

China Regulatory Updates

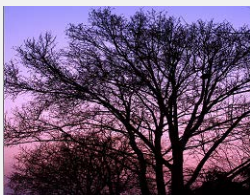
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Connotation of "Han Yi"

- › Standardization
- › Unique player in the PRC legal service market
- › Simplicity, but always with a focus on key points and attention to details

Our Values

- › Professionalism
- › Cost Efficiency and Effectiveness
- › Constant Self-Improvement Towards Perfection



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China Launched Pilot RQFII Scheme to Further Promote RMB Internationalization

中国开始试点 RQFII，助推人民币国际化

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FOREIGN INVESTMENT / 外商投资

NDRC and MOFCOM Released New *Industry Catalogue for Guidance of Foreign Investments*

新版《外商投资产业指导目录》正式发布

Following the draft for comments issued in April 2011 (*please refer to our May 2011 issue of China Regulatory Updates for details*), NDRC and MOFCOM have recently promulgated the new *Industry Catalogue for Guidance of Foreign Investments* (the "New Catalogue"), which will take effect from January 30, 2012 and replace the previous version released in 2007.

Changes in the New Catalogue are generally consistent with the country's "further opening-up" policy and encourage foreign investment to shift from some traditional industries with overcapacity to advanced manufacturing industry, high technology industry, modern service industry, new energy and environment-friendly industries. We have briefly summarized below some major changes in certain industries for your general reference:

- (1) **Automobile Manufacturing:** In order to facilitate the nation-wide industry upgrading program and to avoid potential overcapacity, automobile manufacturing is no longer an *encouraged* category item in the New Catalogue. It is reported that NDRC is currently working on the amendments to the *Automotive Industry Policy*, according to which the industry entry requirements for foreign investment may be raised slightly, and the existing 50% shareholding restriction on foreign investment will most likely remain unchanged. It is noteworthy that in the New Catalogue, manufacturing of key components of new-energy automobile is added into the encouraged category, while in the meantime foreign investments in manufacturing of key auto parts and components as well as research and development of key technology in such sector are still encouraged.
- (2) **Real Estate:** Development and operation of villa projects have been explicitly prohibited under the New Catalogue, which is consistent with the government's tightening policy on real estate development.
- (3) **Wholesale and Retail:** (i) the wholesale and retail of drugs and automobiles are deleted from the restricted category and fall under the permitted category. As such, foreign investments in sale of automobiles will no longer be subject to the restriction that "a chain store company having more than 30 shops selling multiple lines of products under different brand names from different suppliers should be controlled by domestic PRC investors", which restriction however, may still be applicable to chain store companies selling drugs unless it is also lifted by other restrictive rules

在 2011 年 4 月发布的征求意见稿（请参见本所 2011 年 5 月期《中国法律更新》）基础之上，发改委、商务部于近日正式公布了《外商投资产业指导目录（2011 版）》（“新目录”），对《外商投资产业指导目录（2007 版）》进行了系统修订。新目录将于 2012 年 1 月 30 日起施行。

总体而言，新目录体现了继续扩大对外开放领域的大方向，并试图引导外商投资从一些产能过剩的产业逐步转向高端制造业、高新技术产业、现代服务业、新能源和节能环保等产业。下文就新目录对一些行业的重大调整进行了简要总结，供参考：

- (1) **汽车制造：**考虑到汽车整车制造能力或有过剩之虞，新目录中将汽车整车制造从鼓励类调整为允许类。据悉，发改委正在研究修订《汽车产业发展政策》，可能适度提高外资在整车制造领域的准入门槛，且可能会继续坚持目前有关中外合资整车制造企业的外资比例不得高于 50% 的限制。值得注意的是，新目录继续鼓励汽车关键零部件的制造及关键技术研发，并新增对新能源汽车关键零部件制造的鼓励。
- (2) **房地产：**别墅的建设、经营由限制类调整为禁止类，进一步体现了国家对高端房地产开发的控制。
- (3) **批发和零售：**(a) 药品和汽车的销售从限制类调整为允许类，其中汽车销售不再受“设立超过 30 家分店、销售来自多个供应商的不同种类和品牌商品的连锁店应由中方控股”的限制，但药品销售是否还受该等限制，尚待后续专项法规的进一步明确；(b) 特许经营、委托经营、商业管理以及商品拍卖从限制类调整为

(including the *Administrative Measures on Foreign Investment in Commercial Sector*, among others); (ii) franchising, commissioned operation, commercial management and commodity auction are removed from the restricted category to permitted one; and (iii) construction and operation of large-scale wholesale market of agricultural goods is added into the restricted category, which reflects Chinese government's prudent attitude towards foreign investments in such field.

