



China Regulatory Updates

July 2011

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*



■ **OUTBOUND INVESTMENT / 对外投资**

SASAC Issues Measures for Administration of Overseas PRC State-Owned Assets and Property Rights of Enterprises Directly Administered by Central Government

国资委发布中央企业境外国有资产监督管理和境外产权管理办法

■ **ANTI-MONOPOLY / 反垄断**

MOFCOM Solicits Public Opinions on Detailed Rules Regarding Concentration of Business Operators

商务部就经营者集中相关细则征求意见

■ **FOREIGN INVESTMENT / 外商投资**

Pilot RMB Settlement for Foreign Direct Investment Comes into Being

外商直接投资人民币结算业务试点成型

■ **SOCIAL SECURITY / 社会保险**

MHRSS Solicits Public Opinions on Interim Measures for Foreigners' Participation in Social Insurance

人社部发布外国人参加社保暂行办法征求意见稿

Shanghai Office

Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800
Fax: (86-21) 6083-9811

Beijing Office

Suite C203-5A
Lufthansa Centre Office Building
Beijing 100125, China
Tel: (86-10) 6410-5322
Fax: (86-10) 6410-5322

OUTBOUND INVESTMENT / 对外投资

SASAC Issues Measures for Administration of Overseas PRC State-Owned Assets and Property Rights of Enterprises Directly Administered by Central Government

国资委发布中央企业境外国有资产监督管理和境外产权管理办法

In order to facilitate China's "going global" strategy for enterprises directly administered by the central government (the "Central Enterprises") and strengthen regulation of overseas PRC state-owned assets, the PRC State-Owned Asset Supervision and Administration Commission of the State Council ("SASAC") recently issued the *Interim Measures for Regulation and Administration of Overseas PRC State-Owned Assets of Central Enterprises* and the *Interim Measures for Administration on Overseas PRC State-Owned Property Rights of Central Enterprises* (together, the "Measures"), which provided for the first time a full set of stipulations on the administration of overseas PRC state-owned assets held by Central Enterprises and their subsidiaries at various levels. The Measures have taken effect as of July 1, 2011.

According to the Measures, SASAC and the Central Enterprises are the authorities in charge of administering the overseas PRC state-owned assets of Central Enterprises, of which Central Enterprises are responsible for the administration of their overseas state-owned property rights, while SASAC is mainly responsible for the regulation of major overseas investments involving Central Enterprises. The Measures address issues related to overseas asset formation, daily regulation, major issue regulation and etc. as well as the property right registration, asset appraisal, approval procedures, investment liabilities and other issues related to overseas state-owned assets. With respect to nominee shareholding arrangements, which are likely to result in a loss of state-owned assets, the Measures provide that all nominee shareholding arrangements involving Central Enterprises should be reported to SASAC after approval by the relevant Central Enterprises. According to the Measures, transfer of overseas state-owned assets is generally subject to approval by Central Enterprises; provided that if there occurs any change to the control position of a Central Enterprise (e.g., the subsidiary is converted from wholly PRC state-owned to majority PRC state-controlled or from majority PRC state-controlled to relative control or loss of control) as a result, the underlying transfer should be reported to SASAC for approval. If any overseas enterprise wholly owned or controlled by a Central Enterprise or any of its subsidiaries intends to list on an overseas stock exchange, the proposed listing should be approved by the Central Enterprise and reported to SASAC. If any key subsidiary of a Central Enterprise is involved, an approval by or a filing with SASAC would be required depending on the situations.

The implementation of the Measures will help improve the current situation, in which the operation of overseas assets involving Central Enterprises is often improperly regulated and characterized by a lack of risk management after an investment is made. The Measures are not applicable to PRC state-owned

为配合实施央企“走出去”的战略，加强境外国有资产的监管，国资委近日公布了《中央企业境外国有资产监督管理暂行办法》和《中央企业境外国有产权管理暂行办法》(合称“《境外国资办法》”)，对中央企业及其各级独资、控股子企业持有的境外国有资产的监督管理进行了系统规定，填补了境外国有产权管理制度的空白。《境外国资办法》将自7月1日起施行。

