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Memorandum to: Our Clients and Friends

Re: PRC Regulatory Updates on Delegation of FIE Approval Authorities

The simplification of approval procedures and the delegation of approval authority from central approval offices to their local counterparts are two key aspects of China's recent reform of its foreign investment regulatory system. In 2008 and 2009 in particular, many foreign invested projects that were formerly subject to the exclusive administration of the central Ministry of Commerce ("MOFCOM") have been generally delegated or relegated to its local counterparts. In early 2010, the State Council has promulgated the *Several Opinions on Further Improving the Work of Utilizing Foreign Investment (Guo Fa [2010] No. 9, "Circular 9")*, lifting the total investment threshold for foreign-invested projects that require central MOFCOM's approval from USD100 million to USD300 million for projects that fall under the "encouraged" and "permitted" categories in the *Industrial Category Guiding Foreign Investment* (the "Industrial Category"), and further requiring the central government authorities to delegate their powers of approval to their local counterparts. Such efforts were all made to streamline the foreign investment regulatory system and to transform the main responsibilities of central government authorities from approving and supervising specific foreign investment activities to playing more macroscopic roles such as policy-making, general supervision, among others.

The primary administrative authorities for foreign invested projects are MOFCOM and its local counterparts ("MOC offices"). In addition, certain foreign invested projects (if not all) that involve fixed assets investment or may potentially affect the overall national economic development plan are also subject to approval by the National Development and Reform Commission ("NDRC") or its local counterparts ("NDRC offices"). If a project falls under certain special industries, approvals from supervisory authorities governing such industries may also be required. To make this memorandum more focused however, we will only touch on the regulatory updates and changes with respect to the delegation of approval authority of both MOC and NDRC offices over foreign investment projects, based on the latest development of PRC laws and regulations and our relevant practical experience, for general reference purposes only.

I MOC Offices' Approval Authorities

MOC offices are the primary administrative authorities responsible for foreign invested projects. Under the previous approval system, central MOFCOM retained large amounts of approval power over foreign invested projects (including, among others, projects falling under the "encouraged" or "permitted"

category under the Industrial Category with the total investment threshold equal to or higher than USD100 million, or projects under the “restricted” category with total investment threshold equal to or higher than USD50 million, and other special types of projects such as foreign invested companies limited by shares, investment companies, venture capital companies or management companies), while local MOC office only had approval authority over foreign invested projects with investment amounts less than the abovementioned thresholds. In recent years however, central MOFCOM has delegated much of its approval authority. Not only has the total investment threshold for “encouraged” and “permitted” foreign invested projects been significantly increased, but also approval authority over foreign invested projects that was once exclusively held and administered by central MOFCOM has been delegated to local MOC offices to some extent.

1. General Rules

(a) Establishment of Foreign Invested Projects

Generally speaking, the total investment threshold for the “encouraged” or “permitted” foreign invested projects under the Industrial Catalogue, requiring central MOFCOM’s approval has been increased from USD100 million up to USD300 million, while the total investment threshold for projects in the “restricted” category remains unchanged (*i.e.*, USD50 million). In other words, foreign invested projects with total investment amounts less than the aforesaid new thresholds are now subject to the approval of local MOC offices.

(b) Subsequent Changes for Foreign Invested Projects

Under the previous approval regime, generally speaking, all subsequent changes to a foreign invested project were to be reviewed and examined by the MOC office originally in charge of approving the establishment of such projects. From 2007 onward however, approvals of immaterial changes of foreign invested projects originally approved by central MOFCOM have been gradually delegated to local MOC offices (*note that in practice such approvals may still need to be filed with MOFCOM for record*). In principle, MOFCOM is retaining their approval powers on the following matters:

