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FOREIGN INVESTMENT / 外商投资

Approval Requirement for Setting up and Change of FIEs to Be Abolished Nationwide 外商投资企业设立和变更将全面实施备案管理

On September 3, 2016, the Standing Committee of the National People's Congress approved the *Decisions on Amending Four Laws such as the Law of PRC on Wholly Foreign-Owned Enterprises* (the "Decisions"), which will take effect from October 1, 2016. Pursuant to the Decisions, for the foreign-invested enterprises (or FIEs) which will not engage in the industries in the list of the special administration to be further promulgated by the State Council (the "Negative List"), the establishment and follow-on corporate changes will only be subject to ex-post filing requirements with (instead of prior approval of) competent offices of the Ministry of Commerce (the "MOFCOM").

On the same day, MOFCOM released the draft *Interim Measures for Filing Administration on the Establishment and Change of the Foreign-Invested Enterprise* (the "Draft"). The Draft is also expected to be implemented from October 1, 2016. The highlights of the Draft include:

(i) **Filing Administration:** For the FIEs not engaging in the industries in the Negative List, their establishment and follow-on corporate changes will only be subject to filings with competent provincial offices of MOFCOM. The FIEs or its investor(s) (collectively, the "Filing Entities") could go through the filing procedures by filling in the forms and submitting necessary information and documents through online platform set up by MOFCOM. The establishment filing could be proceeded from the date when an FIE obtains the pre-registration of its corporate name till the 30th day after the FIE obtains its business license, while the time for submitting applications of the change filings should be within 30 days after such changes have been adopted by the resolutions of the FIEs' highest authority (*unless otherwise required by applicable PRC laws and regulations*). The competent MOFCOM office will complete the filing procedures within 3 working days and the Filing Entities could request the competent MOFCOM office to issue filing receipts upon completion of the filings. If the establishment or corporate change of an FIE also triggers antitrust review or national

security review according to applicable PRC laws and regulations, the FIE also needs to go through government approval and review procedures in such connection;

(ii) **Coordinated Administration:** Pursuant to the Draft, MOFCOM will corporate closely and share relevant information of the Filing Entities with such other administrative authorities governing public security, state-owned assets, customs, taxes, administration for industry and commerce, securities, and foreign exchange. MOFCOM will promptly notify other competent government authorities of illegal or non-compliance activities of the Filing Entities which are beyond MOFCOM's administrative authority once it becomes aware of such activities; and

(iii) **Punishment Measures:** In violation of the filing obligations, a Filing Entity will face a fine up to RMB30,000 and should correct the noncompliance within the time limit prescribed by the competent MOFCOM office. If the Filing Entity engages in any restricted industry without any prior approval from competent MOFCOM office, or engages in the business prohibited for foreign investment, in addition to the aforesaid fine, it will be ordered to cease to run the restricted or prohibited business and dispose of relevant shares or assets within a designated time limit. In addition, the Filing Entity's noncompliance will be recorded in MOFCOM's credit system and publicized by MOFCOM.

The launch of the Decisions and the Draft reflects that Chinese government has gained solid experience in the negative list administration system previously carried out in the four pilot free trade zones and formed the confidence in adopting the similar regulatory system on a nationwide basis. It is believed that the new rules will greatly facility the establishment and follow-on corporate change procedures of FIEs and is expected to further promote the foreign investment activities in the future.

2016年9月3日, 全国人大常委会表决通过《关于修改〈中华人民共和国外资

企业法〉等四部法律的决定》(“《决定》”), 《决定》将自2016年10月1日起施行。根据《决定》, 不涉及国家规定实施准入特别管理措施(“负面清单”)的外商投资企业的设立和变更, 将由审批改为备案管理。

同日, 商务部公布了《外商投资企业设立及变更备案管理暂行办法(征求意见稿)》(“征求意见稿”), 同样拟于2016年10月1日起施行。征求意见稿的主要内容如下:

(i) **备案制度:** 外商投资企业的设立及变更, 不涉及负面清单的, 适用备案管理制度。外商投资企业或其投资者(“备案主体”)可在线填报和提交备案信息及材料, 省级商务主管部门(“备案机构”)将在3个工作日内完成备案。外商投资企业设立的备案自企业获得名称预核准之日起至营业执照签发后30日内均可办理。外商投资企业变更的备案在变更事项发生后30日内办理(除非法律法规另有要求, 否则变更事项发生时间为企业最高权力机构作出决议或决定的时间)。备案完成后, 备案主体可向备案机构领取备案回执。外商投资事项涉及反垄断审查或国家安全审查的, 按相关规定办理;

