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Memorandum to: Han Yi Clients and Friends

Several Hot Topics on Foreign-Invested RMB Funds

With the promulgation of the amended *PRC Partnership Enterprises Law* (the “Partnership Law”) and the successful launch of ChiNext, China has witnessed the rapid development of its private equity industry as well as the expansion of active fundraising and investment activities by private equity and venture capital funds. In November 2009, the PRC State Council issued the *Administrative Measures on the Establishment of Partnership Enterprises in China by Foreign Enterprises or Individuals* (the “Administrative Measures”), pursuant to which foreign investors are allowed to invest in partnership enterprises in China. This led to a boom of establishment of private equity and venture capital RMB funds in China by foreign investors (the “RMB Funds”), and many foreign investors, including prestigious domestic and international private equity and venture capital firms have begun or plan to establish RMB Funds. Based on the latest development of PRC law and our practical experience, we have prepared this memorandum to discuss and analyze several hot issues on foreign-invested RMB Funds and we hope this will be helpful to investors intending to establish RMB Funds.

I. Major Organizational Forms and Regulatory Framework for Foreign-Invested RMB Funds

According to different organization forms and legal basis, a foreign-invested RMB Fund may take the form of a company with limited liabilities, a cooperative Sino-foreign joint venture with a non legal person status, a trust product, a partnership, and etc., among which the form of limited partnership has gradually become the most popular choice for foreign-invested RMB Funds after the implementation of the Partnership Law and the promulgation of the Administrative Measures.¹ Under PRC law, the structure of limited partnership not only offers advantages in terms of tax treatment (i.e., partnerships are exempted from paying income tax, which will be payable by partners on a pass-through basis), but also provides for more flexibility and autonomy in terms of the determination of rights and obligations of general partners (the “GPs”) and limited partners (the “LPs”), which is more suitable and

¹ The organizational forms of a company with limited liabilities and a cooperative Sino-foreign joint venture with a non legal person status used to be the main forms of foreign-invested venture capital investment enterprises (the “FIVCIEs”). Please refer to our mid-2008 memo for an introduction and analysis of foreign related RMB Funds in the form of FIVCIEs, parallel funds, and etc. Part II of this memo will elaborate on RMB Funds organized as limited partnerships.

favorable for the operation of private equity or venture capital funds.

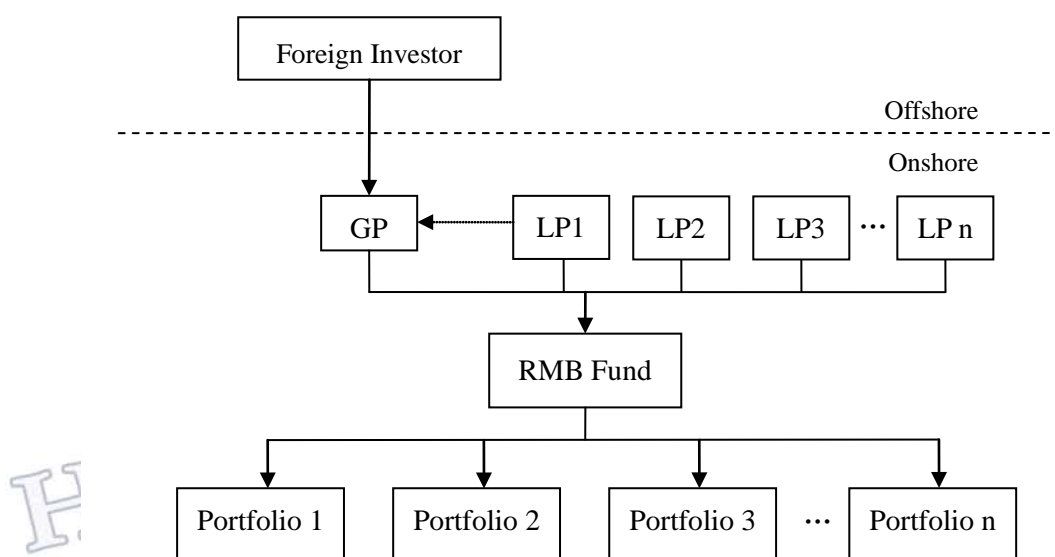
The legal basis of RMB Funds organized as limited partnerships include legislation at both national and local levels. National legislation applicable to limited partnerships includes the Partnership Law, the Administrative Measures, and other general regulations such as the implementation details issued by the State Administration for Industry and Commerce (“SAIC”, together with its local counterparts, “SAIC Offices”). Currently there is no nationwide legislation in China specifically governing RMB Funds. In practice, the establishment and operation of RMB Funds is governed to a large extent by local policies. Tianjin, Beijing, Shanghai, Chongqing, Shenzhen and other local governments have currently issued relevant policies to encourage investors to establish RMB Funds and management companies in their respective administrative regions.

II. An Analysis of the Structure of RMB Funds Organized as Limited Partnerships

According to the Management Measures, foreign investors may participate in the RMB Funds directly. In addition, they may also participate in the launch and management of RMB Funds organized as limited partnerships indirectly through their domestic subsidiaries. Due to the ambiguity in the legislation on investment and foreign exchange with respect to RMB Funds with foreign investors’ direct participation, the indirect mode of participation has become the most prevailing method of investment adopted by foreign parties.

1. Indirect Establishment of RMB Funds Organized as Limited Partnerships (“Indirect Mode”)

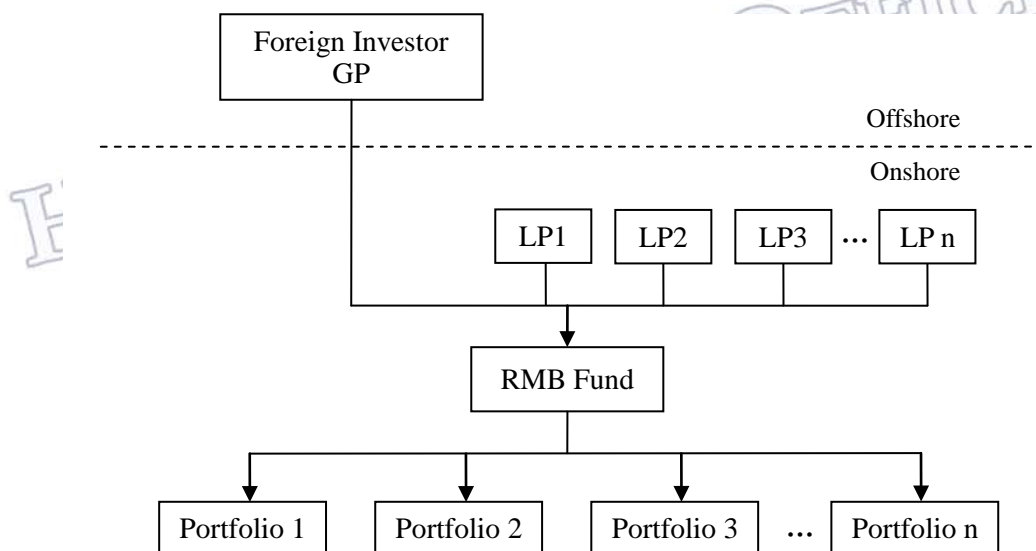
Under the Indirect Mode, a foreign investor normally chooses to set up a wholly foreign-owned enterprise or a joint venture enterprise in China, which will then act as the GP and fund manager of the to-be-established RMB Fund. LPs of a RMB Fund under the Indirect Mode basically are domestic investors. For illustration purposes only, we set out below a typical structure of an RMB Fund established under the Indirect Mode.