根据《境外国资办法》，中央企业境外国有资产的监管部门是国资委和中央企业，其中中央企业是其境外国有产权管理的责任主体，而国资委则主要负责重大境外投资事项的监督管理。《境外国资办法》的内容涉及境外资产形成、日常监管、重大事项监管等，并对境外国资的产权登记、资产评估、审批程序、投资责任等进行了规定。对于实践中较引起国有资产流失的股份代持，《境外国资办法》规定，央企国有资产的代持应报中央企业批准后报告国资委。根据《境外国资办法》，境外国有资产的转让一般由中央企业批准，但导致中央企业重要子企业由国有独资转为绝对控股、绝对控股转为相对控股或者失去控股地位的，应当报国资委审核同意。中央企业及其各级子企业独资或者控股的境外企业在境外上市需经央企批准并报告国资委，如属于中央企业重要子企业的，则应报国资委审核同意或备案。

《境外国资办法》的实施将改善目前央企境外资产运营中不够规范、风险意识不强、重投资、轻管理等情况，有利于境外国有资产的保值增值。《境外国资办法》不适用于地方国有资产，地方国

assets involving other companies (i.e., mainly the local SOEs). Local SASAC offices are authorized to formulate measures to regulate overseas PRC state-owned assets of local enterprises with a reference to these Measures.

有资产监督管理机构可以参照其制定所出资企业境外国有资产管理制度的。

ANTI-MONOPOLY / 反垄断

MOFCOM Solicits Public Opinions on Detailed Rules Regarding Concentration of Business Operators

商务部就经营者集中相关细则征求意见

MOFCOM recently issued the *Interim Rules on Assessing the Impact on Competition Caused by Concentration of Business Operators (Draft for Comments)* (the "Rules") and the *Interim Measures on Investigating and Handling the Failure to File Concentration of Business Operators (Draft for Comments)* (the "Measures"), which aim to refine the relevant provisions on concentration of business operators in the *PRC Anti-Monopoly Law*, to seek public opinions.

The Rules refine the factors that need to be taken into consideration for reviewing the concentration of business operators under Article 27 of the *PRC Anti-Monopoly Law*, and aim to provide guidance for the assessment of concentration of business operators in practice. For example, the Rules define the market share and market control power of business operators involved in concentration, clarify the indices to be referenced for determining the degree of market concentration, and require a comprehensive judgment on the impact of concentration of business operators on market access, technical upgrade, consumers and other business operators, as well as the national economy (the concentration of business operators may have a positive effect on technical upgrade, and consumers will benefit from the economic scale resulted from concentration of business operators, which will also contribute to the development of the national economy). In addition to the factors explicitly set out in Article 27 of the *PRC Anti-Monopoly Law*, we should also take into full consideration the impact of concentration on public interests and economic benefits as well as whether the business operators involved in concentration are near bankruptcy.

Generally, the provisions in the Rules are quite flexible and indefinite, and the specific criteria is not quantified (e.g., the Rules provide that references to HHI index and CR_n index may be made for determining market concentration degree, but fail to specify the criteria for the determination of excluding or restricting competition). MOFCOM may give interpretation and make a comprehensive evaluation of relevant criteria when examining concentration of business operators on a case by case basis.

The Measures make detailed provisions on the investigation and handling procedures, the punishments to be imposed and other issues related to the failure to file any concentration of business operators which has otherwise reached the threshold for filing. According to the Measures, any entity or individual may report any

商务部近期发布了《关于评估经营者集中竞争影响的暂行规定（征求意见稿）》（“《评估规定》”）和《未依法申报经营者集中调查处理暂行办法（征求意见稿）》（“《处理办法》”），向公众征求意见，对《反垄断法》中经营者集中的相关规定进行细化。

《评估规定》将《反垄断法》第二十七条中审查经营者集中应考虑的因素进行了细化，旨在为评价经营者集中具体案件提供指引。比如，《评估规定》对参与集中的经营者的市场份额和市场控制力进行了界定，明确判断市场集中度可参考的指数，并要求综合评判经营者集中对市场进入、技术进步、消费者和其他经营者、国民经济的影响（经营者集中也可能通过整合技术研发力量对技术进步产生积极影响，其带来的规模效益也可能使消费者受益、并促进国民经济发展）。除《反垄断法》第二十七条明确列举的因素外，还需综合考虑集中对公共利益、经济效率的影响，以及参与集中的经营者是否为濒临破产的企业等因素。