(ii) **协同监管:** 备案机构将与公安、国资、海关、税务、工商、证券、外汇等有关行政管理部门密切配合, 加强信息共享。备案机构发现备案主体有不属于本部门管理职责的违法违规行为, 将及时通报有关部门; 以及

(iii) **惩罚措施:** 备案主体违反备案义务的, 将面临最高不超过人民币3万元的罚款, 并被要求限期改正。备案主体未经审批在限制投资领域投资、或在禁止投资领域开展投资经营活动的, 除了前述处罚外, 还可能被处以停止开展相关经营活动、限期处分股权或其他资产的处罚。备案主体的有关诚信信息将记入商务部外商投资诚信档案系统, 并由商务部予以公示。

《决定》的实施与征求意见稿的通过, 将使此前四大自贸试验区实施外商投资负面清单管理模式的经验推广至全国。此举将大大提高外商投资企业设立和变更的效率, 进而促进外商投资业务的发展。

ONLINE FINANCING / 互联网金融

Rules on P2P Lending Business Officially Published
P2P监管规则正式落地

Based on the public comments on the draft *Interim Measures on Managing the Business of Online Intermediary Agency of Lending Information* (the "Draft") promulgated in December 2015 (please refer to our January Issue of *China Regulatory Updates for more information*), the China Banking Regulatory Commission (the "CBRC"), the Ministry of Industry and Information, the Ministry of Public Security and Cyberspace Administration of China jointly published the *Interim Administrative Measures on Business Activities of Intermediary Agency of Online Lending Information* (the "Measures") on August 17, 2016, formally setting out the regulatory regime for the "peer-to-peer" (or P2P) lending information intermediary activities. The companies currently engaging in P2P lending information intermediary business (the "P2P Platforms") have been granted a transitional period of 12 months to make necessary adjustments to their existing business models to meet the new requirements under the Measures. The highlights of the Measures include:

- (i) **Ex-post filing:** Similar to the Draft, the Measures adopt ex-post regulatory system. A P2P Platform does not need to acquire any special government approval before it runs business but shall, after obtaining the business license, go through filing procedures with local department of CBRC and obtain relevant ICP license;
- (ii) **Negative list:** The negative list provided in the Measures is quite different from that in the Draft. Pursuant to the Measures, the P2P Platforms shall not use the platform to finance itself (but financing their related parties is allowed), nor shall they carry out offline promotions by themselves or a third party. Furthermore, The P2P Platforms are not allowed to run asset securitization-like business or engage in transferring creditor's rights in the form of packaged assets, securitized assets, trust assets and fund units. The Measures further forbid the P2P Platforms from involving in such high-risk business as granting loans for securities investment, over-the-counter transactions, futures

contracts, structured products and other derivatives trading. Compared with the Draft, the Measures no longer prohibit P2P Platforms from doing in-kind crowdfunding business, while the equity crowdfunding is still prohibited;

- (iii) **Custodian requirement for clients' capital:** According to the Measures, the P2P Platforms shall separate their own capital account from clients' capital account and appoint qualified third party banks as custodians of clients' funds. In accordance with the rough statistics of the CBRC, less than 3% of the approximately 2,349 existing P2P Platforms have set up client fund custody arrangement as of June 2016. This means that more than 97% P2P Platforms will need to transform their current capital management models according to the Measures or otherwise exit from the more regulated P2P market;
- (iv) **Borrowing caps:** The Measures set upper limits for borrowings: i.e., an individual is allowed to borrow up to RMB200,000 from a single P2P Platform and up to RMB1,000,000 in total from all P2P Platforms; as for a legal person or other organization, the amount should not exceed RMB1,000,000 from one platform and RMB5,000,000 in total from all platforms. The aforesaid borrowing caps are way less than the actual amount that many users intend to borrow from the platforms. These caps are expected to curb lending business through P2P Platforms, and some of the platforms may have to consider shifting their business to small-scale lending going forward; and
- (v) **Miscellaneous:** The Measures require the P2P Platforms to include "P2P lending information intermediary" in their business scopes, instead of in their corporate names as provided in the Draft. Moreover, the information disclosure requirements are generally simplified in the Measures compared to the Draft and P2P Platforms are required to engage law firms to evaluate their

compliance status in operation. Detailed implementing rules on disclosure requirements as well as guiding compliance opinions are yet to be promulgated by relevant government authorities.