2. Direct Establishment of RMB Funds Organized as Limited Partnership (“Direct Mode”)

In addition to the Indirect Mode, a foreign investor may directly (other than

through a foreign-invested enterprise) establish an RMB Fund in the form of a limited partnership in China together with domestic investors (*please see the structure below*). This mode is explicitly permitted only after the promulgation of the Administrative Measures, which may however be subject to more restrictions when the funds make investments (*please refer to “Main Problems of Foreign-Invested RMB Funds” below for more details*). Currently, few foreign investors choose to establish RMB Funds under this mode in practice.



3. Conditions and Procedures for Establishment of RMB Funds Organized as Limited Partnerships

The Partnership Law does not set forth high thresholds for the establishment of limited partnerships. However, as the private equity investment industry is an emerging industry in China, which lacks a robust set of mature marketing practices and rules, in order to generally monitor and regulate behaviors of the market players, many local governments released requirements on the capital commitments/registered capital and initial installment of capital contribution of private equity funds as well as the experience and qualifications of management companies thereof, requirements for which may vary from place to place according to local regulations and practices. With respect to recently established RMB Funds, their capital commitments/fund size are generally above RMB100 million and the registered capital of management companies is mostly above RMB1 million.

Generally speaking, no approval from the PRC Ministry of Commerce (“MOFCOM”, together with its local counterparts, “MOFCOM Offices”) is required for RMB Funds with participation of foreign investors whether under the Direct Mode or the Indirect Mode. The establishment of RMB Funds is only subject to SAIC registration. In practice, however, before applying to SAIC Offices for the registration of a RMB Fund organized as a limited partnership, foreign investors usually need to first consult with local government authorities in charge of finance, economy and etc. to seek their opinions and confirm any preferential treatments that may be enjoyed. In addition, SAIC Offices may, when reviewing application documents, solicit opinions from competent government authorities in charge of finance, commerce, fiscal, tax, foreign exchange and etc. and decide whether to approve or not.

4. Major Problems of Foreign-Invested RMB Funds

In spite of the notable development in the formation and deployment of private equity and venture capital funds in China during recent years, the overall development in this business sector is still of an exploratory nature. Currently, regulations and rules on RMB Funds are basically made by authorities at the low or local level which are even at times in conflict with each other. This situation has to a large extent limited the development of RMB Funds. The major problems currently faced by foreign-related RMB Funds include:

(a) Foreign Exchange

According to Hui Zong Fa [2008] No. 142 (“Circular 142”) issued by the State Administration of Foreign Exchange (“SAFE”, together with its local counterparts, “SAFE Offices”) in August 2008, the RMB capital of a foreign-invested enterprise that is converted from foreign exchange under capital account shall be used for the businesses within its approved business scope and may not be used for domestic equity investments unless otherwise permitted by law. Therefore, generally speaking, under the Indirect Mode, if the GP is a foreign-invested enterprise,² it may only invest in the to-be-established RMB Fund with its self-own RMB capital, other than RMB capital converted from foreign exchange settlement under capital account.³ In practice, RMB Funds are primarily funded by domestic investors.

Despite that the approved business scope of RMB Funds under the Direct Mode includes “equity investments”, there is no regulation expressly allowing the foreign exchange under their capital account to be converted into RMB and to be used for domestic equity investments freely. It is predicted that SAFE Offices may make reference to the foreign exchange settlement mode for FIVCIEs (i.e., *the foreign exchange of FIVCEs should be directly remitted to the capital account of portfolio companies other than FIVCIEs’ and converted into RMB upon approval*) to resolve the foreign exchange settlement issues for foreign-invested RMB Funds.

Due to the above-mentioned foreign exchange dilemma, at present, foreign investors participate in RMB Funds mainly in the capacity of GPs and fund managers rather than LPs whether under the Direct Mode or the Indirect Mode.

(b) Investment Restrictions

Foreign investors, as GPs, are always the actual controller of RMB Funds, though they generally account for a relatively small proportion (generally 1%-5%) of capital commitments in RMB Funds. It needs to be clarified whether investments made by such foreign-invested RMB Funds are subject to foreign investment industrial policy.

Based on our understanding, in practice, some approval authorities tend to

² Note that under PRC law and in accordance with practice, the approved business scope of a foreign invested enterprise normally does not include domestic equity investment unless such enterprise is a foreign invested investment company of a large-scaled multinational companies having established subsidiaries in China. The domestic equity investment made by a foreign invested investment company will be deemed and treated as the direct investment by its foreign parent under PRC law.

³ Under applicable PRC law, proceeds of loans should not be used for equity investment.

hold the view that investments made by foreign-invested RMB Funds under the Indirect Mode are generally not subject to foreign investment industrial policy restrictions, while investments made by funds under the Direct Mode should be carried out according to PRC laws and regulations governing foreign investments and foreign investment restrictions set forth under the *Catalogue for the Guidance of Foreign Investment Industries* should be complied with. The above opinions are however not supported by official documents and there are rarely cases. Therefore, it still remains to be seen how investments made by foreign-invested RMB Funds will be handled in practice.

(c) Exit Mechanism

RMB Funds will mainly exit through domestic IPO (including on ChiNext, SME board and main board) or trade sale, and may hardly exit through overseas capital markets like USD funds do. In spite of the overall higher capitalization of domestic capital markets (especially ChiNext) than that of overseas capital markets, the high listing requirements, long waiting time before listing, and uncertainties related to domestic IPO will adversely impact the exit of RMB Funds.

5. QFLP: A Breakthrough in RMB Funds System

As restricted by Circular 142 and other regulations, at present, foreign investors invest in RMB Funds mainly in the capacity of GP. In the first half of this year, it was reported that Shanghai, Beijing and Tianjin respectively, had submitted to the competent financial regulatory authorities for approval a system of qualified foreign limited partners (“QFLP”), with an aim to solve the foreign exchange settlement and investment restriction issues related to foreign-invested RMB Funds. It is reported that the proposed system of Shanghai has recently been approved in principle by the competent financial regulatory authorities.

QFLP is a system similar to QFII (i.e., qualified foreign institutional investors). Under the QFLP system, foreign LPs and GPs may invest in domestic RMB Funds by converting their foreign exchange into RMB within the quota approved by SAFE Offices. For example, in Shanghai, the quota may not exceed \$100 million or 50% of fund size and the total amount of foreign exchange settlement of GPs may not exceed 5% of fund size. Upon approval and implementation of the QFLP system, foreign investors may participate in RMB Funds in the capacity of GPs and LPs and the foreign exchange settlement issues confronting most foreign-invested RMB Funds hopefully will be solved smoothly. In addition, it is provided in the Shanghai QFLP system that RMB Funds whose LPs are all domestic investors with foreign investors solely as GPs will be treated as domestic RMB Funds and will not be subject to industrial restrictions on foreign investment.