- (4) **Modern Services:** Venture capital investment, intellectual property right service and home service industries have for the first time been classified into the encouraged category, and financial leasing companies have been removed from the restricted category to the permitted category, which altogether mirror the government's encouragements to foreign investments in modern service industries.
- (4) **现代服务业:** 创业投资企业、知识产权服务和家庭服务业首次被列为鼓励类，金融租赁公司从限制类调整为允许类，体现了监管部门对现代服务业的鼓励政策。
- (5) **Medical Institutions:** The New Catalogue removes medical institutions from restricted category to permitted category. Under other applicable PRC laws and regulations, except for investments by qualified service providers from Hong Kong, Macau and Taiwan in certain costal areas, foreign investors may at maximum hold 70% equity interests in a medical institution in China. Such restriction, though may still be applicable for the time being, is expected to be gradually lifted in the near future in accordance with the *Opinions on Further Encouraging and Guiding Investment in Medical Institutions with Non-State Capitals* jointly issued by several government authorities in late 2010.
- (5) **医疗机构:** 新目录将医疗机构从限制类调整为允许类。目前，除了允许港澳台服务提供者在大陆部分沿海地区以独资方式设立医疗机构之外，外方还只能以中外合资、合作的方式成立医疗机构，且其在该等医疗机构中持股不得超过70%。尽管该等外资比例限制暂时还会继续适用，但新目录将其从限制类删除，体现了《关于进一步鼓励和引导社会资本举办医疗机构的意见》的通知（国办发〔2010〕58号）中有关“逐步取消对境外资本的股权比例限制”的原则。
- (6) **Publishing Business:** Foreign entry restrictions in publishing sector have been generally relaxed in the New Catalogue. For example, the New Category has canceled the requirement that the distribution of audio & video products (excluding films) should be controlled by Chinese investors. Further, foreign investments master distribution of books, newspaper and journals, as well as import of books, newspaper, journals, audio & video products and electronic publications are no longer forbidden in the New Catalogue.
- (6) **出版领域:** 新目录总体上放宽了对出版领域外资准入的限制，包括取消音像制品（除电影外）的分销需由中方控股的限制，允许外资从事图书、报纸、期刊的总发行和图书、报纸、期刊、音像制品和电子出版物进口等业务。
- (7) **Express Delivery Services:** The New Catalogue has explicitly prohibited foreign investment in domestic mail express delivery services, which is consistent with the relevant provisions under the *PRC Postal Law* promulgated in 2009. Note however, that domestic parcel express deliveries are generally permitted for foreign investment. It is reported that the State Council has recently approved foreign invested companies to engage in domestic express (parcel) deliveries and the State Post Bureau is expected to extend licenses for express delivery services to foreign invested express parcel delivery companies fairly soon.¹
- (7) **快递:** 与2009年修订的《邮政法》一致，信件的国内快递业务现被明确列为禁止类。但据悉，国务院已于日前批准外资经营国内快递业务（信件除外），国家邮政局近期将向外资快递企业发放快递业务运营许可证。¹

¹ The State Post Bureau has been quite prudent in issuing licenses for express delivery services to foreign invested express delivery companies and it is reported that no such license has ever been issued to any foreign invested express delivery companies yet, although

- (8) **Education:** Vocational training has been for the first time listed in the encouraged category without restriction on foreign investment ratio.

According to the NDRC, as to foreign investment projects in the business sectors which the New Catalogue added new restrictions on or even been removed to the prohibited category, if such projects have been approved by competent government authorities and started operating before January 30, 2012, they could continue to operate in accordance with the rules and policies which were effective when such projects were approved, while any capital increase, shareholding change or overseas listing of such projects should be subject to the New Catalogue.

In addition, pursuant to the New Catalogue, if there is any discrepancy between the New Catalogue and any special regulation or industrial policy of the State Council, such special regulation or industrial policy should prevail. This also leaves rooms for the State Council to release, from time to time and based on the country's then applicable industrial upgrading and adjustment policies, new rules disparate from the New Catalogue in the future.