继2015年12月《网络借贷信息中介机构业务活动管理暂行办法（征求意见稿）》（“《征求意见稿》”）（相关内容请参见我所2016年1月刊*China Regulatory Updates*）出台后，2016年8月17日，中国银监会、工业和信息化部、公安部及国家互联网信息办公室发布《网络借贷信息中介机构业务活动管理暂行办法》（“《办法》”），正式确立了网络借贷信息中介机构（“P2P机构”）的监管规则，并明确P2P机构的整改期为《办法》发布之日起的12个月。《办法》的主要内容如下：

- (i) **事后备案制度:** 《办法》依旧遵循《征求意见稿》事后监管的思路，即P2P机构在设立方面不受前置审批或牌照的限制，而是应当在取得营业执照后向注册地地方金融监管部门进行登记备案，在备案完成后还应当申请相应的电信业务经营许可，否则不得开展网络借贷信息中介业务；
- (ii) **负面清单管理:** 此次的负面清单与《征求意见稿》相比有较大的变化。根据《办法》，P2P机构不得进行自融（但为关联公司融资将不会受到限制）；P2P机构不得自行或通过第三方进行线下宣传。此外，《办法》还新增了P2P机构不得开展类资产证券化业务或实现以打包资产、证券化资产、信托资产、基金份额等形式的债权转让行为的规定，并明确P2P机构不得从事股权投资、场外配资、期货合约、结构化产品及其他衍生品等高风险的业务。同时，《办法》明确P2P机构不得从事股权众筹等业务，删去了《征求意见稿》中“实物众筹”的表述；
- (iii) **第三方资金存管要求:** 根据《办法》，P2P机构应当选择符合条件的银行业金融机构作为第三方资金存管机构，对客户资金进行管理和监督，实现客户资金和P2P机构自身资金分账管理。而根据银监会的不完全统计，截至2016年6月底，国内正常运营的P2P机构有2,349家，而完成银行资金存管、符合监管要求的机构不足3%，剩余的97%将面临转型或退出；
- (iv) **新设借款上限:** 与《征求意见稿》相比，《办法》对于单一借款人在P2P机构的借款余额上限做了明确规定：同一自然人在同

一P2P机构借款余额不超过人民币20万元，在不同P2P机构借款总余额不超过人民币100万元；同一法人或其他组织在同一P2P机构借款余额不超过人民币100万元，在不同P2P机构借款总余额不超过人民币500万元。该项规定中的上限金额远远低于实际中希望通过P2P机构获得借款的主体的资金需求量，部分P2P机构或需向小额分散的消费金融业

务进行转型；以及
(v) **其他：**根据《办法》，P2P机构的经营范围内应实质明确“网络借贷信息中介”，该要求比《征求意见稿》中P2P机构的公司名称中须包含“网络借贷信息中介”字样的要求更为合理。《办法》对P2P机构的信息披露要求进行了简化，只进行了原则性的规定，银监会表示将于日后出台相关的细则。另外需要注意的

是，《办法》要求P2P机构应当引入律师事务所对其合规情况进行评估，而具体的合规意见指引有待日后发布。

CAPITAL MARKET / 资本市场

NEEQ Relaxed Requirements on PE Registration with AMAC 全国股转系统放松对私募投资基金登记备案的相关要求

On September 2, 2016, the National Equities Exchange and Quotations Co., Ltd. (or NEEQ) released the *Answers to Relevant Questions Regarding Registration and Filing of Private Equity Funds with AMAC* (the “Q&A”).

According to the Q&A, in respect of such major financing activities to be conducted by a NEEQ-listed company or a company intending to list on NEEQ as public listing, issuing new shares, major assets reorganization, before the application of such financing activities is submitted for NEEQ’s review, a private equity fund manager (the “Manager”) or a private equity fund (the “PE Fund”) managed by a fund manager who has already been registered with AMAC, is not required to complete the registration or filing procedures with AMAC if the aforesaid Manager itself or the PE

Fund (as the case may be) intends to participate in such financing activities as potential investor, provided, however, the Manager or the fund manager of the PE Fund (as the case maybe) should issue a commitment letter specifying the promised application date of the required registration or filing procedures with AMAC.

By relaxing PE registration/filing requirement with AMAC, the Q&A would help to increase the efficiency of NEEQ’s review of the above-mentioned financing activities participated by the PE Funds or the Managers.