III. Major Sources of Capital

RMB Funds have been growing vigorously and their fundraising channels are becoming increasingly diversified. GPs may raise capital directly from qualified domestic LPs or from funds of funds (“FOFs”) as well as indirectly from LPs through third party financial services institutions and private banking departments of commercial banks. Currently, the main fundraising channels for RMB Funds under PRC law are as follows:

1. Government Guidance Funds

Government guidance funds are policy funds established and operated by

governments. With the promulgation of the *Guidance Opinions on Standardized Establishment and Operation of Venture Capital Investment Guidance Funds*, there is a boom of government guidance funds across various regions of China. The sources of funding for guidance funds are more stable as compared with other LPs and guidance funds may take advantage of government resources to obtain quality investments. However, guidance funds generally only invest in venture capital funds focused on un-listed hi-tech enterprises, and will often set further requirements such as principal guarantees of fiscal capital and minimum amount of investments in local SMEs (e.g., 30% to 70% of fund size), which may impact the market-oriented operation of funds.

2. National Social Security Funds

In April 2008, the Ministry of Finance and the Ministry of Human Resources and Social Security issued a notice according to which national social security funds are for the first time explicitly permitted to invest in RMB Funds. Though they have abundant capital, due to policy restrictions, the investment channels for national social security funds are quite limited. These funds have mainly invested in industrial funds approved by the National Development and Reform Commission (“NDRC”) and equity investment funds filed with NDRC, subject to relevant requirements.⁴ According to the website of national social security funds, they have currently invested in eight industrial funds and equity investment funds.

3. Financial Assets: Trust Capital, Insurance Fund and Banking Capital

(a) Trust Capital

Trust companies may engage in equity investment with their own capital or fund under trust products, but in practice, they more often use the fund under trust products to make equity investment.⁵ As trust products are not qualified shareholders for listed companies as required by China Securities Regulatory Commission, trust companies now gradually turn to use the fund under trust products to make equity investment indirectly through RMB funds (rather than direct investment in portfolio companies).

(b) Insurance Fund

In September 2010, China Insurance Regulatory Commission issued the *Interim Measures for Equity Investments with Insurance Capital*, according to which insurance fund is for the first time permitted to be invested in RMB Funds, which may release hundreds of billions RMB of insurance fund. However, the measures set forth high requirements on fund management companies (e.g., registered capital not less than RMB100 million, at least three successful exits, and at least RMB3 billion under management) and there are few qualified management companies. In addition, insurance fund may not be invested in

⁴ Please note that NDRC has not issued the rules on requirements of equity investment enterprises to date, although it did accept filing applications from some private equity funds. As of the date hereof, there are about 22 equity investment management enterprises filed with NDRC. Note however that NDRC has recently suspended filings of equity investment funds.

⁵ In practice, where a trust company makes equity investments with its own capital, investments are generally made directly in financial institutions. The total equity investment amount made by a trust company with its own capital, either directly or indirectly through private equity investment trust plans, may not exceed 20% of its net assets as of the end of the previous year.

funds with high risks such as venture capital funds and the capital commitments of the invested funds shall not be less than RMB500 million.

(c) Banking Capital

It is explicitly prohibited by PRC law for commercial banks to directly engage in domestic equity investments. In practice, however, commercial banks may make equity investments through their offshore subsidiaries (mainly applicable to large scale commercial banks, e.g., Industrial and Commercial Bank of China, China Construction Bank and Bank of China) or through their private banking departments, which act as financial advisors or financial intermediaries and recommend RMB Funds to their wealthy clients. This financial services mode has reportedly been tried out by China Merchants Bank and China Minsheng Bank, among others.

4. Large Enterprises and High Net Worth Individuals

With the development of China's economy, there has emerged a group of large state-owned and private enterprises as well as wealthy individuals, who have abundant capital and strong deal resources. Recently, such large enterprises and wealthy individuals are becoming especially keen on investments in the increasingly booming and profitable RMB Funds. Compared with government guidance funds, national social security funds and financial institutions as mentioned above, they are subject to fewer restrictions when making equity investments and are an importance source of capital for RMB Funds.

5. FOFs

FOFs invest in different types of RMB Funds with capital raised from investors. FOFs are an important source of capital for equity investment funds in more established markets due to their sophistication and financial strength. In China, FOFs are underdeveloped, where many RMB Funds are concurrently FOFs and make investments in other RMB Funds. Currently, most FOFs in China are government guidance funds and industrial development funds.

It is noteworthy that, unlike in developed countries, equity investment funds are a relatively new thing in China. Pension funds, corporate annuity and university endowments, which are major LPs in developed countries, fail to become the main sources of capital for RMB Funds, and commercial banks are not permitted to directly invest in RMB Funds. With the improvement of legislation and maturity of practice, the sources of capital for RMB Funds will become more diversified.

IV. Location Selection: Incentive Policies and Competitive Advantages

In order to attract foreign investment, some local governments offered a variety of incentive policies to RMB Funds established in their respective administrative regions. These incentive policies and measures look generally similar, with some minor differences. Foreign investors may need to consider and weigh various factors according to specific circumstances and select an investment location that best suits their needs. For investors' reference purposes, we have prepared a brief summary below with respect to the incentive policies offered by several municipalities (*please refer to Appendix I for more details*):

1. Tax Incentives for Management Companies

According to the regulations of several local governments (such as Tianjin and Chongqing), foreign-invested equity investment management companies registered in such regions are entitled to the preferential policy of a two-year

exemption followed by a three-year 50% reduction on their enterprise income tax and business tax to be retained by the local government.

2. Rewards for Establishment

According to regulations of several local governments (such as Tianjin, Pudong New Area of Shanghai and Shenzhen), GPs of RMB Funds registered in such areas will be rewarded with one-time financial incentives ranging from RMB5 million to 15 million according to the scale of their registered capital (e.g., above RMB500 million) or paid-in capital (e.g., above RMB1 billion).

3. Advantages of Project Resources

Generally (though without express stipulations), local governments will give priority to introducing good portfolio projects to local equity investment management companies and to supporting IPOs of such projects. Accordingly, areas with good portfolio projects will often be more attractive to fund managers and investors.

4. Rewards for Investment Proceeds

According to regulations of several local governments (such as Tianjin, Pudong New Area of Shanghai and Shenzhen), when RMB Funds exit from portfolio companies in such areas, they will be rewarded with certain portion (ranging from 30% to 60%) of their investment proceeds (mainly their income tax to be retained by the local government).

5. Other Incentive Policies and Measures

(i) Housing Subsidies. According to regulations of most areas, RMB Funds registered in such areas will be provided with appropriate subsidies for their purchase or rental of housing. For instance, RMB Funds may be entitled to housing purchase subsidy amounting to RMB1,000 per square meter in one lump sum or rental subsidy equivalent to 30% of the rental for several consecutive years. Besides, some local governments may also encourage investors through exemption and reduction of deed tax or property tax payable by RMB Funds.

(ii) Rewards for Senior Executives. In order to attract talent, local governments will reward qualified senior executives with incentives such as housing purchase/rental subsidies, household allowances, or a partial return of income tax, as well as helping to find employment for their spouse and education for their children.