- Capital Increase over Threshold. If a foreign invested project intends to increase its investment amount by USD300 million or higher (*in case the project falls in the “encouraged” or “permitted” category*), or by USD50 million or higher (*in the case that the project falls in the “restricted” category*), such capital increase will require MOFCOM’s approval, regardless of the original approval authority for the establishment of the project.
- Substantive Changes for FIEs Originally Approved by Central MOFCOM. According to the *Circular on Issues Relevant to Delegation of the Examination and Approval Authority over Foreign Investments to Lower Levels (Shang Zi Fa (2010) No. 209, “Circular 209”)*, currently central MOFCOM is primarily responsible for the approval of capital increases of FIE with incremental amounts of the total investment equal to or higher than the above-mentioned approval thresholds or other changes to FIEs which require central MOFCOM’s approval as specifically provided under applicable laws and regulations. In other words, except for the aforesaid changes of an FIE, all other subsequent changes of an

FIE will only be subject to approval by the competent local MOC office. In practice, however, with respect to the “material changes” of FIEs (including among others, equity transfer or change of business scopes), the establishment of which was originally approved by central MOFCOM, some local MOC offices may submit the requests to central MOFCOM’s approval or informally seek central MOFCOM’s opinion before they issue approvals for such changes, as the description of “applicable laws and regulation” under Circular 209 lacks definite scope or clarification and the allocation of approval authority over FIE projects between central government authorities and their respective local counterparts are mainly regulated by rules and regulations promulgated by different authorities under the State Council, some of which are inconsistent or even conflict with each other.

2. Special Approval Rules for Certain FIE Projects

(a) FIEs in the “Encouraged” Category Without Need of Comprehensive National Balancing

MOFCOM has delegated its approval and administrative authority over the establishment and changes of all FIEs in the “encouraged” category (*including those beyond the USD300 million threshold*) to local MOC offices, provided that no “comprehensive national balancing” is required for such FIEs. Thus the establishment and subsequent changes of such FIEs will not be subject to such USD300 million threshold and shall all be subject to the approval by local MOC offices.

Please note however, as there is not a definitive scope or definition of foreign invested project requiring national comprehensive balancing, either in law or in practice,¹ it is suggested that foreign investors should consult competent MOC office(s) to discover the proper approval authority if the total investment amount of a proposed “encouraged” foreign invested project is beyond the USD300 million threshold.

(b) FIEs in Service Industries

Along with China’s opening of its service market to foreign investors in the wake of its entrance into the World Trade Organization, approval authority for foreign invested projects in the service sectors has in recent years been gradually delegated from central MOFCOM to its local counterparts. Based on the recently promulgated Circular 209, the establishment and subsequent changes (*including capital increase above the relevant threshold*) of all FIEs in service industries will only be subject to approval by local MOC offices, unless otherwise provided by applicable PRC laws and regulations. As a consequence, among the more-than-forty industries in the service sector that in previous years were exclusively administered by central MOFCOM, around thirty service industries are now delegated to and approved by local MOC offices. Central MOFCOM will only retain approval power over FIEs in a few specific

¹ In 1999, the State Planning Commission (*i.e., the predecessor of NDRC*) and the State Economic and Trade Commission (*i.e., the predecessor of MOFCOM*) issued a circular to set out a brief list of projects requiring comprehensive national balancing (*e.g., infrastructure projects, aeronautical and astronautical projects or mining projects that are of importance to the nation’s economy and the people’s livelihood and the distribution of productive forces*). However, these policies seem to have not been strictly carried out in practice anymore.

service industries such as the financial, telecommunication and direct sales industries, among others.

Note however, that provisions in Circular 209 with respect to the approval authority over foreign invested projects in service industries are too broad and may even conflict with MOFCOM's previous rules. For example, Circular 209 keeps silent on at which level the regulations may require the application of exceptional rules, subjecting certain projects to central MOFCOM's approval. Does Circular 209 also delegate the approval authority over certain foreign invested projects (*such as FIEs engaging in medical-service or auction*) with investment amounts beyond the relevant investment thresholds to local MOC offices? According to MOFCOM's previous rules, however, only approval authorities over such projects with investment amount lower than the investment thresholds are specifically delegated to local MOC offices. Does this mean that under Circular 209, all such projects (*including those beyond the investment thresholds*) will only be reviewed and approved by local MOC offices? In practice, MOFCOM may still retain their approval authority over these ambiguous areas until such rules and regulations are further spelt out.