2016年9月2日，全国中小企业股份转让系统有限责任公司（“全国转股系统”）发布《关于私募投资基金登记备案有关问题的解答》（“《解答》”）。

自《解答》发布之日起，在申请挂牌、

发行融资、重大资产重组等环节，私募投资基金管理人（“管理人”）自身参与上述业务的，其完成登记不作为相关环节审查的前置条件；已完成登记的管理人所管理的私募投资基金（“私募基金”）参与上述业务的，其完成备案不作为相关环节审查的前置条件。上述管理人及私募基金在上述交易被审查期间未完成登记和备案的，管理人需出具承诺函，并明确具体（拟）登记或备案申请的日期。

全国转股系统对管理人和私募基金登记备案相关要求的松绑，既有助于提高前述事项的审查效率，也为（拟）挂牌公司的挂牌、融资、重大资产重组提供了便利。

NEEQ Imposed Limitations on Special Rights Attached to Shares Issued by NEEQ-Listed Companies

限制新三板挂牌公司在股票发行中约定特殊条款

On August 8, 2016, the National Equities Exchange and Quotations Co., Ltd. (or NEEQ) released the *Frequently Asked Questions (III) of Share Issuance by NEEQ-Listed Companies* (the “FAQ III”).

According to the FAQ III, the share subscription agreements to be entered into by and between NEEQ-listed companies and investors shall not contain such provisions as anti-dilution, mandatory or restricted dividend distribution, most-favored-nation treatment, independent director appointment right and veto rights at the board, liquidation preference not compliant with applicable laws, as well as other special provisions which may jeopardize the legitimate interests of the NEEQ-listed companies or their shareholders, nor shall the NEEQ-listed companies become liable for

any kind of such special provisions.

However, whether some special provisions could be included among all or part of the shareholders in a separate shareholders agreement or whether those specific provisions already existed in a company’s investment agreement should be removed before the company applies for NEEQ listing remains to be seen in practice.

2016年8月8日，全国中小企业股份转让系统有限责任公司（“全国转股系统”）发布《挂牌公司股票发行常见问题 解答（三）》（“《问答（三）》”）。

根据《问答（三）》，在挂牌公司股票发行认购协议中，挂牌公司不得作为任何特殊条款的义务承担主体，且不得存在反稀释、强制或限制分红、

最惠国待遇、独立董事委派权、董事会事项一票否决权、不符合规定的优先清算权及其他损害挂牌公司或者挂牌公司股东合法权益的特殊条款。

随着《问答（三）》的出台，部分《问答（三）》中未明确提及的特殊条款（例如投资人的共同出售权等）可否出现在挂牌公司的股票发行认购协议中，拟挂牌公司在申请新三板挂牌前已存在的特殊条款在挂牌时是否会参照针对挂牌公司股票发行的要求而被清理等问题，都还有待于进一步观察。

NEEQ Provides Transfer Services for Preferred Shares 全国股转系统为非公开发行优先股提供转让服务

Pursuant to the announcement published by the National Equities Exchange and Quotations Co., Ltd. (or NEEQ) on August 8, 2016, the preferred shares issued non-publicly by eligible public companies could be transferred at NEEQ in accordance with the *Pilot Implementation of Business Guidelines for Preferred Shares on NEEQ*.

The announcement is another move of the NEEQ's bid to encourage and support the development of preferred share market and is likely to promote preferred share investment activities.

2016年8月8日，全国中小企业股份转让系统有限责任公司（“全国转股系统”）发布通知，优先股投资者可以按照《全国中小企业股份转让系统优先股业

务指引（试行）》规定，进行优先股转让。

优先股转让服务的落地，体现了全国转股系统对发展优先股的支持。优先股流动性的提高，也有助于吸引投资者在全国转股系统投资优先股。

Shenzhen-Hong Kong Stock Connect Program Prepared to Be Launched 深港通实施准备工作正式启动

According to the *Joint Announcement of the China Securities Regulatory Commission and the Securities and Futures of Hong Kong* dated August 16, 2016 (the “Joint Announcement”), the two regulatory authorities have approved, in principle, the establishment of the Shenzhen-Hong Kong Stock Connect Program.

It is noteworthy that there is no aggregate quota limit under the Shenzhen-Hong Kong Stock Connect Program, while the aggregate quota limit under the Shanghai-Hong Kong

Stock Connect Program is lifted upon the promulgation of the Joint Announcement. Furthermore, the requirements on eligible transactions, settlement and listing, method of settlement and qualifications of eligible investors provided under the Shanghai-Hong Kong Stock Connect Program are also applicable to the Shenzhen-Hong Kong Stock Connect Program.

2016年8月16日，《中国证券监督管理委员会、香港证券及期货事务监察委员会联合公告》（“《联合公告》”）正式签署，原则上批准建立深港股票市场

交易互联互通机制（“深港通”）。

根据《联合公告》，深港通未设总额度限制，而沪港通的总额度限制自《联合公告》发布之日起取消。此外，对于适用的交易、结算及上市规定、结算方式、投资者适当性等问题，深港通均参照沪港通相关规定执行。

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