总体而言，《评估规定》的内容比较软性和模糊，也未量化具体标准（比如《评估规定》提出判断市场集中度可参考 HHI 指数和 CR_n 指数，但未明确达到什么标准的经营者集中会被认定为排除、限制竞争行为），商务部在审查具体经营者集中时应会对相关标准进行解释和综合评价。

《处理办法》则对达到申报标准但未依法申报的经营者集中的调查处理程序、处罚措施等进行了具体规定。根据《处理办法》，任何单位和个人有权向商务部举报涉嫌未依法申报的经营者集中，

suspected failure of filing to MOFCOM. MOFCOM should conduct an investigation on any concentration of business operators with a high possibility of not being filed according to applicable law. If the investigation finds that there is a failure to file the concentration of business operators, MOFCOM should conduct further investigation and assess whether it has or may have the effect of eliminating or restricting competition. The Measures has also stipulated punishments for conducting concentration against applicable law, i.e., MOFCOM should order the suspension of concentration, or a proper disposal of the shares or assets involved in a timely manner, or a divestiture of certain businesses, or other necessary measures in order to restore related matters to their status prior to the concentration. In addition, a fine of up to RMB500,000 may also be imposed. The Measures are however silent on circumstances in which a concentration fails to be filed according to applicable law but is also not prohibited in the final decision. Currently there is no report that MOFCOM has dealt with any concentration of business operators that fails to be filed according to applicable law. With the promulgation of the Measures, MOFCOM may gradually pay more attention to this kind of case and certain measures will also be taken accordingly.

对存在未依法申报重大嫌疑的经营者集中，商务部应当立案调查，调查发现属于未依法申报经营者集中的，商务部应进行进一步调查，评估其是否具有或者可能具有排除、限制竞争效果。《处理办法》规定了违法实施集中的处罚，即商务部应责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，并可以处人民币五十万元以下的罚款，但并未明确未依法申报、却最终被认定为不予禁止的集中行为该如何处罚。据悉，目前商务部尚未公开处理过未依法申报的经营者集中。随着《处理办法》的正式颁布，商务部可能逐步关注这类案件、并对其作出相应处理。

FOREIGN INVESTMENT / 外商投资

Pilot RMB Settlement for Foreign Direct Investment Comes into Being

外商直接投资人民币结算业务试点成型

The People's Bank of China ("PBOC") recently issued the Circular on Clarification of Issues Related to Cross-Border RMB Business (the "Circular"), which formally specifies the measures for pilot RMB settlement for foreign direct investment. PBOC previously issued the *Measures for Administration on Pilot RMB Settlement for Cross-Border Trade* and the *Measures for Administration on Pilot RMB Settlement for Overseas Direct Investment* in July 2009 and January 2011 respectively, with an aim to facilitate RMB settlement for import/export trade and overseas direct investment in selected pilot regions. The promulgation of the Circular indicates a further accelerated RMB flow-back mechanism, a gradually improved RMB inflow and outflow mechanism, and is recognized as a big step forward for the RMB going international.

According to the Circular, during the pilot period, foreign investors may use their legally obtained RMB to invest in China, in the form of greenfield investment, acquisition of domestic enterprises (excluding round-trip acquisition), equity transfer, capital increase of existing enterprises and providing shareholder loans. However, to ensure that the relevant business is carried out in a smooth and orderly fashion and to guard against the inflow of hot money, the pilot RMB settlement business for foreign direct investment is currently not available to projects restricted or heavily regulated by the government.

The Circular sets forth strict provisions on the relevant operating procedures, which illustrate the government's determination to act

日前，中国人民银行公布了《关于明确跨境人民币业务相关问题的通知》（“通知”），正式明确了外商直接投资人民币结算业务的试点办法。此前，央行曾于2009年7月和2011年1月颁布《跨境贸易人民币结算试点管理办法》及《境外直接投资人民币结算试点管理办法》，在相关试点地区推动人民币进出口贸易结算以及境外直接投资人民币结算。《通知》的发布意味着人民币回流机制进一步打通，人民币双向流动机制逐步完善，人民币国际化再次迈出一大步。

根据《通知》规定，试点期间外国投资者可以以合法获得的人民币来华投资，包括用于新设立企业出资、并购境内企业（不含返程并购）、股权转让以及对现有企业进行增资、提供股东贷款。但为确保相关业务稳妥有序开展，防范热钱流入，目前人民币外商直接投资业务试点对国家限制类和重点调控类项目暂不受理。

《通知》对试点操作程序作了严格规定，体现了审慎的原则。《通知》要求

with prudence in regards to the regulation of RMB flows. The Circular requires that, in order to handle RMB cross-border settlement, a domestic settlement bank for foreign investors or domestic foreign invested enterprises should submit a pilot application to an appropriate PBOC branch, report level by level to the PBOC head office for approval and obtain a filing notice for RMB cross-border investment and financing settlement business.