(c) Foreign Invested Companies Limited by Shares

Approval authority for foreign invested companies limited by shares ("FICLS") has also been significantly delegated so that the establishment of an FICLS is essentially subject to the general rules applicable to ordinary forms of FIEs as introduced under Section I.1 above (*rather than uniformly subject to MOFCOM's supervision under the previous approval regime*), provided however, that the threshold for different levels of approval authorities for an FICLS is determined on the basis of the registered capital (*instead of investment amount*) of the target FICLS due to the lack of investment amount for an FICLS in practice. This means that the establishment of an FICLS with registered capital of USD300 million or higher in the "encouraged" or "permitted" categories under the Category Guidance, or an FICLS with registered capital of USD50 million or higher in the "restricted" category, shall be approved by central MOFCOM, otherwise an FICLS shall be subject to approval by local MOC offices. However, if an FICLS is established through conversion from a foreign invested limited liability company, such threshold shall be calculated by the net assets of such FICLS.

In addition, principles in relation to the approval authority over subsequent changes of FIEs provided in Section I.1.(b) are also generally applicable to that of an FICLS. However, if such a change is made for an FICLS to be listed publicly, or is as a consequence of strategic investment by foreign investors in an A-share FICLS (*either through foreign related M&A deals or equity transfer of an existing listed FICLS*), then such changes shall still be subject to approvals by central MOFCOM (*regardless of the size of the target company or the proposed deal*) and the China Securities Regulatory Commission.

(d) Foreign Investment in Domestic Companies through M&A

The approval authority over a foreign related M&A project is determined by the threshold calculated by the "transaction volume" of such a project, instead of the total investment amount of the FIE transformed through such M&A deals from a target domestic company as per various practices under previous approval regime. Specifically speaking, (i) M&A deals with the transaction volumes of USD300 million or higher for a target company that

falls under the “encouraged” or “permitted” category under the Industrial Category, or (ii) M&A deals with transaction volumes of USD50 million or higher for a target company in the “restricted” category, shall be subject to approval by MOFCOM. M&A deals which fall below such thresholds shall be subject to approval of local MOC offices.

Compared with ordinary foreign invested projects, foreign invested projects through M&A deals are relatively complicated and may be subject to more restrictions or approvals, such as an anti-monopoly review and a national security examination.

(e) Foreign Invested Investment Companies and Foreign invested Venture Capital Companies

Foreign invested investment companies, foreign investment venture capital companies and foreign invested venture capital management companies are, based on whether their registered capital is above or below the threshold of USD300 million, subject to approval by central or local MOC offices (previously, they were all subject to MOFCOM’s approval).

In addition, general approval principles applicable to changes of FIEs provided in Section I.1.(b) can also be applied to that of foreign invested investment companies, foreign invested venture capital companies and foreign invested venture capital management companies. Particularly, for a foreign invested venture capital company originally approved by MOFCOM, the changes to requisite investors thereof shall generally be subject to the approval by MOFCOM.

Please note that we only list out above several specific rules with respect to the regulatory updates on certain major FIE projects and are not aiming to provide a truly detailed and comprehensive summary of all rules over approvals of foreign invested projects (*especially those with respect to specific industries*). Therefore, it is advisable for investors to make prior communication and seek confirmation with competent government authorities for their proposed investment in special types of enterprises.

Furthermore, when it comes to any specific foreign invested project that should be subject to a variety of special rules which may result in overlap or even conflict among different approval authorities, consultation and further confirmation with relevant government authorities may be required, in which case, the more stringent rules may apply.

3. Local MOC Offices’ Approval Authority

Local MOC offices refer to MOFCOM’s local counterparts at provincial or lower levels. Among them, provincial-level MOC offices refer to those of provinces, autonomous regions, municipalities and municipalities separately listed on the state plan, Xinjiang Production and Construction Corps, sub-provincial cities (*including Harbin, Changchun, Shenyang, Ji’nan, Nanjing, Hangzhou, Guangzhou, Wuhan, Chengdu and Xi’an*) and economic and technological development zones at the national level.