- (8) **教育:** 职业技能培训首次被列为鼓励类, 且未对外资比例做出限制。

根据发改委的解释, 新目录实施之前核准的外商投资项目仍依照原目录执行。对新目录中增设限制条件(含禁止)的项目, 如该等项目已在2012年1月30日以前存在并运营, 仍按项目核准时的政策执行, 但其增资、股权转让或境内企业境外上市等, 须按照新目录的规定执行。

此外, 值得注意的是, 新目录首次强调了“国务院专项规定或产业政策另有规定的, 从其规定”。据此, 如果现行相关专项规定中存在与新目录不一致之处, 一般情况下仍应以相关专项规定为准; 另外新目录也为国务院根据国家产业政策的最新调整不时作出与新目录不同的规定预留了余地。

MOFCOM Simplified Onshore Reinvestment Procedures for Foreign-Invested Investment Type of Companies or Foreign-Invested Holdco's

商务部简化外商投资性公司境内再投资程序

With an aim to better regulate the approval and administration of the foreign exchange matters of foreign invested investment companies (“Investment Companies”), MOFCOM and SAFE have jointly promulgated the *Circular on Further Improving Management Measures Concerning Foreign Invested Investment Companies* (the “Circular”) recently, providing that: (i) subject to the approval of local SAFE offices, an Investment Company may use its RMB income legally derived from dividend distribution, capital return, liquidation, equity transfer, or capital reduction to make reinvestments in China; or (ii) a foreign investor may contribute such RMB income to its Investment Company as its capital increase, which in turn could be used to make equity investments within China. Prior to the promulgation of the Circular, only the latter way seems to be ambiguously permitted pursuant to the *Circular on the Implementation Guidance for Issues Relating to the Capital Verification for Reinvestment by Foreign Invested Investment Companies* issued by SAFE.

Further, the Circular prohibits an Investment Company from making any leveraged investments in China by using domestically obtained loans, so as to maintain a tight control of domestic loans and prevent potential speculation over RMB or other capital products.

为规范外商投资性公司的审批和外汇管理, 商务部、外管局近日联合发布了《关于进一步完善外商投资性公司有关管理措施的通知》(“《联合通知》”), 规定: (i) 外商投资性公司以其在中国境内获得的人民币合法所得(人民币利润、先行回收投资、清算、股权转让、减资的人民币合法所得)进行境内再投资, 可以经所在地外汇局核准后直接用于境内投资; 或者(ii) 外国投资者也可将其前述合法所得向投资性公司注册资本出资(或增资)后开展境内投资。而根据之前外管局的规定(《关于外商投资性公司再投资所涉验资询证有关问题操作指引的通知》), 仅有前述第(ii)种方案可行。

此外, 为了管控境内贷款, 避免对人民币或资本性产品进行投机炒作, 《联合通知》明文禁止外商投资性公司的境内贷款用于境内再投资。

in practice, some domestic express delivery companies with foreign participations have already been in operation.

¹据报道, 邮政管理部门对向外资发放快递业务运营许可证一直比较审慎, 虽然有不少外资快递企业经营包裹等国内快递业务, 但实际并未取得快递业务运营许可证。

PRIVATE EQUITY / 私募股权投资

NDRC Issued National Administrative Rules Governing PE Funds

发改委发布全国性私募股权投资基金管理规范

In order to strengthen regulations on private equity funds (the "Funds"), NDRC has recently released the *Circular on Promoting Orderly Development of Private Equity Investment Enterprises* (the "Circular"), extending the practices under the pilot rules (the "Pilot Rules"; please refer to our March 2011 issue of *China Regulatory Updates* for details) from a few geographic areas to the whole country.

The Circular is generally in line with the Pilot Rules in terms of its major contents, with some noteworthy alterations set forth below:

(1) Small Funds Also Subject to Filing Requirement

According to the Pilot Rules, only Funds with a committed size of RMB500 million (or an equivalent amount in a foreign currency) or larger in the pilot areas are mandatorily required to be filed with the central NDRC, while pursuant to the Circular, Funds with a smaller size (the "Small Funds") should also be filed with the competent government authorities (the "Provincial Filing Authorities") as designated by local provincial government. The filing procedures of any Fund shall be initiated within one month after the Fund has been registered with local SAIC offices.

Han Yi Observations: Requiring Small Funds to comply with the filing requirement is consistent with NDRC's attempt to prevent illegal fund raisings, which tend to happen frequently with Small Funds. Due to the lack of the implementing rules with respect to detailed local filing procedures and who will be the Provincial Filing Authorities, it remains to be seen how effective the filing mechanism will work for Small Funds.

(2) More Stringent Control on Number of Investors

The Circular introduced a so-called "look-through" approach when counting the number of investors in a Fund. Where an investor of a Fund is structured as a partnership or a trust (except for fund of funds or FOF), the ultimate investors of such partnership or trust should be fully disclosed and counted in when determining whether the number of such Fund's qualified investors is in compliance with applicable PRC laws.

