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**WE WISH YOU ALL A SPLENDID
YEAR OF THE GOAT!**

新春快乐，万事如意！

—— Han Yi Law/瀚一全体人恭贺

FOREIGN INVESTMENT / 外商投资

MOFCOM Solicited Public Comments on Draft Foreign Investment Law 商务部就《外国投资法》草案公开征求意见

On January 19, 2015, the Ministry of Commerce ("MOFCOM") issued the *Draft Foreign Investment Law* with an official explanation (collectively, the "Draft Bill") to solicit public comments. The primary purpose of this major regulatory initiative is to reform the existing foreign investment law regime as a whole and formulate a unified and transparent foreign investment regulatory structure. The Draft Bill introduces the "negative list" approach to regulate foreign investments in restricted and prohibited areas and proposes to grant national treatment to all other foreign investments. Meanwhile, the Draft Bill incorporates the national security review as a separate chapter and thus elevates it from administrative regulation to official law. This change suggests that MOFCOM may play a more active role in initiating such reviews and implementing relevant decisions in the future. In addition, the Draft Bill for the first time expressly provides that foreign *control* through contractual arrangements or VIE structures will also be subject to rules applicable to

entry and administration of foreign investments. As a result, foreign investors may no longer be able to circumvent foreign investment restrictions through VIE structures going forward while existing VIE structures may have to face some uncertainties pending the final version of this law.

In summary, the Draft Bill reflects Chinese government's commitment and determination to further reform the regulatory regime for foreign investments and build up a more coherent and equal legal infrastructure within the more developed Chinese legal system. It is expected that, after the Draft Bill is finalized and promulgated, the various Chinese regulatory authorities will release a series of implementing rules and supporting regulations to link the law with the existing foreign investment practice and system, which we will closely monitor and follow up.

1月19日，商务部官方网站公布了《中华人民共和国外国投资法（草案征求意见稿）》及其官方说明（“外资法草

案”），向社会各界公开征求意见。外资法草案旨在全面梳理和变革现有外商投资制度，建立统一、透明的管理体系，并在外资准入方面引入“负面清单”机制，最大限度地给予外国投资者以国民待遇，同时，还将国家安全审查制度作为该法专门的一章，使其从目前的部门规章层面提升至更高的法律层面，预示着商务部将在启动该项审查和执行相关审查决定方面起到更积极的作用。除此以外，外资法草案首次明确将VIE/协议控制纳入外资准入和监管的范畴，基本上使得外国投资者将来无法再通过VIE结构轻易达到规避外资准入和相关审批监管的目的。

总体而言，基于目前的草案文本，该部法律反映了中国政府深化改革外商投资领域管理体制的决心和努力。该法正式出台后，相关主管部门可能还会陆续颁布一系列相关实施细则和配套制度以使该法与现有的其他各项外商投资领域的实践和制度得以衔接，我们将对此持续保持密切关注。

Two Authorities Issued Circular to Reduce Preconditions for Enterprise Investment Project Approval 两部门发文缩减企业投资项目核准前置条件

In early January of 2015, the National Development and Reform Commission ("NDRC"), together with the State Commission Office of Public Sectors Reform jointly issued the *Circular on Prohibiting Requiring Items Subject to the Autonomy of Enterprises as Preconditions for Enterprise Investment Project Approvals* (the "Circular"), which specifies that 18 items (e.g., financing teasers, bank reference letters, capital contribution commitments of shareholders, review opinions on feasibility study reports, etc.) will no longer serve as preconditions for enterprise investment project approvals and further emphasizes that any provision that

requires items subject to the autonomy of enterprises as preconditions for investment approvals shall be deemed invalid, unless laws or regulations stipulates otherwise. However, it is noteworthy that since MOFCOM does not participate in issuance of the Circular, it remains to be seen whether MOFCOM and its local counterparts will also adjust the list of documents required for foreign investment approvals (for example, bank reference letters and feasibility study reports are currently required to be submitted for MOFCOM's approvals of certain foreign investments).