Generally speaking, provincial-level MOC offices may further delegate their approval authority to lower levels of MOC offices as they believe appropriate, with certain exceptions that could not be further delegated to the lower level of the provincial MOC offices, such as establishment and changes of the below-threshold foreign invested investment enterprises, foreign invested venture capital enterprises and certain FIEs in the “restricted” category.

II NDRC's Approval Authority

In addition to approval by MOC offices, certain foreign invested projects should be also approved by NDRC offices prior to or at the same time as the submission for approval by MOC offices. In practice, based on different localities and the specific industries they engage in, not all FIE projects are mandatorily required to be approved by NDRC offices. Generally speaking, foreign invested projects in service or trade areas without fixed assets investment are not subject to approvals from NDRC offices, while foreign investment in steel, cement and other infrastructure industries shall be subject to approvals from NDRC offices.

With respect to a foreign invested project that requires approval by NDRC offices, the competent NDRC office in charge of such foreign invested project should be determined based on the specific industries the target company is engaging in and the proposed total investment amount of such a project. In accordance with Circular 9 and the implementing rules subsequently issued by NDRC, the total investment threshold for a foreign invested project that requires central NDRC's approval, just as MOFCOM's rules, has been raised from USD100 million to USD300 million, which will make the approval level of NDRC offices generally consistent with that of MOC offices. After delegations, the approval authority of NDRC offices over foreign invested projects can be summarized as follows:

- (a) Foreign invested projects in the "encouraged" or "permitted" industries under the Industrial Category with a total investment amount of USD300 million or above, or in the "restricted" industries with a total investment amount of USD50 million or above, shall be subject to approvals by central NDRC (*among which projects in the "encouraged" or "permitted" industries with a total investment amount of USD500 million or above, and projects with a total investment amount of USD100 million or above in the "restricted" industries shall, after being approved by NDRC, be submitted to the State Council for final examination and approval*);
- (b) Foreign invested projects in the "encouraged" or "permitted" industries with a total investment amount smaller than USD300 million, or projects in the "restricted" industries with a total investment smaller than USD50 million, shall be subject to approval by local NDRC offices. The scope of approval authority of provincial-level NDRC offices should be determined by the provincial government. However, foreign invested projects in the "restricted" industries with a total investment smaller than USD50 million shall be subject to the approval by provincial-level NDRC offices and cannot be further delegated to any NDRC offices at lower levels.

* * *

The above summary is only a brief introduction and overview of the current PRC laws and practices with respect to approval authority delegation over foreign invested projects, which hopefully will serve as a useful reference to you. Please note however that since China is under the process of foreign investment regulatory reform (*e.g., the Industrial Category is under a new round of comprehensive revision, and further delegation of approval authority is expected*), and the relevant rules and regulations referenced herein are relatively new and government authorities in different places may hold different opinions or interpretations, therefore if there is any discrepancy between the discussion herein and any special rules, policies or practices of any specific PRC government authority, such rules, policies or practices shall prevail. This memorandum is for the purpose of general reference only and should

not be relied upon as any formal PRC legal opinion with respect to any general or specific PRC law issue.

If you have any questions or comments with respect to anything set forth herein, please do not hesitate to contact us at inquiry@hanyilaw.com for a further discussion.

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关于：外商投资项目审批权限下放的简介

简化审批程序、下放外商投资项目的审批权限是中国政府近年来在外商投资管理体系改革中推进的一项重要内容。尤其在 2008 年和 2009 年，商务部多次发文，将原由商务部集中审批的多项外商投资项目下放或者委托地方商务主管部门审批。2010 年初，国务院下发了《关于进一步做好利用外资工作的若干意见》(国发〔2010〕9 号)，将鼓励类、允许类外商投资项目的商务部审批限额由 1 亿美元大幅提高到 3 亿美元，并概括性地要求中央有关部门将本部门负责的审批事项下放到地方政府审批，从而大幅地推动了外商投资管理体制改革，逐步将中央部委的职责从履行具体行政审批转变到制定政策、实行监督等宏观管理任务上来。

