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TABLE OF CONTENTS / 本期内容

FOREIGN INVESTMENT / 外商投资

Foreign Investment Law Officially Released 《外商投资法》正式发布

2019年3月15日，全国人民代表大会审议通过了《中华人民共和国外商投资法》（“《外商投资法》”），以作为外商投资领域的首部基础性法律，并将于2020年1月1日起正式生效实施。此前，商务部曾于2015年发布《外国投资法草案（征求意见稿）》（“《15年草案》”）向社会公开征求意见，与之相比，《外商投资法》大幅精简了条文，删除了协议控制（VIE）等具有较大争议的问题，表述也更加原则化。以下为我们对《外商投资法》主要内容的解读：

1. 统一界定外商投资：《外商投资法》中定义的外商投资是指外国的自然人、企业或者其他组织直接或者间接在中国境内进行的投资活动，并列举了设立外资企业、取得中国境内企业的股份、股权、财产份额或者其他类似权益、以及投资新建项目三种具体类型，并以“法律、行政法规或者国务院规定的其他方式的投资”作为兜底条款。可见《外商投资法》意图通过较为宽泛的定义，将外资公司设立、外资并购、外商投资上市公司、再投资等各类外商投资行为均纳入《外商投资法》的规制范围，以此作为规范外商投资活动的统一法律指引。

2. 明确外资管理制度：《外商投资法》的出台，意味着国家首次以法律的形式明确对外商投资实行准入前国民待遇加负面清单管理制度，对负面清单之外的外商投资，给予国民待遇，并原则性规定了信息报告制度、国家安全审查制度、经营者集中审查制度等外资管理制度。针对公平参与政府采购、平等参与标准制定、知识产权侵权责任、利润及收益自由汇出、禁止强制技术转让等外国投资者普遍关心的热点问题，《外商投资法》均有提及，以强调对外商投资的促进与保护。上述管理制度及原则性规定都有待主管机关后续通过实施细则进一步落实与细化。

3. 对三资企业的影响：《外商投资法》施行后，《中外合资经营企业法》、《外资企业法》、《中外合作经营企业法》（合称为“三资企业法”）将同时废止，届时内外资企业将统一适用《公司法》、《合伙企业法》等法律的规定。对于依照三资企业法设立的外商投资企业来说，主要会带来以下影响：

   首先，《外商投资法》施行后，将不存在合资/合作合同的概念，外商投资企业将依靠公司章程、股东协议等自主约定各方的权利义务；其次，三资企业法与《公司法》在公司治理结

On March 15, 2019, the National People’s Congress adopted and issued the *PRC Foreign Investment Law*, which will become effective on January 1, 2020 as the first comprehensive law for foreign investments in China. Compared with the draft released by the Ministry of Commerce (“MOFCOM”) for public comments in 2015 (the “2015 Draft”), the formally issued version has been significantly simplified, and shelved certain controversial issues including the treatment of foreign investment adopting variable interest entities (“VIE Structure”). Set forth below are our observations on some key provisions of the Foreign Investment Law:

1. Scope of foreign investments. Foreign investments are defined as direct or indirect investment activities conducted within China by natural persons, enterprises, or other organizations of a foreign country. In addition to numerating three specific types of foreign investment activities (i.e., *(i) establishing a foreign-invested enterprise (“FIE”); (ii) acquiring stock shares, equity interests, asset interests, or other similar rights and interests of a Chinese enterprise; (iii) investing in a new project*), the Foreign Investment Law also provides a catch-all clause referring to “foreign investments in other forms as provided by law, administrative regulations, or by the State Council”. With a broad definition of foreign investment, the Foreign Investment Law intends to generally subject all kinds of foreign investment activities into its jurisdiction including among others, establishment of FIEs, mergers and acquisitions of Chinese enterprises by foreign investors, strategic foreign investment in listed companies, domestic investment by FIEs to other Chinese companies, and serves as a unified and fundamental legal framework for foreign investment activities.

2. Administration system for foreign investments. The issuance of Foreign Investment Law lays a nation-wide legislation foundation for the pre-access national treatment plus negative list system. Foreign investments fall outside the "negative list" will be entitled to national treatments. In addition, the Foreign Investment Law also confirms in principle some of the major administration systems in foreign investment area currently implemented in practice, including, the information reporting system, national security review system and antitrust review system. To show China's emphasis on promoting foreign investment and protecting legal interests of foreign investors, the Foreign Investment Law also set out principle rules on such issues commonly concerned by foreign investors as fair competition in government procurement projects, equal participation in standard-setting, liabilities for infringement of intellectual property rights of FIEs, free remittance of profits and gains, prohibition on mandatory technology transfer and among others. Given the related provisions are quite general and in principle, it is expected that further implementing regulations will be formulated to provide more elaboration and clarity.