为了进一步强化对私募股权投资基金 ("基金") 监管, 发改委于近日发布了《关于促进股权投资企业规范发展的通知》(《通知》), 将此前在部分省市试点实施的基金备案方案(《试点规则》); 请参见本所2011年3月期《中国法律更新》) 推向全国。

《通知》的大致架构及主要内容与《试点规则》基本一致, 主要的不同之处有以下几点:

(1) 股权投资企业的备案管理范围扩大

根据《试点规则》, 国家发改委只对资本规模(含投资者已实际出资及虽未实际出资但已承诺出资的资本规模)达到或者超过5亿元人民币(或者等值外币)的基金进行备案管理; 而《通知》则要求5亿元人民币以下的基金("小规模基金")也应在省级人民政府确定的备案管理部门("省级备案管理部门")备案。所有基金均需在工商设立登记后1个月内申请备案。

瀚一评述: 将小规模基金纳入监管范围被视为发改委致力于杜绝非法集资问题的一项重要举措(非法集资问题通常发生在小规模基金身上)。目前负责小规模基金备案的地方操作细则尚未出台, 很多地方也未明确省级备案管理部门, 对小规模基金的监管措施能否有效执行尚待进一步观察。

(2) 投资者人数严格受限

《通知》明确规定, 投资者为集合资金信托、合伙企业等非法人机构的, 应打通核查最终的自然人和法人机构是否为合格投资者, 并打通计算投资者总数, 但投资者为股权投资母基金的除外。

Han Yi Observations: This “look-through” approach is designed to help to prevent the intentional evasion of restrictions on the number of Fund investors, and may consequently obstruct the capital raising channel through private banking or third party wealth management institutions that is often structured through a partnership type of investment vehicle in practice. Further, according to a seminar held by NDRC, only FOFs duly filed with NDRC would be treated as a single investor, otherwise the “look-through” approach should still be applicable to such FOFs.

瀚一评述: 发改委要求将壳公司“开包解原”，以杜绝部分基金以多层合伙等模式规避基金的合格投资者人数限制。据此，目前很多基金向私人银行、第三方理财机构募集资金的渠道将受到较大影响（实践中很多私人银行、第三方理财机构通过设立合伙企业从客户群募集资金，再将合伙企业作为单一出资人向基金注资）。另据报道，发改委有关人士在相关研讨会上表示，能被视为单个投资者的股权投资母基金必须在发改委完成备案，否则仍需要打通计算投资者总数。目前发改委已经着手界定股权投资母基金满足合格投资者要求的相关标准。

(3) Mandatory Asset Custody

The Pilot Rules only require Funds managed by foreign invested entities to put the assets of such Funds in custody of onshore custodians with legal person status. According to the Circular, assets of any other Fund should also be held by qualified custodians, unless otherwise agreed by all investors of such Fund unanimously. Introduction of custodians is helpful to better supervise capital flow of the Funds and protect the interests of their investors.

As the first nation-wide administrative rules on the Funds, the Circular will definitely play an important role in the sound and orderly development of Funds in China. However, the Circular is more like a guidance type of document mainly focusing on such major issues as capital raising, fund filing, information disclosure and etc., and is silent on some practical issues like forex settlement, investment, capital withdrawal, among others. Some provisions therein are also not clear enough (e.g., FOFs and the so-called “qualified investors” have not been defined), and the limit of duties and responsibilities of relevant authorities (i.e., NDRC, MOFCOM, CSRC, SAFE and etc.) still require further clarifications. It is reported that NDRC is working on certain implementing rules and may release such rules in the near future.

(3) 增加了“资产托管”的规定

《试点规则》仅规定“管理机构为外商独资或者中外合资的，应当由在境内具有法人资格的独立托管机构托管该基金的资产。”但是《通知》要求内资管理机构所管理基金的资产也应当委托托管机构进行托管（除非所有投资者一致同意免于托管）。托管机构能够协助监控基金的资产流向，有利于更好地保护投资者的利益。

作为我国首个全国性的基金管理规则，《通知》对我国基金行业的规范发展意义重大。但是，《通知》的部分表述比较原则（例如，未对母基金及合格投资者作出明确界定），且监管范围仍主要集中于基金备案、募集及信息披露等部分层面（对结汇、投资、退出等主要操作环节均未规定），因此实践操作中还有不少模糊的空间尚待相关实施细则的出台。此外，发改委、商务部、证监会、外管局等各个政府部门各自的监管职责和具体分工仍待厘清。