外商投资项目的主要审批部门为商务部及其地方部门(统称“商务主管部门”)。部分涉及固定投资或者其他涉及国家综合平衡的项目，还需要国家发展改革委员会(“国家发改委”)及其地方部门(统称“发展改革部门”)的审批。除此之外，根据项目涉及的具体行业，还可能需要具体行业主管部门(例如中国银行业监督管理委员会、中国证券监督管理委员会及中国保险监督管理委员会等)的审批。限于篇幅，本备忘录将重点对近年来商务主管部门和发展改革部门在外商投资项目的审批权限变化进行介绍，供阁下参考。

一、商务主管部门的审批权限

商务主管部门是外商投资项目的主要审批机构。在原来的审批体制下，商务部集中了大量外商投资项目的审批权限，比如《外商投资产业指导目录》中鼓励类、允许类投资总额 1 亿美元和限制类投资总额 5,000 万美元及以上的外商投资项目、外商投资股份有限公司、投资性公司、外商投资创业投资企业等特殊类型项目和大量的服务业领域外商投资企业的设立和变更等。地方商务主管部门的审批权限相对较小(仅涉及非特殊类型且限额以下的项目)。审批权限下放后，不仅地方商务主管部门有权审批的鼓励类、允许类外商投资项目限额大幅扩大，同时多数原由商务部统一监管的特殊类型公司的审批权限也不同程度地下放至地方商务主管部门。

1. 外商投资项目审批的一般性规定

(a) 外商投资项目的设立

除一些特殊类型或涉及特殊行业的外商投资项目外，目前需要商务部审批的外商投资鼓励类、允许类的外商投资项目的投资总额限额由原来的1亿美元提高至3亿美元。但是，限制类的外商投资项目的审批权限未发生变化，仍然以投资总额5,000万美元为限，限额以下由地方商务主管部门审批，限额以上（含限额）由商务部审批。

(b) 外商投资项目的变更

原审批体制下，外商投资项目的变更一般由原批准设立该项目的商务主管部门负责审批。2007年开始，经商务部批准设立的外商投资企业之后续非实质性事项变更，也逐步下放或委托地方商务主管部门审批（但一般需报送商务部备案）。原则上，商务部仅负责如下变更事项的审批：

- 单次增资超过限额：不论原审批机关是地方商务主管部门还是商务部，鼓励类、允许类外商投资企业单次增加的投资总额超过3亿美元，或者限制类外商投资企业单次增加的投资总额超过5,000万美元，均应由商务部负责审批和管理。
- 商务部批准设立的外商投资企业的后续实质性变更：根据《商务部关于下放外商投资审批权限有关问题的通知》（商资发[2010]209号），目前商务部仅负责审批单次增资达到或者超过限额的外商投资项目以及其他法律法规明确规定的由商务部负责审批的外商投资企业变更事项。除前述情形外，外商投资企业的变更事项均应由地方商务主管部门负责审批和管理而无论该外商投资企业的设立是否由该地方商务主管部门批准。但我们了解到，由于前述通知中有关“法律法规”的描述过于笼统，目前各级商务主管部门的审批权限多由部门规章予以规定，有些规定之间还存在不一致，甚至矛盾之处，因此，在实践中，对于由商务部批准设立的外商投资企业的后续“实质性”变更事项（如股权转让（尤其是控制权发生变更）和增加经营范围等），很多地方商务主管部门倾向于采取较为保守的态度，仍将该等事项上报商务部审批或通过非正式的途径征询商务部的审批意见。

2. 外商投资项目审批的特殊性规定

(a) 鼓励类且无需国家综合平衡的外商投资企业

原在商务部审批范围内的鼓励类且无需国家综合平衡的外商投资企业的设立和变更事项（包括限额以上的新设外商投资企业及外商投资企业增资）现全部下放至地方商务主管部门审批和管理。据此，这类企业的设立和任何后续变更事项将不受3亿美元限额的影响，均由地方商务主管部门审批。