3. Impact on existing FIEs. After the new law comes into force, the Sino-Foreign Equity Joint Venture Law, the Foreign Enterprise Law and the Sino-Foreign Cooperative Joint Venture Law (collectively, the “three FIE laws”) will be repealed as of January 1, 2020, since which time the organizational form and organizational structure of FIEs will be mainly governed by the Company Law and the Law on Partnership Enterprises. This may have the following major implications on existing FIEs established under three FIE laws:

   The concept of “equity joint venture contracts” and “contractual joint venture contracts” stipulated by three FIE

构、表决机制、股权转让限制、清算等方面存在不同规定，意味着现有的三资企业需要修改公司章程中涉及的相关事项，以符合《公司法》的规定；再者，三资企业法废止后，内外资企业将统一注册资本制度，外资企业应不存在投资总额和注册资本的比例要求以及“投注差”的概念。根据现行外汇管理相关法规，外资企业的外债额度存在“宏观审慎”与“投注差”两种确定模式，在三资企业法废止后，“投注差”模式也将失去存在基础。

为实现外资企业的平稳转型，《外商投资法》规定了根据三资企业法设立的外资企业，在施行后5年内可以继续保留原企业组织形式，具体实施办法由国务院规定。此外，就《外商投资法》颁布之日至施行之日期间的外商投资如何衔接适用新规的问题，我们向一些地方工商局及商务局进行了咨询，该等主管机关暂未收悉上级部门发布的相关业务指导文件，认为目前的外商投资仍应按照三资企业法等现行法律法规进行。

4. 尚待明确的几个主要问题：《外商投资法》仅对外商投资的基本规则与管理制度做了原则性的规定与指引，因此依然存在一些不够明确的问题，尚待主管机关的进一步解读、说明或者后续配套规则的出台，其中主要问题包括：

(1) VIE是否属于外商投资：《15年草案》中多次出现“实际控制”概念，将“通过合同、信托等方式控制境内企业或者持有境内企业权益”明确列举为外商投资的一种形式，并且对于既存的VIE结构，在新法实施后如何处理也提议了可能的处理办法。而《外商投资法》并未提及“实际控制”和VIE的概念，因此也未明确提及通过VIE方式规避准入特别管理措施的责任，但外商投资的宽泛定义（*包括将“取得中国境内企业的类似权益”列举为外商投资的类型之一，以及兜底条款*）似乎又为将VIE认定为外商投资保留了空间，因此主管机关是否会穿透审查至最终控制人来判断外商投资的性质、以及对既存的VIE结构如何处理尚待明确。

(2) 其他外资相关法规的适用：《外商投资法》虽明确规定了三资企业法将随《外商投资法》的施行而废止，但对于其他规范外商投资的法律法规，特别是与《外商投资法》存在不一致的规定，在《外商投资法》施行后将如何适用，并未给出明确答案。例如，根据《外商投资法》，仅涉及准入特别管理措施的投资需要审批，而《关于外国投资者并购境内企业的规定》（10号文）中规定了外资关联并购需商务

laws will no longer exist under the Foreign Investment Law, which means that the legal documents governing rights and obligations of an FIE's shareholders will mainly be the shareholders agreements and articles of association of the FIE. Since the Company Law compared to the three FIE laws, set forth quite different rules on the internal governance and management of a company/FIE (including among others, the governance structure, voting mechanism, corporate liquidation mechanism and equity transfer restrictions), the Foreign Investment Law provides a five-year transitional period for existing FIEs to change their articles of association to conform with the Company Law.

In addition, as a uniform regulatory regime on registered capital will be applied to both domestic companies and FIEs under the Foreign Investment Law and the Company Law, the removal of total investment amount of FIEs will make the "investment balance" concept (i.e., the difference between the total investment amount and registered capital of an FIE) loss its legal basis. As a result, the existing duel mechanisms for confirming qualified foreign debt amount of FIEs (i.e., the "macro-prudential management mechanism" and "investment balance mechanism") will become the unified one with domestic companies.

As to whether existing FIEs should comply with the Foreign Investment Law by reference, or continue to comply with the three FIE laws before the new law takes effect, we have made inquiries with a few local competent authorities and they believe that the current foreign investments shall continue to be subject to the three FIE laws, as the policy guidance in this regard has not been issued by the State Council yet.