Please kindly note that local policies may change from time to time and some of them are even not recorded in official documents. Before making investment decisions, investors therefore need to consult in details with competent government authorities to confirm any specific incentives that they may obtain. Furthermore, in addition to the above-mentioned incentive policies and measures, qualified RMB Funds may also enjoy some other preferential policies and measures that are applicable to financial institutions.

* * *

China's RMB Funds market is an emerging market filled with opportunities and challenges. RMB Funds are playing an increasingly important role in China's private equity investment market. While RMB Funds are still at their initial development stage, it is hoped that with the perfection of legislation and maturity of

practice, various issues such as foreign exchange settlement, investments by RMB Funds and exit mechanism of RMB Funds will be addressed, and the fund-raising channels will be further widened. Thus, the future RMB Funds market is full of potentials.

Since current PRC laws and regulations governing RMB Funds still need to be improved and various local policies are subject to change and development from time to time, investors may need to communicate with competent government authorities before making investments, to confirm the specific incentives that may be obtained. This memorandum is for your general reference only and shall not be relied on as any formal PRC legal opinion with respect to any matter in any respect.

If you have any questions, please feel free to contact us at inquiry@hanyilaw.com.

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Appendix I: Comparison of Major Regulations of Several Municipalities (for reference purpose only)

		Tianjin	Beijing	Shanghai (Pudong New Area)	Shenzhen	Chongqing	
Tax Incentives	Partner Income Tax	Individual Income Tax	<ul style="list-style-type: none"> ➤ <u>GPs</u>: investment proceeds or equity transfer proceeds shall be taxed at 20%; other income shall be taxed at five-level progressive rates ranging from 5% to 35%. ➤ <u>LPs</u>: 20% fixed rate shall apply. 	<ul style="list-style-type: none"> ➤ <u>All partners</u>: 20% fixed rate shall apply. 	<ul style="list-style-type: none"> ➤ <u>GPs</u>: five-level progressive rates ranging from 5% to 35% shall apply. ➤ <u>LPs</u>: 20% fixed rate shall apply. 	<ul style="list-style-type: none"> ➤ <u>GPs</u>: five-level progressive rates ranging from 5% to 35% shall apply. ➤ <u>LPs</u>: 20% fixed rate shall apply. 	<ul style="list-style-type: none"> ➤ <u>GPs</u>: N/A ➤ <u>LPs</u>: 20% fixed rate shall apply.
			Enterprise Income Tax	<ul style="list-style-type: none"> ➤ 2 years exemption followed by 3 years 50% reduction of local portion of income tax from the year in which the management enterprise makes profit. 	<ul style="list-style-type: none"> ➤ Rewards will be given to a fund according to its contribution to the local district, subject to satisfaction of certain conditions. 	<ul style="list-style-type: none"> ➤ N/A 	<ul style="list-style-type: none"> ➤ Venture capital enterprises may enjoy enterprise income tax incentives provided by the state (i.e., a reduction from their taxable income of 70% of the total amount of investments).
	Business Tax	<ul style="list-style-type: none"> ➤ 2 years exemption followed by 3 years 50% reduction of local portion 		<ul style="list-style-type: none"> ➤ N/A 	<ul style="list-style-type: none"> ➤ N/A 	<ul style="list-style-type: none"> ➤ N/A 	<ul style="list-style-type: none"> ➤ 2 years exemption followed by 3 years 50% reduction from

	Tianjin	Beijing	Shanghai (Pudong New Area)	Shenzhen	Chongqing
	of business tax from the date on which business tax is first paid.				the year in which business starts.
Rewards for Establishment	➤ N/A	➤ Subsidy of RMB10 million when its registered capital is above RMB1 billion, or subsidy of RMB8 million when its registered capital ranges from 0.5 to 1 billion (with paid-in capital of at least RMB0.5 billion).	➤ Corporation: Subsidy of RMB5 million when its registered capital is above RMB0.5 billion, or subsidy of RMB10 million when its registered capital is above RMB1.5 billion, or subsidy of RMB15 million when its registered capital is above RMB3 billion. ➤ Partnership: Subsidy of RMB5 million when its paid-in capital for the year is above RMB1 billion, or subsidy of RMB10 million when its paid-in capital is above RMB3 billion, or subsidy of RMB15 million when its paid-in capital is above RMB5 billion.	➤ Corporation: Subsidy of RMB5 million when its registered capital is above RMB0.5 billion, or subsidy of RMB10 million when its registered capital is above RMB1.5 billion, or subsidy of RMB15 million when its registered capital is above RMB3 billion. ➤ Partnership: Subsidy of RMB5 million when its paid-in capital for the year is above RMB1 billion, or subsidy of RMB10 million when its paid-in capital is above RMB3 billion, or subsidy of RMB15 million when its paid-in capital is above RMB5 billion.	➤ N/A
Project Resources	➤ Recommendation of good projects periodically. ➤ Portfolio projects will be on the priority list for IPO candidates.	➤ Portfolio projects will be on the priority list for IPO candidates. ➤ Assist with transfer of equity in hi-tech enterprises.	➤ N/A	➤ N/A	➤ N/A

	Tianjin	Beijing	Shanghai (Pudong New Area)	Shenzhen	Chongqing
Rewards for Investment Proceeds	<ul style="list-style-type: none"> Local financial department will reward RMB funds investing in local projects with 60% of the local part of income tax formed through its exit from portfolio projects or gained from investment proceeds. 	N/A	<ul style="list-style-type: none"> Local financial department will reward RMB funds investing in encouraged projects in Pudong New Area with 50% of local part of financial income gained from investment proceeds. 	<ul style="list-style-type: none"> Local financial department will reward RMB funds investing in local projects with 30% of local part of financial income formed through its exit from portfolio projects, provided that the reward should be not more than RMB3 million at one time. 	N/A
Subsidies for Housing Purchase or Rental	<ul style="list-style-type: none"> <u>Housing subsidy</u>: (i) no deed tax, and property tax is exempted for first 3 years; (ii) one-time subsidy of RMB1,000/m² (up to RMB5 million). <u>Rent subsidy</u>: 30% of the rent per year (not higher than market guidance price) for first 3 years (the subsidized area should not be more than 1000 m², and the total subsidy amount should not be more than RMB1 million). 	<ul style="list-style-type: none"> <u>Housing subsidy</u>: one-time subsidy of RMB 1,000/m². <u>Rent subsidy</u>: 50% of the rent for the first year, 30% for the second year, and 10% for the third year (trial). 	<ul style="list-style-type: none"> <u>Housing subsidy</u>: 1.5% of the housing purchase price. <u>Rent subsidy</u>: RMB500/m²/year. <p>*limited to Lujiazui area and Zhangjiang functional area.</p>	<ul style="list-style-type: none"> <u>Housing subsidy</u>: amount to 1.5% of the housing purchase price (up to RMB5 million). <u>Rent subsidy</u>: 30% of the rent (market guidance price) per year for first 3 years (the total subsidy amount should not be more than RMB1 million). 	<ul style="list-style-type: none"> <u>Housing subsidy</u>: (i) one-time subsidy of RMB1,000/m²; (ii) no deed tax; property tax is exempted for first 3 years. <u>Rent subsidy</u>: 30% of the rent for first 3 years. <p>*limited to central business district, financial core area and northern new district.</p>
Rewards for Senior Executives	<ul style="list-style-type: none"> Senior executives that have served in management companies 	<ul style="list-style-type: none"> Senior executives that have served for qualified 	<ul style="list-style-type: none"> (Vice) chairman and (deputy) general manager of funds (as a corporation) and 	<ul style="list-style-type: none"> Qualified senior managers, after recognition by local human resources and social 	<ul style="list-style-type: none"> Senior executives of equity investment