QFII / 人民币合格境外机构投资者

China Launched Pilot RQFII Scheme to Further Promote RMB Internationalization

中国开始试点 RQFII，助推人民币国际化

To expand investment channels for offshore RMB and to develop the offshore RMB market in Hong Kong, CSRC, PBOC and SAFE jointly issued the *Pilot Measures for Fund Management*

为拓展境外人民币投资渠道，发展香港离岸人民币市场，2011年12月16日，证监会、央行、外管局联合发布了《基

Companies and Securities Companies that Qualify as RMB Qualified Foreign Institutional Investors ("RQFII") to Invest in Onshore Securities Market on December 16, 2011, followed by relevant implementing rules issued by CSRC and SAFE respectively in late December, 2011 (collectively, the "RQFII Pilot Measures"). The RQFII Pilot Measures have become effective upon issuance.

According to the RQFII Pilot Measures, Hong Kong subsidiaries of qualified Chinese domestic fund management companies and securities companies (the "HK Subsidiaries") may invest in China's onshore securities markets with the RMB fund raised in Hong Kong. An eligible HK Subsidiary (e.g., such HK Subsidiary and its onshore parent company should have obtained qualifications for asset management business in Hong Kong and mainland China respectively, have been conducting such business in accordance with relevant applicable regulations, and have not been materially penalized by its competent regulators over the past 3 years) may carry on securities investments once it obtains approvals from CSRC and competent SAFE office with respect to investment qualification and investment quota, respectively.

SAFE will supervise the investment quota of each pilot RQFII ("Investment Quota") based on their respective quota balance, and the accumulated offshore RMB remitted to mainland China by a pilot RQFII shall not at any time exceed its approved Investment Quota. If any pilot RQFII fails to make full use of its Investment Quota within one year upon approval by competent SAFE office, the competent SAFE office is entitled to reduce or cancel the Investment Quota of such RQFII at its sole discretion. Meanwhile, in order to mitigate market risks, the RQFII Pilot Measures require that the RMB fund invested by a pilot RQFII in stocks or securities funds should not exceed 20% of all RMB fund raised by it, and that no less than 80% of RMB fund should be invested in fixed-income products (e.g., bonds or fixed-income types of funds).

The launch of RQFII scheme will help facilitate RMB internationalization, and will introduce new cash sources to onshore A-share market. However, given that the pilot scheme is only applicable to HK Subsidiaries (i.e., Hong Kong subsidiaries of qualified PRC domestic fund management companies and securities companies) and the total Investment Quota for all pilot RQFIIs is comparatively limited for the time being (i.e., temporarily RMB20 billion), influence of the pilot scheme upon the securities market seems immaterial. It is reported that so far 9 fund management companies and 12 securities companies have obtained the pilot RQFII licenses, and are applying to SAFE for their respective Investment Quota.

基金管理公司、证券公司人民币合格境外机构投资者境内证券投资试点办法》；证监会、外管局分别于 2011 年 12 月 16 日及 2011 年 12 月 23 日就试点办法发布了相关的实施细则（统称“《试点办法》”）。试点办法自发布之日起实施。

《试点办法》适用于境内基金管理公司、证券公司的香港子公司（“香港子公司”），运用在香港募集的人民币资金投资境内证券市场的行为。根据《试点办法》，满足一定条件的香港子公司（例如，香港子公司及其境内母公司分别取得香港证券监管部门及证监会的资产管理业务资格，且经营行为规范，最近 3 年内未受到重大处罚）投资境内证券市场须先经证监会批准，然后向外管局申请取得投资额度后方可进行投资。

外管局对试点 RQFII 的额度（“投资额度”）实行余额管理，累计净汇入的人民币资金不得超过经批准的投资额度。已取得投资额度的 RQFII 如自获批额度之日起 1 年内未能有效使用投资额度，外管局将酌情调减其投资额度直至取消。同时，为了控制风险，《试点办法》要求试点机构投资于股票及股票类基金的资金不超过募集规模的 20%，投资于固定收益证券（各类债券及固定收益类基金）的资金不少于募集规模的 80%。

RQFII 的推出将有利于推动人民币的国际化，并在一定程度上为 A 股带来资金的利好。但鉴于目前试点范围仅限于香港子公司（即内地在港券商和基金公司），且试点的总资金规模较小（暂定为人民币 200 亿元），其所带来的实质影响可能还比较有限。据悉，目前已经有 9 家基金公司和 12 家证券公司获得 RQFII 试点资格，正在向外管局申请投资额度。

For further information, please write us at inquiry@hanyilaw.com.

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