4. A few major outstanding issues that remain unresolved. Given the Foreign Investment Law only provides fundamental and principle regulations and guidelines on administration of foreign investments, it keeps silent on some major practical issues which would need to be further clarified by follow-on interpretation, clarification and elaboration by competent authorities. Set forth below are some of the issues mostly concerned by foreign investors:

(a) *The nature and legality of VIE Structure*. The 2015 Draft introduced the concept of "actual controlling" in several provisions, clearly defined investment via VIE Structure as a form of foreign investment subject to the 2015 Draft and provided proposed solutions to the existing VIE Structures after the new law comes into effect. On the one hand, all the above have been removed in the Foreign Investment Law; on the other hand, however, the broad definition of foreign investment in the Foreign Investment Law seems to leave more room and flexibilities to include foreign investment via VIE Structures and other forms of foreign investments its regulatory regime. It is expected that further calcifications on whether the ultimate actual controller standard will be employed in the recognition of foreign investment and how to deal with existing VIE Structure in practice will be issued around the effectiveness of the Foreign Investment Law.

(b) *Application of existing foreign investment rules*. Though the Foreign Investment Law specify that three FIE laws will be repealed after it takes effect, it fails to provide clear guidance on the application of other existing foreign investment rules, especially those having similar or conflicting provisions. For example, according to the Foreign Investment Law, only foreign investments in the restricted industries or those in negative list require approvals by MOFCOM or its local counterparts, while the *Provisions on Merger and Acquisition of Domestic Enterprise by Foreign Investors* (Circular No. 10) provides that related party mergers shall be subject to the approval by MOFCOM, and the existing regulations governing foreign invested partnership enterprises prohibits

部审批、规范外商投资合伙企业的相关法规中规定了涉及准入特别管理措施的外商投资项目不得设立外商投资合伙企业。《外商投资法》生效后，上述法规是否仍然适用，有待主管机关进一步说明。此外，就外商战略投资上市公司而言，《外商投资法》中规定了外国投资者在证券市场进行投资的管理，国家另有规定的，依照其规定。我们理解，就外商投资境内上市公司的限制，仍需依照现行的《外国投资者对上市公司战略投资管理办法》。

我们理解，为衔接新旧法规之间的适用，国务院应会就《外商投资法》施行之前及5年过渡期内的外商投资法律适用及业务办理出台具体的实施细则，对于除三资企业法之外的其他外商投资相关法律法规应该也会逐步修改、清理，我们将对此保持持续关注。

foreign investors from establishing partnership enterprises in the restricted industries. Therefore, it remains to be further explained by competent authorities about whether the above foreign investment rules will still be applicable after the new law comes into force. For strategic investments in listed companies by foreign investors, as the Foreign Investment Law clearly provides that special rules of the State on foreign investors' investments in securities market shall be followed, we understand that the current regulations governing foreign strategic investment in listed companies will remain in force and prevail in this specific area.

With respect to the application of rules and guidelines on foreign investment practice before the Foreign Investment Law comes into effect and during the 5-year transitional period, we believe that related implementing rules will be issued by State Council in order to address the uncertainties and secure a smooth transition of the foreign investment administration system. Revisions and clean-ups on existing foreign investment regulations except three FIE laws will also be expected. We will continue to monitor and timely update interested investors of major developments in this connection.

CAPITAL MARKET / 资本市场

IPO Examination and Approval Criteria Further Clarified 上市审核标准进一步公开透明化

上海证券交易所于2019年3月3日和24日相继发布了《科创板股票发行上市审核问答》及《科创板股票发行上市审核问答（二）》（合称为“《科创板问答》”），提出32条科创板上市审核标准。3月25日，证监会随即发布《首发业务若干问题解答》（“《IPO解答》”），对50项IPO审核过程中的常见问题作出解答。值得注意的是，《科创板问答》与《IPO解答》对于实际控制人认定、对赌协议、三类股东、突击入股、锁定期等上市审核热点问题的解答基本相同或非常相近，体现了科创板和主板等其他板块IPO在该等事项上的审核口径趋于一致。以下为几点值得投资人注意的主要突破性变化：

1. 新增对赌协议的内容：明确说明对于PE、VC等投资机构在投资时约定对赌协议或类似安排的，原则上要求发行人在申报前进行清理，除非同时满足以下要求：(i)发行人不作为对赌协议当事人；(ii)对赌协议不存在可能导致公司控制权变化的约定；(ii)对赌协议不与市值挂钩；(iv)对赌协议不存在严重影响发行人持续经营能力或者其他严重影响投资者权益的情形。因此，控股股东与投资人之间的对赌协议在符合一定要求的前提下是可以保留的，但发行人应披露对赌协议的具体内容、影响及风险，保荐人及发行人律师应当就对赌协议是否符合上述要求发表明确核查意见。