	Tianjin	Beijing	Shanghai (Pudong New Area)	Shenzhen	Chongqing
	<p>for over 2 years will be compensated for purchasing the first set of housing and one car as well as participating in professional training in local area with the local part of their individual income tax, provided that the accumulative amount should not be more than the amount actually paid by the senior executives, and the reward should not exceed 5 years.</p>	<p>management companies for over 2 years will be compensated for purchasing one set of housing and one car, as well as participating in professional training in local area with 80% of the local part of their individual income tax (in principle, the compensation amount each year should not be more than RMB0.3 million).</p>	<p>management companies will be rewarded with 40% of the local part of their individual income tax; and investment managers/project managers will be rewarded with 20% of the local part of their individual income tax.</p> <p>➤ When registered capital of a fund (as a corporation) is above RMB0.5 billion or total capital under management of a management company is above RMB1 billion, its (vice) chairman and (deputy) general manager will be rewarded with one-time housing purchase/rent of RMB0.2 million.</p>	<p>security department, may enjoy relevant preferential policies on talent introduction, spouse employment, children education and healthcare.</p>	<p>enterprises will be rewarded with 100% of the local part of their individual income tax for the first 3 years and be compensated for continuing education and housing purchase for self-use with 50% of the local part of the their individual income tax for the 4th and 5th years.</p>

关于外商投资人民币基金的几个热点问题

随着《合伙企业法》的修订及创业板的开启，中国私募股权投资行业发展迅速，人民币基金募、投活跃。2009年11月，国务院发布了《外国企业或者个人在中国境内设立合伙企业管理办法》（“《管理办法》”），允许外国投资者在境内投资设立合伙企业，将外商投资人民币基金推向了一个高潮。众多外国投资者，包括一些在国内外享有盛誉的私募股权和风险投资机构，纷纷设立或者计划设立人民币基金。本备忘录根据中国最新立法及实践，选取外商投资人民币基金的几个热点问题进行分析和探讨，希望对拟进入人民币基金市场的投资者能够有所帮助。

一. 外商投资人民币基金的主要形式和立法框架

根据组织形式和法律依据的不同，外商投资人民币基金可以通过公司制、合作制、信托制和合伙制等多种形式设立。其中，随着新的《合伙企业法》实施和《管理办法》的颁布，有限合伙制逐渐成为外商投资人民币基金的首要选择。¹这不仅因为合伙制在税收方面具有较大优势（即合伙企业本身不缴纳所得税，而是由其合伙人直接缴纳相关所得税），同时也因为在有限合伙企业中，普通合伙人和有限合伙人的权利义务可以更加自由地约定，更适合私募股权和风险投资基金的运营。

有限合伙制人民币基金的法律依据包括全国性立法和各地地方立法。全国性立法包括《合伙企业法》、《管理办法》及国家工商总局发布的相关细则等一般性规定，目前还没有与人民币基金相关的专项立法。实践中，人民币基金在很大程度上依据地方政策设立和运营。目前，天津、北京、上海、重庆和深圳等地方政府均已经出台相关政策，吸引投资者到该等地区设立人民币基金和管理机构。

二. 有限合伙制外商投资人民币基金的结构剖析

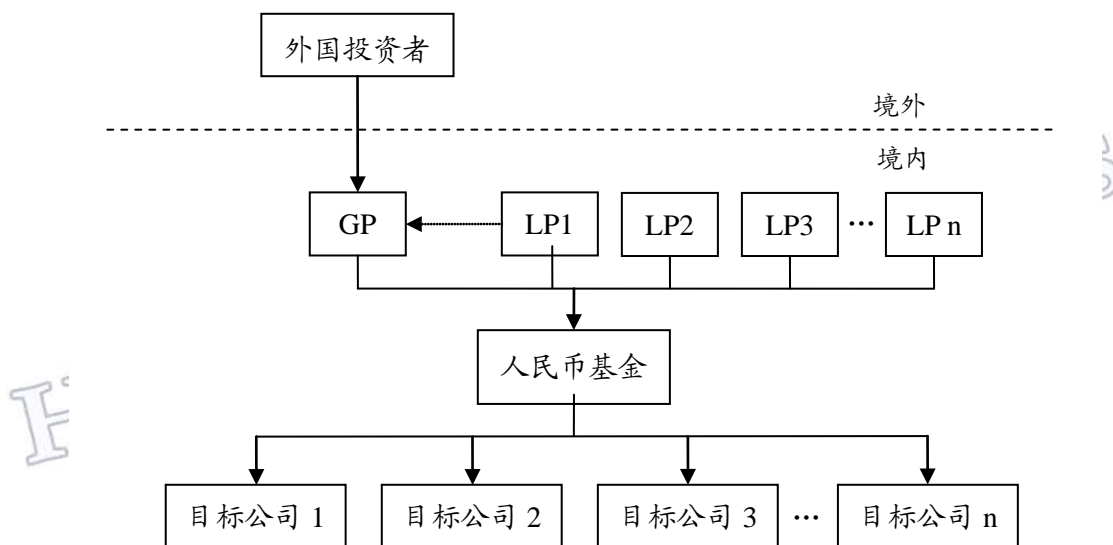
根据《管理办法》，外国投资者可以直接投资设立人民币基金。此外，外国投资者还可以通过在境内设立的外商投资企业（一般作为人民币基金的管理人及普通合伙人）间接参与人民币基金的设立和管理。由于中国目前对于外国投资者直接参与设立的人民币基金在对外投资和外汇方面的政策并不明确，间接参与模式成为目前外商投资人民币基金较普遍采纳的模式。

1. 间接设立有限合伙人民币基金（“间接模式”）

在间接模式下，外国投资者可以在中国境内独资或者与境内机构合资设立一家外商投资企业，通常情况下，该企业将作为人民币基金的普通合伙人（即 General Partner 或 GP）及管理人，与境内投资人（一般作为有限合伙人，即

