用于四大自贸区的首批政策发布

On April 8, 2015, the General Office of the State Council issued the *Tentative Measures for the National Security Review of Foreign Investment in the FTZs* (the “Measures for Security Review”) and the *Special Access Administrative Measures for Foreign Investment in the FTZs* (the “Negative List of 2015”). On the same day, MOFCOM issued the *Administrative Measures for Record-filing of Foreign Investment in the FTZs (for Trial Implementation)* (the “Measures for Record-filing”). All these three policies will take effect in early May.

The Measures for Security Review, which apply to foreign investments in all FTZs, are generally consistent with the current security review system for acquisitions of domestic enterprises by foreign investors. In addition, the Measures for Security Review further include investments whereby foreign investors take control of enterprises engaging in important cultural activities or information technologies into the scope of review, and require additional evaluation of investments’ influence on culture safety, public morality and Internet safety. As we understand, these adjustments reflect the increasingly strict governmental regulations towards cultures, telecommunications and Internet, and as a result foreign investors may face more difficulties when investing in these sectors.

The Negative List of 2015 is applicable to all four FTZs, while the *Closer Economic Partnership Arrangement* (“CEPA”) and its supplementary agreements between the mainland and Hong Kong/Macau and the *Economic Cooperation Framework Agreement* (“ECFA”) between the mainland and Taiwan shall prevail to the extent that more favorable policies are provided therein. Compared to the amended *Catalogue of Industry for Guiding Foreign Investment* released by NDRC and MOFCOM in March 2015 (please refer to our April 2015

issue of China Regulatory Updates for more information) and the Negative List of 2014 applicable to Shanghai FTZ, the Negative List of 2015 removes or lifts foreign ownership limitations in sectors such as manufacturing and transportation, and meantime elaborates the thresholds and restrictions on investments in sectors such as finance, education, culture and entertainment. It is also noteworthy that the Negative List of 2015 sets a 50% cap on foreign shareholding in value-added telecom (excluding E-commerce) business, which is more stringent than the policies previously issued by the Ministry of Industry and Information Technology for Shanghai FTZ. We believe this shareholding cap to some extent echoes the regulatory agencies’ attitude as implied in the above-mentioned Measures for Security Review.

The Measures for Record-filing adopt a system under which the establishment and change of FIEs in sectors falling outside of the Negative List of 2015 are only subject to record-filings instead of governmental approvals. Such system is consistent with that already implemented in Shanghai FTZ but with one major improvement - foreign investors and FIEs are allowed to go through the filing procedure no later than 30 days after obtaining initial or updated business licenses or occurrence of certain changes, which means such filing procedure is no longer a precondition for SAIC registration in this respect.

4月8日，国务院办公厅发布了《自由贸易试验区外商投资国家安全审查试行办法》（“《安全审查办法》”）和《自由贸易试验区外商投资准入特别管理措施（负面清单）》（“《2015负面清单》”）。同日，商务部发布了《自由贸易试验区外商投资备案管理办法（试行）》（“《备案办法》”）。上述三项政策均将于5月初生效。

《安全审查办法》适用于外国投资者在各个自贸区内的投资活动，总体内容上与中国现行的外国投资者并购境内企业安全审查制度基本一致，其主要区别在于，《安全审查办法》将外国投资者取得重要文化、重要信息技术产品和服务领域企业实际控制权的投资行为纳入安全审查的范围，并且在审查内容中新增“对国家文化安全、公共道德的影响”和“对国家网络安全的影响”。我们理解，这一调整充分反映了国家对于文化、电信、网络等文化、技术领域的监管将更趋于严格，境外投资人在相关领域的投资难度也将相应加大。

《2015负面清单》的适用范围包括我国目前的全部四个自贸区，但同时也规定，内地与香港、澳门之间《关于建立更紧密经贸关系的安排》（CEPA）及其补充协议、内地与台湾地区之间《海峡两岸经济合作框架协议》（ECFA）在各自贸区内仍然适用，如对符合条件的投资者有更优惠的开放措施的，则按照相关规定执行。内容方面，相对于今年3月国家发改委和商务部发布的《外商投资产业指导目录》（相关内容请参见我所2015年4月刊*China Regulatory Updates*）和上海自贸区2014年适用的负面清单，《2015负面清单》均进一步取消了对部分行业（如制造业和运输业）外资准入的限制或降低了准入门槛，而对于金融、教育、文化娱乐等行业的投资门槛和限制条件则规定得更为细化。但是值得关注的是，《2015负面清单》规定，增值电信业务（电子商务除外）的外资比例均不超过50%，这相对于工信部此前发布的、适用于上海自贸区的相关文件，限制力度明显加强，这也在一定程度上与前述《安全审查办法》所体现的监管意图相吻合。

另外，《备案办法》则是规定，外国投资者在自贸试验区投资《2015负面清单》以外领域，相关外商投资企业的设立和变更由核准制改为备案制。该办法的内容与上海自贸区此前施行的《中国（上海）自由贸易试验区外商投资企业备案管理办法》基本一致，主要区别在于，《备案办法》允许外国投资者或外商投资企业最晚可在取得、换发营业执照或者变更事项发生之日起30日内办理备案手续，换言之，该备案手续将不作为企业登记的前置条件。

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