2. 放宽对三类股东的披露要求：对于发行人在新三板挂牌期间形成契约性基金、信托计划、资产管理计划等“三类股东”的，一些核心的核查要求并没有变化（*如控股股东、实际控制人*

On March 3 and March 24, the Shanghai Stock Exchange released a series of *Questions and Answers on Examination and Approval of Issuance and Listing of Stocks on the Science and Technology Innovation Board* (the “Sci-Tech Innovation Board Answers”), setting forth 32 standards for examination and approval of issuance and listing on the sci-tech innovation board. Subsequently, the China Securities Regulatory Commission (“CSRC”) issued the *Answers to Several Questions about Initial Public Offerings* (the “IPO Answers”, together with the Sci-Tech Innovation Board Answers, the “Answers”) on March 25, providing clarity on 50 questions most commonly faced by existing IPO applicants. It is noteworthy that, the answers and standards set out in both the Sci-Tech Innovation Board Answers and the IPO Answers with respect to such hot IPO issues as identification standards for actual controllers and “three types of shareholders”, valuation adjustment mechanism, introduction of new shareholders shortly before or after IPO application, and the lock-up periods and among others are generally consistent, which means the sci-tech innovation board, main board and others boards adopt similar examination and approval criteria in terms of such issues. Set forth below are some notable changes in the Answers:

1. Requirements on VAM arrangements clarified. The Answers clarified and emphasized that all valuation adjustment mechanism (VAM) or similar arrangements (“VAM Arrangement”) should be cancelled before submission of a formal IPO application, unless the VAM Arrangement meet all of the following requirements: (i) the issuer is not a party to the VAM Arrangement; (ii) the VAM Arrangement will not result in a change of control of the issuer; (iii) the VAM Arrangement is not linked to the market evaluation of the issuer; and (iv) the VAM will not lead to severe adverse impact on sustainable operation of the issuer or interest of other investors. In addition, for the qualified VAM Arrangements among shareholders of a company per the foresaid requirements, if the parties to such VAM Arrangements intend to keep such arrangements effective after the company's IPO, the company shall fully disclose the terms, potential impact and risks of the VAM Arrangements, and its IPO sponsor and legal counsel shall review and provide their respective professional opinions on whether the VAM Arrangement has fulfilled the requirements.

及第一大股东不得为三类股东、三类股东需依法设立并纳入金融监管范围、高杠杆结构化产品和层层嵌套的主体要进行整改规范等），但证监会不再强调对三类股东需要穿透式披露，发行人只需按照首发信息披露准则进行披露，中介机构则应明确三类股东中是否存在控股股东、实际控制人、董监高及其近亲属，以及中介机构及其签字人员是否直接或间接在三类股东中持有权益。

《科创板问答》与《IPO解答》的相继出台有利于推动上市审核标准公开透明化，也体现了发审制下审核标准不公开等监管思路将在科创板注册制的推动下逐渐转变。我们期待证监会对更多上市审核等实际操作问题作进一步的补充完善，并将对此保持持续关注。

2. Disclosure requirements for three types of shareholders relaxed. For IPO applicants with "three types of shareholders" (i.e., *the contractual funds, trust plans and asset management plans*), though the key examination requirements remain unchanged (e.g., *the controlling shareholder, the actual controller and the largest shareholder of an issuer shall not be three types of shareholders, any shareholders that fall within the three types have been registered and filed with relevant regulators, and any shareholders with highly leveraged and multi-level nested structure shall be rectified and cleaned up*), CSRC no longer emphasizes look-through disclosure requirement on three types of shareholders. An IPO applicant may make disclosures with respect to its three types of shareholders just according to the general rules on information disclosure for IPO while the intermediary institutions shall specify whether the three types of shareholders include controlling shareholders, actual controller, executives or their close relatives, and whether the intermediary institutions or their signatories hold any interest in the three types of shareholders either directly or indirectly.

The issuance of the Answers will to some extent enhance the transparency and openness of IPO examination and approval process, and also reflects a gradual adjustment of the current IPO examination and approval system with the push of registration system under sci-tech innovation board. We will continue to monitor and timely update the interested investors of future major regulatory developments on IPO approval and examination.

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