2015年1月初，国家发改委和中央机构编制委员会办公室共同发布《关于一律

不得将企业经营自主权事项作为企业投资项目核准前置条件的通知》（“《通知》”），具体列举了18项不再作为企业投资项目核准前置条件的事项（如融资意向书、资金信用证明、股东出资承诺、可行性研究报告审查意见等），并且强调，除非法律或行政法规明确规定，相关文件中将属于企业经营自主权事项规定为投资项目核准前置条件的，一律无效。但是需要注意的是，对于外商投资项目，由于商务部不是《通知》的发文部门，因此该部门及其下属机构在对此类项目的核准上是否会对现有的核准文件要求作出调整（比如出资方需提交的资金信用证明和可行性研究报告等），还有待进一步明确。

PE&VC / 私募股权及创业投资

CSRC Strengthened Regulation on PE Fund Filings 证监会加强私募基金备案监管

On January 23, 2015, the China Securities Regulatory Commission ("CSRC") released on its website the *Q&A on Regulation of Securities*

Issuance -- Explanation of PE Fund Filing Issues Relating to Regulation of Securities Issuance (the "Explanation"), which requires both

sponsor institutions and issuers' lawyers (collectively, the "Intermediary Agencies") to check and issue opinions on compliance of PE funds

participating in securities issuance and whether such funds have completed the filing procedure in accordance with relevant rules. According to our understanding, although the Explanation does not directly clarify whether the failure-to-file situation has to be corrected prior to the securities issuance, the aforesaid requirement for the Intermediary Agencies will significantly restrict non-filing PE

funds' ability to invest and thus strengthen the enforcement of existing rules against non-filing PE funds.

2015年1月23日，证监会在其网站发布了《发行监管问答—关于与发行监管工作相关的私募投资基金备案问题的解答》（“《解答》”），要求保荐机构和发行人律师（合称“中介机构”）在开展证券发行业务中，对参与发行的私募基金的合规性以及是否已按相关规定履行了备案程序进行核查并发表意见。

对此，我们理解，虽然《解答》未直接明确未备案私募基金参与证券发行的情况是否必须在发行前予以清理，但其要求中介机构对基金是否备案发表意见，已在很大程度上限制了未备案私募基金的投资能力，从而加强了现行的相关私募基金规范性文件对未备案私募基金的约束力。

FOREIGN EXCHANGE / 外汇

SAFE Issued New Rules on Foreign Exchange Issues Concerning Overseas Listings

外汇局出台境外上市外汇管理新规

At the end of 2014, the State Administration of Foreign Exchange (“SAFE”) issued the *Circular on Certain Issues Concerning Foreign Exchange Administration for Overseas Listings* (“Circular No.54”) to replace the previous 2013 circular with the same name (“Circular No.5”). Circular No.54 further relaxes foreign exchange regulation on overseas-listed onshore companies limited by shares (the “Onshore Companies”) and their shareholders. Specifically, in comparison with Circular No.5, Circular No.54 (i) cancels the approval for the exchange settlement of repatriated funds raised through

overseas listings, (ii) allows free exchange settlement and transfer of remaining funds that has been remitted overseas for Onshore Companies to buy back stocks or for their shareholders to increase shareholdings, and (iii) allows shareholders of Onshore Companies to deposit capital incomes (e.g., incomes derived from reducing or transferring overseas-listed foreign shares, or delisting of Onshore Companies, etc.) overseas rather than demands them to repatriate such income into onshore special accounts.

2014年末，《国家外汇管理局关于境外上市外汇管理有关问题的通知》

（“《54号文》”）出台，废止了外汇局2013年发布的同名文件（“《5号文》”），进一步放松了对在境外直接上市的境内股份有限公司（“境内公司”）及其股东的外汇监管。具体而言，相对于《5号文》，《54号文》取消了境内公司在境外上市的外资股项下所募集资金调回的结汇审批，允许境内公司回购、境内股东增持等汇出资金后剩余款项的自由结汇及划转，并且不再要求境内股东因减持、转让境内公司境外股份或境内公司从境外证券市场退市等原因所得的资本项下收入调回境内专用账户，而是允许其留存境外。

TAXATION / 税收

Two Authorities Jointly Issued Preferential Policy to Optimize Environment for Corporate Investments and Reorganizations