需要注意的是，如何理解哪些项目需要国家综合平衡目前并没有明确的法律依据，实践中也似乎没有形成统一的意见。¹因此，如果涉及超过限额的鼓励类外商投资项目，可能还需要就个案向相关商务主管部门咨询。

(b) 服务业企业

服务业是中国加入世贸组织时承诺逐步对外开放的行业，也是近年来外商投资审批权限下放的重要领域。根据商务部最近发布的《关于下放外商投资审批权限有关问题的通知》（商资发[2010]209号），除法律法规明确规定由商务部审批外，服务业领域外商投资企业的设立及其变更事项（包括限额以上新设外商投资企业及外商投资企业增资）均由地方商务主管部门按照国家有关规定进行审批和管理。据此，原来基本上由商务部集中审批的40余项服务业领域外商投资项目中，约30余项将下放至地方政府。商务部保留审批权限的服务业领域外商投资项目主要集中在金融、电信、直销等少数领域。

但值得注意的是，商资发[2010]209号文对外商投资服务业的规定太过笼统，与商务部此前发布的文件也存在一定程度上的冲突，比如如何界定“法律法规明确规定由商务部审批”中的“法律法规”，是否包括商务部等部委发布的部门规章。另外，商务部曾明确规定限额以下的部分服务业外商投资项目（比如医疗、拍卖等）由地方商务主管部门负责审批，但商资发[2010]209号文是否将这些行业限额以上外商投资项目也统一下放到地方政府却仍存在疑问。在这些问题得以明确之前，商务部将有可能继续实际负责部分限额以上服务业外商投资项目的审批事项。

(c) 外商投资股份公司

根据现行规定，外商投资股份公司的设立也将适用一般外商投资企业的设立原则（而非原来的统一由商务部监管）。鉴于一般情况下商务主管部门不核定外商投资股份公司的投资总额，因此外商投资股份公司的限额一般应以注册资本计算，即：(i)鼓励类、允许类外商投资股份公司的设立以注册资本3亿美元为限额；(ii)限制类外商投资股份公司的设立以注册资本5,000万美元为限额，分属商务部和地方商务主管部门审批和管理。但是，如果外商投资股份公司系通过从有限责任公司改制而设立，则其限额一般应按公司的净资产计算。

关于外商投资股份公司的后续变更，基本适用前述第1部分“外商投资项目的变更”中介绍的基本原则。但是，股份公司为上市进行的相关变更事项，以及外国投资者对A股上市的股份公司进行的战略投资（不

¹ 国家计委（国家发改委前身）和国家经贸委（商务部前身）于1999年曾发布一项通知，罗列了鼓励类中需要国家综合平衡的外商投资项目（比如基础设施、航空航天、矿业项目等关系国计民生和生产布局的项目等），但实践中该项通知并未严格执行，是否可以该通知为依据判断“国家综合平衡”标准也无定论。

论通过并购还是外商投资的 A 股上市公司的股权变更), 仍需要获得商务部的审批 (不论标的公司的规模或并购金额的大小) 以及中国证监会的审批。

(d) 通过并购境内企业设立外商投资企业

除非专项规定明确由商务部审批, 外国投资者通过并购境内内资企业而设立外商投资企业的, 一般应以并购交易额 (而不是原来实践中的外资并购后目标企业的投资总额) 为限额确定审批机关, 即: (i) 如果被并购企业为鼓励类、允许类, 则以交易额 3 亿美元为限额; (ii) 如果被并购企业为限制类, 则以交易额 5,000 万美元为限额, 分属商务部和地方商务主管部门审批和管理。

(e) 投资性公司和外商投资创投企业

投资性公司的设立以注册资本 3 亿美元为限额, 外商投资创业投资企业、外商投资创业投资管理企业的设立以资本总额 3 亿美元为限额, 分属商务部或者地方商务主管部门 (而不是原来统一由商务部负责) 负责审批和管理。

前述第 1 部分中关于“外商投资项目的变更”的相关原则基本适用于投资性公司或者外商投资创业投资企业及外商投资创业投资管理企业的变更。尤其是由商务部批准设立的外商投资创业投资企业涉及必备投资者的变更时, 一般仍然由商务部负责审批和管理。