外国投资者或境内外商投资企业的境内结算银行向相应的人民银行分行提交试点申请，逐级报至总行同意并取得人民币跨境投融资业务备案通知书，方可办理人民币资金的跨境结算。

SOCIAL SECURITY / 社会保险

MHRSS Solicits Public Opinions on Interim Measures for Foreigners' Participation in Social Insurance

人保部发布外国人参加社保暂行办法征求意见稿

In order to facilitate the implementation of the *PRC Social Insurance Law*, which takes effect as of July 1, 2011, the PRC Ministry of Human Resources and Social Security ("MHRSS") recently issued the *Interim Measures for Foreigners Working in China to Participate in Social Insurance (Draft for Comments)* (the "Interim Measures"), which require foreigners working in China to participate in China's social insurance. Foreigners are currently not mandatorily included in China's social insurance system.

为配合《社会保险法》的实施（该法于2011年7月1日起施行），人力资源和社会保障部于近日发布《在中国境内就业的外国人参加社会保险暂行办法（征求意见稿）》（“暂行办法”），要求在中国就业的外籍人士参加相关中国社保（目前外籍人士并没有被强制性地要求加入中国社保）。

The Interim Measures are not only applicable to foreigners directly employed by PRC entities, but also to foreigners concluding employment contracts with foreign employers and dispatched to their employers' PRC branches and representative offices. The provisions of the Interim Measures also apply to people from the regions of Hong Kong, Macao and Taiwan working in mainland China. With respect to coverage of insurance, foreigners working in China should participate in the same social insurance for employees applicable to Chinese employees, i.e., basic pension insurance, basic medical insurance, work injury insurance, unemployment insurance and maternity insurance. If a foreigner who has participated in China's social insurance satisfies certain conditions, he/she may enjoy social insurance benefits according to applicable law. If a foreigner leaves China before he/she reaches the age qualified for enjoying the pension, his/her individual pension account will be maintained and his/her contributions from previous years may be accumulated once more when or if he/she works in China again. Moreover, upon his/her request in the form of a written application, the PRC social insurance agencies may refund the balance in his/her individual account in a lump sum and terminate the basic pension insurance relationship.

《暂行办法》不仅适用于中国境内组织直接招用的外国人，也适用于与境外雇主订立雇用合同后，被派遣到中国境内的分支机构、代表机构从事相关工作的外国人（港澳台人员在内地就业的，参照《暂行办法》规定参加社会保险）。关于参加险种，《暂行办法》规定，在中国就业的外国人应与中国员工一样，参加职工类社会保险，即职工基本养老保险、职工基本医疗保险、工伤保险、失业保险和生育保险。参加社会保险的外国人，符合条件的，依法享受社会保险待遇。在达到中国规定的领取养老金年龄前离境的，其个人账户予以保留，再次来中国就业的，缴费年限可以累计计算；经本人书面申请的，社会保险经办机构也可以将其个人账户储存额一次性支付给本人，并终止其职工基本养老保险关系。

As a common international practice, bilateral or multilateral treaties are usually concluded to deal with issues related to double or multiple social insurance participation. The Interim Measures therefore, provide that social insurance for foreigners working in China, who are citizens of a country with which the PRC has concluded bilateral or multilateral treaties, should be handled in accordance with those respective treaties. China has currently entered into bilateral treaties with only a limited number of countries such as Germany and Korea.

值得注意的是，国际上处理双重或者多重参加社会保险问题的通行做法是签订双边或者多边协议。《暂行办法》规定，具有与中国签订社会保险双边或多边协议国家国籍的人员在中国境内就业的，其参加社会保险的办法按照协议规定办理。目前中国仅仅与德国、韩国等少数国家签署了社会保障双边协定。

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

HAN YI LAW OFFICES

HAN YI LAW OFFICES

HAN YI LAW OFFICES

These updates are intended for information purpose only and are not a legal advice or a substitute for legal consultation for any particular case or circumstance. © Han Yi Law Offices All rights reserved.