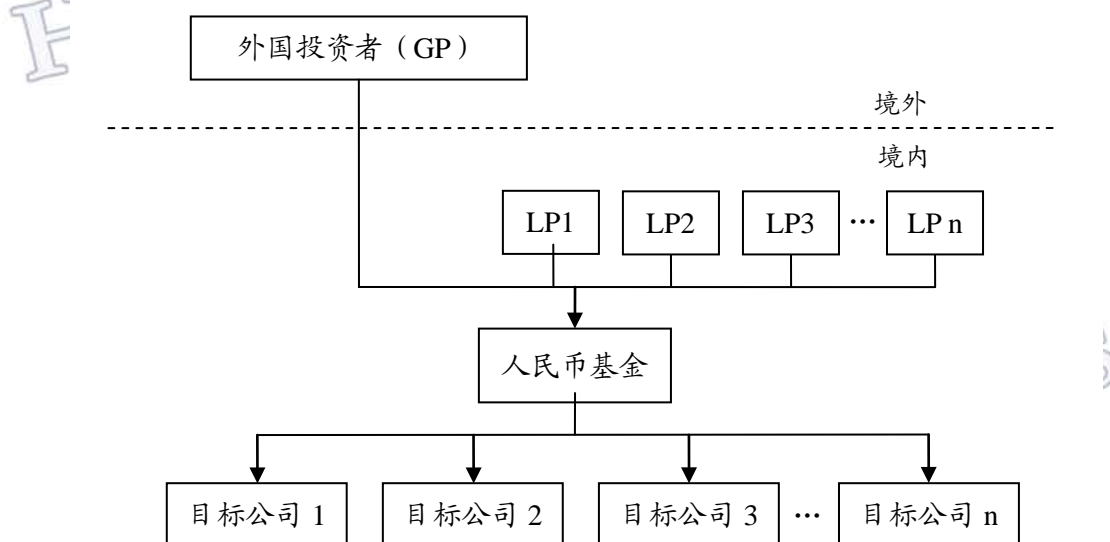
¹ 公司制和合作制曾是外商投资创业投资企业（Foreign Invested Venture Capital Investment Enterprise 或 FIVCIE）的主要形式。本所在 2008 年中旬曾撰写备忘录对 FIVCIE、平行基金等模式的人民币基金进行专门的介绍和分析，在此不作赘述。本备忘录第二部分将着重介绍有限合伙形式的人民币基金。

Limited Partner 或 LP) 一起, 设立有限合伙形式的人民币基金 (该模式的结构示意图如下)。该种模式是目前外商投资人民币基金所普遍采纳的模式。



2. 直接设立有限合伙人民币基金 (“直接模式”)

除了间接模式, 外国投资者也可以直接 (而不通过外商投资企业) 与境内投资人共同投资设立境内有限合伙人民币基金 (该模式的结构示意图如下)。该种模式随着《管理办法》的颁布才被明确允许, 但在对外投资方面可能受到更多的限制 (详见下文“外商投资人民币基金面临的主要问题”中的分析), 目前实际按照该模式设立并运行的人民币基金还很少见。



3. 有限合伙制人民币基金的设立条件和程序

《合伙企业法》并未对设立合伙企业设定很高的门槛。但是, 鉴于人民币基金的特殊性, 各地政府一般会对基金和管理机构的出资额/注册资本、首期出资、管理机构的经验和资质等提出要求, 该等要求根据设立地的规定和实践

可能不同。近期设立的人民币基金中，出资额/募集资金规模一般在人民币亿元以上，管理机构的注册资本则一般在人民币百万元以上。

一般而言，外国投资者通过直接或者间接模式设立有限合伙人民币基金，均不涉及商务主管部门的前置审批，而仅需直接向相关工商部门办理设立登记。但实践中，在向工商部门提交设立基金的申请前，投资者一般需首先与当地的金融、经济等主管部门协商，听取其意见并确定可能取得的优惠措施。另外，工商登记部门可能在审查登记材料阶段，向金融、商务、财政、税务、外汇等部门征求意见，并最终决定是否准予登记。

4. 外商投资人民币基金面临的主要问题

尽管近年来人民币基金获得了令人瞩目的发展，但这种发展总体来说还是探索性的。立法层级低、地区化甚至互相冲突等问题在很大程度上束缚着人民币基金的发展。目前，外商投资人民币基金所面临的主要问题包括：

(a) 外汇问题

根据国家外汇管理局综合司于 2008 年 8 月发布的“汇综发[2008]142 号”文件，外商投资企业资本金结汇所得人民币资金，应当在经营范围中使用，除另有规定外，不得用于境内股权投资。这意味着，一般情况下，作为 GP 的外商投资企业只能以其自有人民币资金（而无法通过外国投资者投入的外汇资本金结汇所得人民币）向人民币基金投资。实践中，人民币基金的资金将主要来源于境内投资人。

另外，在直接模式下，尽管人民币基金的经营经营范围包括“股权投资”，但这是否意味着该模式下的人民币基金可以不受上述 142 号文的约束，其资本金是否可以结汇成人民币用于境内股权投资，目前尚不明确。有人预测，外汇管理部门可能参考 FIVCIE 资本金结汇模式（即 FIVCIE 的资本金将被直接汇入被投资企业（而不是 FIVCIE）的资本项目专用外汇账户，经核准后结汇成人民币）来解决外商投资人民币基金的结汇问题。但实践中通过直接模式设立并已经实际运作的人民币基金还十分少见，因此直接模式下的外汇结汇问题将如何解决尚存在较大的不确定性。

(b) 对外投资政策限制

外国投资者在人民币基金中的出资比例一般比较低（一般在 1%-5% 之间），但是，作为普通合伙人的外国投资者却往往是基金的实际控制人，该外商投资人民币基金对外投资时，是否需符合外商投资产业政策是另一个尚待明确的重要法律与实践问题。

据我们的了解，实践中部分审批部门倾向于认为，间接模式下的外商投资人民币基金对外投资一般不受外商投资产业政策限制，而直接模式下

基金的对外投资则应依照国家有关外商投资的法律法规，遵守《外商投资产业指导目录》对外商投资的相关限制。但上述意见并没有明文依据，也很少看到与此相关的案例，因此实践中将如何把握尚待进一步观察。

(c) 退出机制

相对于美元基金，人民币基金的主要退出渠道是境内上市（包括创业板、中小板和主板）或股权/股份转让，很难通过境外股市退出。尽管目前中国股市（尤其是创业板）的市盈率普遍比境外股市高，但境内上市要求高、耗时长、不确定因素也较多也成为人民币基金退出的一个相对不利因素。

5. 外商投资人民币基金制度突破：QFLP 制度尝试

受限于 142 号文等规定的限制，目前外商主要以 GP 的身份进行人民币基金投资。今年上半年，国内媒体相继报道上海、北京和天津等地已分别向国家金融监管部门提交申请，拟推行合格境外有限合伙人（Qualified Limited Partners 或 QFLP）制度，致力于解决外商投资人民币基金的结汇和对外投资限制问题。据报道，上海版 QFLP 方案已于近期获国家金融监管部门原则性批准。

QFLP 是类似于 QFII（合格境外机构投资者或 Qualified Foreign Institutional Investor）的一种制度。在该制度下，境外 LP 和 GP 在外汇管理部门核准的额度内可以将外币结汇成人民币向境内基金投资（以上海为例，该额度不得超过 1 亿美元或基金资本总额的 50%，且普通合伙人的结汇总额不超过基金资本总额的 5%）。QFLP 制度一旦获准实施，外国投资者将可以作为 GP 或 LP 参与到人民币基金中，目前外商投资人民币基金面临的结汇问题将迎刃而解。另外，上海版 QFLP 方案规定，如果外国投资者仅作为人民币基金的 GP，基金所有的 LP 均来自于境内，则该人民币基金对外投资时将视为内资人民币基金，不受外商投资产业政策限制。

三. 主要募集资金来源

在人民币基金蓬勃发展的背景下，其募资渠道也逐渐走向多元化。GP 可以直接向适格的境内 LP 直接募集资金，也可以向基金中的基金（即 Fund of Funds 或者 FOF）募集，或通过第三方理财机构、商业银行私人银行部间接向 LP 募集。目前，我国法律允许且比较常见的资金募集渠道主要包括：