上文仅对近年来几项涉及审批权限下放的主要外商投资项目审批的特殊性规定做了介绍, 并不包括所有的外商投资项目可能涉及的特殊性规定 (尤其是针对特定行业的特殊性规定)。因此, 涉及具体的外商投资项目时, 还需要根据不同情况具体分析相应的审批层级。

另外, 如果外商投资项目同时涉及多项特殊性规定时 (比如同时涉及外资并购和外商投资服务业的特殊规定; 或同时涉及外资并购和设立外商投资股份有限公司时), 如相关规定之间存在不一致之处, 以哪一项规定为准, 则需要根据情况向可能涉及的相关商务主管部门咨询。实践中, 审批机关比较倾向适用较为严格的规定来确定相关项目的审批权限。

3. 地方商务主管部门的审批层级

地方商务主管部门包括省级及省级以下的商务主管部门。其中省级商务主管部门一般包括省、自治区、直辖市、计划单列市、新疆生产建设兵团、部分副省级城市 (包括哈尔滨、长春、沈阳、济南、南京、杭州、广州、武汉、成都、西安) 以及国家级经济技术开发区的商务主管部门。

一般情况下，省级商务主管部门可以根据国家的相关政策和本地区外资审批管理的实际情况，将所承接的外商投资审批事项适时适量地下放至地市级商务主管部门办理。但是，也有部分审批事项下放至省级后不得继续下放，比如限额以下投资性公司、外商投资创投企业、部分限制类外商投资企业的设立和变更等。

二、发展改革部门的审批权限

除了商务主管部门外，外商投资项目还可能涉及发展改革部门的审批。根据涉及的地域和产业不同，实践中并不是所有的外商投资项目均需经过发展改革部门的核准。一般情况下，服务业领域或其他不涉及固定资产投资的项目无需发展改革部门的核准，涉及固定资产投资或者国家宏观调控的行业（如钢铁、水泥、电解铝、造船和房地产行业等行业），则通常需要获得发展改革部门的核准。

就需要发展改革部门核准的外商投资项目而言，除非另有规定，根据其在《外商投资产业指导目录》中属于鼓励类、允许类还是限制类，以及项目的投资总额，外商投资项目将分属国家发改委和地方发展改革部门核准。根据国发〔2010〕9号文以及发改委随后发布的该文件的实施文件，地方发展改革部门核准的鼓励类、允许类项目的限额由原来的1亿美元扩大至3亿美元，与商务主管部门的审批层级基本保持一致。据此，目前发展改革部门对外商投资项目的审批权限可大致归纳如下：

- (a) 投资总额在3亿美元及以上的鼓励类、允许类项目和投资总额在5,000万美元及以上的限制类项目由国家发改委核准（其中，投资总额在5亿美元及以上的鼓励类、允许类项目和投资总额在1亿美元及以上的限制类项目由国家发改委审核后还应报国务院核准）；
- (b) 投资总额不足3亿美元的鼓励类、允许类项目和投资总额不足5,000万美元的限制类项目，除《政府核准的投资项目目录》规定需由国家发改委核准之外，由地方发展改革部门核准。省级以下发展改革部门的核准权限由省级人民政府确定，但投资总额在5,000万美元以下的限制类项目须由省级发展改革部门核准并且不得下放。

* * *

以上是我们根据近年来的相关政策、法规和实践，就相关政府部门对近年来外商投资项目审批权限下放的概括性介绍和分析，希望对阁下有所帮助。值得注意的是，外商投资审批体制改革还在进行中（比如相关部门正着手于新一轮《外商投资产业指导目录》的修订工作、外商投资项目的审批权限很可能会进一步下放等），且本备忘录中很多内容所依据的政策法规都比较新，中国各地对该等政策法规的理解和具体实践也不一定相同，因此如果本备忘录内容与相关政府部门另行颁布的任何规章、通知或政策有不一致之处，应以有关政府部门颁布的相关规定和解释为准。本备忘录仅供阁下用作一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。

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

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