两部门联合出台企业投资优惠政策，优化企业投资重组环境

In early January of 2015, the Ministry of Finance and the State Administration of Taxation jointly released the *Circular on Issues Concerning Enterprise Income Tax Treatments for Promotion of Corporate Reorganizations* (“Circular No. 109”) and the *Circular on Issues Concerning Enterprise Income Tax Policy for Non-Monetary Asset Investments* (“Circular No.116”) to further alleviate enterprises' tax burden for internal group reorganizations and non-monetary asset investments. Specifically, Circular No. 109 lowers the threshold of enjoying special tax treatment for equity/asset acquisitions paid by shares through reducing the minimum equity/asset acquisition percentage that are required to qualify for special tax treatment from 75% to 50% of the acquired companies' total equities/assets. Circular No. 109 further provides that, when transfer of equities or assets is carried out at net book value and between resident

enterprises 100% controlled by the same group, under certain conditions such transfer shall be subject to special tax treatment and no taxable income shall be recognized by either party to the transaction. Circular No.116 alleviates the burden on cash flow of enterprises carrying out non-monetary asset investments through allowing such enterprises to pay enterprise income tax in installments within five years for their gains derived from contributing non-monetary assets into resident enterprises. This preferential policy was previously adopted in China (Shanghai) Pilot Free Trade Zone (“Shanghai FTZ”) since the end of 2013 and now is applicable across the whole country.

2015年1月初，财政部和国家税务总局联合发布了《关于促进企业重组有关企业所得税处理问题的通知》（“《109号文》”）和《关于非货币性资产投资企业所得税政策问题的通知》（“《116号文》”），旨在进一步减轻企业在集团内部重组和非货币性资产

投资下的税收障碍和负担。其中，《109号文》降低了交易各方对其股权投资部分适用特殊性税务处理的门槛，即被收购股权/资产占被收购企业全部股权/转让企业全部资产的比例由不低于75%调整为不低于50%，同时，还对集团内100%直接控制的居民企业之间按照账面净值划转股权或资产的行为，也在一定条件下给予了特殊性税务处理待遇，规定交易双方均不确认所得，从而大大降低了集团内企业内部交易的税收成本。而《116号文》则是将上海自贸区于2013年底开始施行的非货币性资产投资递延纳税政策推广到全国适用，明确居民企业以非货币性资产对外投资实现的资产转让所得，可在5年内递延缴纳企业所得税，缓解了企业进行此类投资后的纳税义务对企业现金流造成的负担。

FTZ UPDATES / 自贸区近期动态**MIIT Removed Foreign Ownership Cap on Certain E-Commerce Businesses in Shanghai FTZ**
工信部放开上海自贸区内经营类电子商务外资比例

On January 13, 2015, the Ministry of Industry and Information Technology ("MIIT") released the *Circular on Removing Restrictions on Foreign Equity Ratios in Online Data Processing and Transaction Processing (Operating E-Commerce) Business in Shanghai FTZ*, relaxing the foreign equity ratio restriction on e-commerce business from 55% to 100%. Till now, foreign investors are allowed to invest in 6 categories of value-added telecommunication businesses in the form of WFOEs within Shanghai FTZ. Pursuant to relevant rules issued by MIIT, enterprises operating those businesses shall be incorporated and

locate their service equipment in Shanghai FTZ. However, except for Internet access service business, foreign investors are allowed to provide services under the other 5 categories to customers across the country. It would be helpful to note that, however, given Chinese authorities' prudent attitude towards foreign investments in value-added telecommunications business historically, in practice it may not be very easy or straightforward for foreign-invested enterprises (especially WFOEs) to actually apply and obtain the relevant licenses and permits to operate those businesses within Shanghai FTZ.

2015年1月13日, 工信部发布《关于在中国(上海)自由贸易试验区放开在线数据处理与交易处理业务(经营类电子商务)外资股权比例限制的通告》, 将相关外资股权比例从原先的55%提高至100%。至此, 目前区内外资企业能够全资经营的增值电信业务增加到了6项。根据工信部的相关文件, 经营该等增值电信业务的企业注册地和服务设施须设在区内, 除因特网接入服务业务外, 其他业务的服务范围可以面向全国。但是需要注意的是, 实践中, 由于主管部门长期以来对外资进入增值电信业务采取较为严格的监管态度, 估计外国投资者(尤其是外商独资企业)在区内取得相关许可仍会遇到不少难度。

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