1. 政府引导基金

政府引导基金是由政府设立并运作的政策性基金。随着 2008 年 10 月《关于创业投资引导基金规范设立与运作的指导意见》的出台，政府引导基金在各地遍地开花。与其他 LP 相比，引导基金的资金来源稳定，并可利用政府资源协助获得优质投资项目。但是，引导资金一般仅投资于以未上市高新科技

企业为投资目标的创投企业，并且他们在向基金投资时往往提出财政出资保本、向本地中小企业投资底线（比如基金规模的 30% 至 70%）等要求，从而可能影响基金的市场化运作。

2. 全国社保基金

2008 年 4 月，财政部、人保部下文首次明确允许全国社保基金向人民币基金进行投资。全国社保基金拥有充裕的资本，但因政策限制，其投资对象较窄，主要是经发改委批准的产业基金和符合发改委要求并经其备案的股权投资基金。²全国社保基金网站显示，目前获得其投资的产业基金和股权投资基金共计 8 家。

3. 金融资产：信托、保险和银行

(a) 信托资金

信托公司可以以其固有财产或者信托计划财产从事股权投资业务。实践中向人民币基金投资的一般是信托计划资产。³信托计划不符合证监会对上市公司股东的相关要求，因此其逐步开始尝试通过向人民币基金投资（而不是直接向目标项目投资）的方式间接开展股权投资业务，试图绕开这种限制。

(b) 保险资金

2010 年 9 月，保监会公布《保险资金投资股权暂行办法》，首次允许保险资金向人民币基金投资，可能释放上千亿保险资金。但是，办法对基金管理机构提出了较高的要求（如注册资本不低于 1 亿元、已成功退出至少 3 个项目，管理资产余额不低于 30 亿等），目前市场上满足条件的管理机构还非常少。在投资方向上，保险资金不得投资于从事创业投资或风险投资的高风险基金，且被投资基金的募集或认缴资金规模不得低于 5 亿元。

(c) 银行资金

中国法律明确禁止商业银行直接在境内从事股权投资业务。但实践中，商业银行可能通过在境外设立的子公司（主要是大型商业银行，比如工商银行、建设银行、中国银行等）从事股权投资业务，或者通过其私人银行部，以财务顾问或金融中介的角色，向其拥有高资产的客户推荐人民币基金，招商银行、民生银行等银行据报道已经开始试点推行这种金融理财模式。

² 值得注意的是，发改委关于股权投资基金备案的具体要求以及监管规定至今尚未出台，并且发改委近期暂停了对股权投资基金的备案。截至本备忘录出具之日，获得发改委备案的股权投资管理企业计有约 22 家。

³ 实践中，目前信托公司以固有财产进行股权投资的，主要以直接投资方式进行，投资方向主要是金融类机构。如果以固有财产投资的，固有财产直接从事和通过参与私人股权投资信托计划间接投资股权投资业务的投资总额不得超过信托公司上年末净资产的 20%。

4. 大型企业和高净值个人投资者

随着中国经济的发展，国内已经逐渐成长起一批大型国有、私营企业以及富裕个人，他们拥有充足的资金和丰富的项目资源。近年来，随着人民币基金的持续升温，这些大型企业和富裕阶层对投资于人民币基金的热情大增。相对于前述政府引导基金、全国社保基金、金融机构等，他们对外开展股权投资业务所受的限制较少，是外资人民币基金的重要资金来源。

5. 通过 FOF 募集

FOF 从最终投资人处获取资金，然后向不同类型的人民币基金投资。鉴于 FOF 相对比较专业，且财力丰厚，是成熟市场股权投资基金的重要来源。在中国，FOF 的发展还不成熟，很多人民币基金同时也是 FOF，向其他的人民币基金投资。目前中国市场上常见的 FOF 是政府引导基金和产业发展基金。

值得注意的是，相对于发达国家，股权投资基金在中国还是新鲜事物，发达国家一些常见的 LP，如养老基金、企业年金和大学捐赠基金等，还未能成为人民币基金的主要资金来源，商业银行也不能直接投资于人民币基金。随着相关立法的完善和实践的成熟，人民币基金的募集渠道应会被进一步拓宽。

四. 设立地点选择：各地优惠政策和竞争优势

为了招商引资，各地政府会向在该地区设立的人民币基金提供各种政策优惠。总体上，各地优惠措施的种类比较接近，但也存在着一定差异。外国投资者需根据具体情况，比较、权衡各种因素，选择最佳投资地点。下文中，我们对几个主要城市（天津、北京、上海、重庆和深圳）的地方优惠政策进行了初步总结和归纳，供投资人参考（具体优惠措施请见附件一）：

1. 管理公司税收优惠

根据部分地方（如天津、重庆）规定，如果外国投资者在该等地方设立股权投资管理公司，可按照“两免三减半”减免管理公司所需缴纳的企业所得税和营业税之地方所得部分。

2. 开办奖励

部分地方（比如天津、上海浦东新区、深圳等）规定，在该等地区设立人民币基金的，可以根据人民币基金的注册资本或实际募集资金（比如注册资本 5 亿元或者实募资金 10 亿元以上），给予普通合伙人 500 万元至 1500 万元不等的一次性财政奖励。

3. 项目资源优势

一般情况下(即使未明文规定),各地政府会优先将当地的优秀项目推荐给当地股权投资管理机构,并优先扶持该等项目上市融资。因此,拥有优秀项目资源的地区往往对基金经理和投资人更具吸引力。

4. 投资收益奖励

根据部分地方(如天津、上海浦东新区和深圳等)规定,人民币基金投资于该等地区相关企业,其退出时所获得的投资收益之地方财力(主要是所得税地方分享部分),将按照一定比例(比如30%、50%甚至60%)奖励给该基金。

5. 其他优惠政策和措施

(1) 房屋补贴: 大部分地方规定,在该等地区设立人民币基金的,地方财政将适当提供购房或租房补贴,比如以每平方米1,000元左右的标准提供一次性购房补贴,或按租金30%连续若干年提供租房补贴。另外,部分地方还可以通过减免契税、房产税的方式鼓励当地人民币基金。

(2) 对高管的奖励: 为了吸引人才,各地对于符合相关条件的基金高管,可能以购房/租房补贴、安家费,或者以个人所得税部分返还等方式提供奖励,另外也会在配偶就业、子女教育方面提供帮助。

需要注意的是,地方政策的变动性较大,且部分政策并未书面化,投资人需在投资之前与主管政府部门详细商谈,确认可能获得的具体优惠措施。另外,除上述优惠政策和措施外,符合相关条件的人民币基金,还可能享受一些金融机构所能享受的优惠政策和措施。

* * *

中国的人民币基金市场是一个非常年轻的市场,充满着机会和挑战。在以中国市场为投资目标的私募股权行业中,人民币基金的重要地位逐步凸显。尽管人民币基金的发展还处于初期,但随着立法的完善和实践的成熟,诸如外汇、对外投资、退出机制等现阶段困扰人民币基金发展的诸多问题均应会被逐步解决,资金募集渠道也应会被进一步拓宽。未来人民币基金市场拥有巨大的发展潜力。

需提醒阁下注意的是,中国有关人民币基金的相关法律法规并不健全,各地政策也不尽相同且在不断发展变化,投资人在投资之前,需根据具体情况,与相关政府部门充分沟通和协商,确定相关法律问题和政策优惠。本备忘录仅供阁下用作一般性参考,并不能视为我们就任何具体事项出具的任何意义上的正式中国法律意见。

如阁下对于本备忘录述及之内容有任何疑问,敬请随时与敝所联系(inquiry@hanyilaw.com)。

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2010年12月15日

附件一：部分地区现行主要政策比较（仅供参考）

			天津	北京	上海（浦东新区）	深圳	重庆
税收优惠	合伙人所得税	个人	<ul style="list-style-type: none"> ▶ <u>普通合伙人</u>: 投资或股权转让收益, 适用 20% 税率; 其他收益, 适用 5%-35% 的五级超额累进税率 ▶ <u>有限合伙人</u>: 20% 固定税率 	<ul style="list-style-type: none"> ▶ <u>所有合伙人</u>: 适用 20% 固定税率 	<ul style="list-style-type: none"> ▶ <u>普通合伙人</u>: 适用 5%-35% 的五级超额累进税率 ▶ <u>有限合伙人</u>: 适用 20% 固定税率 	<ul style="list-style-type: none"> ▶ <u>普通合伙人</u>: 适用 5%-35% 的五级超额累进税率 ▶ <u>有限合伙人</u>: 适用 20% 固定税率 	<ul style="list-style-type: none"> ▶ <u>普通合伙人</u>: 未提及 ▶ <u>有限合伙人</u>: 适用 20% 固定税率
		企业	<ul style="list-style-type: none"> ▶ 自管理企业获利年度起实施“二免三减半”（地方留存部分） 	<ul style="list-style-type: none"> ▶ 所设基金满足一定条件后, 根据该企业对区县所做贡献给予奖励 	<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 创投类企业享受国家有关企业所得税优惠（即按投资额的 70% 抵扣企业的应纳税所得额） 	<ul style="list-style-type: none"> ▶ 自管理企业获利年度起实施“二免三减半”（地方留存部分） ▶ 符合西部大开发政策的, 按规定执行 15% 的税率
	营业税	<ul style="list-style-type: none"> ▶ 自缴纳第一笔营业税之日起, 就地方留存部分, 实施“二免三减半” 	<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 自开业年度起, 实施“二免三减半” 	
开办奖励		<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 注册资本 10 亿元以上补助 1000 万元; 5 亿-10 亿补助 800 万元（累计实收资本应在 5 亿元以上） 	<ul style="list-style-type: none"> ▶ 公司制: 注册资本 5 亿元以上奖励 500 万元; 15 亿元以上奖励 1000 万元; 30 亿元以上奖励 1500 万元 ▶ 合伙制: 当年实募资金 10 亿元以上奖励 500 万, 30 亿元以上奖励 1000 万, 50 亿元以上奖励 1500 万 	<ul style="list-style-type: none"> ▶ 公司制: 注册资本 5 亿元以上奖励 500 万元, 15 亿元以上奖励 1000 万元, 30 亿元以上奖励 1500 万元 ▶ 合伙制: 当年实募资金 10 亿元以上奖励 500 万元, 30 亿元以上奖励 1000 万元, 50 亿元以上奖励 1500 万元 	<ul style="list-style-type: none"> ▶ 未提及 	
项目资源		<ul style="list-style-type: none"> ▶ 定期推荐优秀项目 ▶ 所投资项目优先列入上市后后备企业培育计划 	<ul style="list-style-type: none"> ▶ 所投资项目优先列入上市后后备企业培育计划 ▶ 支持所投资高新技术企业在中关村代办股份转让系统挂 	<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 未提及 	<ul style="list-style-type: none"> ▶ 未提及 	

	天津	北京	上海（浦东新区）	深圳	重庆
投资收益奖励	<ul style="list-style-type: none"> 投资于本市项目，由财政部门按项目退出或获得收益后形成的所得税地方分享部分的60%给予奖励 	<p>牌</p> <ul style="list-style-type: none"> 未提及 	<ul style="list-style-type: none"> 投资于新区的鼓励项目，所获投资收益形成的新区地方财力，按50%标准奖励该股权投资企业 	<ul style="list-style-type: none"> 投资于本市项目，按其退出后形成地方财力的30%给予一次性奖励，但单笔奖励最高不超过300万元 	<ul style="list-style-type: none"> 未提及
购买/租赁自用办公房相关补贴	<ul style="list-style-type: none"> 购房补贴：(i)免征契税，免房产税三年；(ii)按1,000元/m²一次性补贴（最高500万元） 租房补贴：三年内按租金（不高于租金市场指导价）30%/年（补贴面积不超过1000平方米，补贴总额不超过100万元） 	<ul style="list-style-type: none"> 购房补贴：按1000元/m²一次性补贴； 租房补贴：第一年优惠50%，第二年优惠30%，第三年优惠10%（试点） 	<ul style="list-style-type: none"> 购房补贴：按购房房价给予1.5%的补贴； 租房补贴：500元/平方米/年 <p>*限于在陆家嘴和张江功能区</p>	<ul style="list-style-type: none"> 购房补贴：按购房房价给予1.5%的补贴（最高500万元）； 租房补贴：三年内按租金市场指导价30%/年补贴（最高100万元） 	<ul style="list-style-type: none"> 购房补贴：(i)按1000元/m²一次性补贴；(ii)纳税确有困难的，免征契税，免房产税三年 租房补贴：三年内按租金30%/年补贴 <p>*限于中央商务区、金融核心区和北部新区</p>
对高管的奖励	<ul style="list-style-type: none"> 对在管理企业任职2年以上的高管人员，以其缴纳的个人所得税地方留存部分补偿其在本市第一次购买商品、汽车或参加专业培训，累计最高限额为购房、购车或参加专业培训实际支付的金额，奖励期限不超过五年 	<ul style="list-style-type: none"> 在符合条件的管理企业任职2年以上的高管人员，按其上一年度所缴个人所得税地方留成部分80%的标准予以奖励（每年原则上不超过30万），用于其在本市购买商品一套、汽车一辆和参加专业领域培训 	<ul style="list-style-type: none"> 担任公司制基金和管理企业（副）董事长、（副）总经理的，按其当年个人工薪所得形成全部财力的40%补贴；担任投资经理/项目经理的，按其当年个人工薪所得形成全部财力的20%补贴 公司制基金注册资本5亿元或管理企业管理资本10亿元以上的，对其（副）董事长、（副）总经理一次性住房/租房补贴20万元 	<ul style="list-style-type: none"> 符合相关条件的高级管理人员，经市人力资源保障部门认定，可享受关于人才引进、人才奖励、配偶就业、子女教育、医疗保障等方面的相关政策 	<ul style="list-style-type: none"> 股权投资类企业高级管理人员，第一至三年缴纳的个人工薪收入所得税地方留成部分由财政部门按年度给予全额奖励，第四至五年按年度给予地方留成部分50%奖励，用于鼓励和支持其深造培训、购买自用住房等