



China Regulatory Updates

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- ▶ *Standardization*
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中小企业私募债试点开始

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FOREIGN INVESTMENT / 外商投资

MOFCOM Tightened up Filing Administration of FIVCIEs

商务部完善外商投资创业投资企业备案管理

On May 7, 2012, MOFCOM issued the *Circular on Improving the Filing Administration of Foreign-Invested Venture Capital Investment Enterprises* (Shangzihan [2012] No. 269, the "Circular") to further clarify certain administrative matters concerning foreign-invested venture capital investment enterprises ("FIVCIE"). The circular has become effective upon circulation.

The Circular imposed a more stringent filing obligation on FIVCIEs. It explicitly provided that MOFCOM should disclose and update on its website on a timely basis a list containing all FIVCIEs that have completed their filings with competent MOFCOM offices. MOFCOM offices at various local levels shall not accept any application for the investment or subsequent change of a FIVCIE that is not included in such list (*note that MOFCOM has not yet released the list as of the date hereof*).

The Circular in the meantime has further encouraged FIVCIEs to invest in strategic emerging industries and modern service industries, and promoted foreign investors to invest in FIVCIEs with offshore RMB funds. Further, the examination and approval time period for the investment by any FIVCIE in industries that fall under the encouraged or permitted categories under the *Catalog of Foreign Investment Industry Guidance* has been shortened to 5 working days under the Circular.

2012年5月7日，商务部下发了《关于完善外商投资创业投资企业备案管理的通知》（商资函[2012]269号，“《通知》”），对外商投资创业投资企业（“创投企业”）的监管事项进行了进一步明确。《通知》自颁布之日起实施。

《通知》首次确立备案名单的前置性地位，加强创投企业的监管。根据《通知》，商务部应在其网站及时发布与更新完成备案手续的创投企业名单；商务部门不得为未在名单之列者办理相关变更手续或准许其开展境内投资（目前商务部网站尚未公布该名单）。

此外，《通知》进一步引导鼓励创投企业对国家战略性新兴产业和现代服务业领域进行投资，并鼓励境外投资者以境外人民币出资设立创投企业或向创投企业增资。对于创投企业向《外商投资产业指导目录》中的鼓励类和允许类行业进行投资的项目，审批时间将缩短至5个工作日，加快了创投企业对外投资的速度。

NDRC Attempted to Clarify Legal Identity of Foreign-Invested RMB Funds

发改委发文确认外商投资人民币基金身份

At the end of April, NDRC issued a brief circular (the "Circular") stating that, according to the *Provisions on Guiding Foreign Investment Direction* and the *Administrative Measures for the Establishment of Partnership Enterprises in China by Foreign Enterprises or Individuals*, for limited partnership type of private equity funds where the GP is a foreign-owned entity and the LPs are domestic PRC entities, they should all be administered according to rules and policies governing foreign investors and their investment activities in China should be subject to the *Catalog of Foreign Investment Industry Guidance*. As a result, investments by foreign-invested RMB funds (*most of which have adopted the above-mentioned structure*) in industries falling under the prohibited areas are now explicitly forbidden and investments in restricted industries will be subject to more stringent administration. In addition, future investments by such RMB funds may also have to go through the relevant approval and/or filing procedures that currently only apply to foreign investment activities, subject of course to further clarification by MOFCOM.

4月底，国家发改委做出解释性批复，对于普通合伙人外资、有限合伙人内资的有限合伙制股权投资企业，根据《指导外商投资方向规定》和《外国企业或者个人在中国境内设立合伙企业管理办法》等规定，应“按照外资政策法规进行管理，其投资项目适用《外商投资产业指导目录》”。这意味着外商在华设立的很多人民币基金（多数外商投资人民币基金采纳上述结构）将受限于《外商投资产业指导目录》的限制（不能向“禁止类”项目投资、向“限制类”项目投资将受到诸多限制），且其对外投资时也有可能需履行与外商投资相关的审批/备案程序。

The Circular represents a major setback for foreign-invested RMB funds and foreign fund managers who are trying to raise new RMB funds. Before the issuance of the Circular, the various local authorities (e.g., *Shanghai and Tianjin*) have offered a *de facto* “national treatment” for funds with a foreign invested GP that has committed no more than 5% of the total fund size (i.e., *such foreign-invested RMB funds can be treated as domestically funded entities for the purpose of foreign investment rules and practice*).

The legal nature of foreign-invested RMB funds has long been a controversial matter under the PRC law and practice. MOFCOM, the primary administration authority of foreign investment matters at the central government level, has so far remained silent on this subject matter. Some media reports have argued that this seems to be the latest attempt by NDRC to further gain its control (from MOFCOM and CSRC presumably) over the administration of all PE funds (including foreign invested ones which presumably should be primarily administered by MOFCOM as a matter of Chinese legal system and the common practice). The market is widely expecting that MOFCOM will soon come up with a new rule to clarify how foreign-invested limited partnership type of RMB funds should be treated under the PRC law for the purpose of foreign investment administration.

发改委的上述批复与此前上海、天津等地的地方性规定明显冲突。根据该等地方性规定，如果外商投资的普通合伙人对相关基金的出资不超过所募集资金总额度的 5%，那么该部分出资不影响所投资合伙制股权投资企业的原有属性（即该等基金可以被划分为国内基金）。

外资人民币基金的身份问题一直广受争议。在中央政府层面，外商投资的主要监管部门 - 商务部至今尚未就该问题明确表态。此次发改委的批复被一些媒体解读为发改委、商务部和证监会三大部门之间就私募股权投资基金的监管职权的权力之争。市场广泛预期，商务部可能会于近期下文对外资人民币基金的身份问题做出认定，届时上述外资人民币基金的身份之争可望得到进一步明确。

SECURITIES AND FINANCE / 证券及金融

CSRC Amended Offering and Underwriting Rules

证监会修改证券发行与承销办法

On May 18, 2012, CSRC issued the newly amended *Measures for Administration of Offering and Underwriting of Securities* (the “Measures”), in an effort to facilitate the reform of the current IPO system and to provide more detailed provisions for the *Guiding Opinions on Further Deepening the Reform of Initial Public Offerings* (the “Guiding Opinions”) promulgated last month. The Measures came into effect upon issuance.

The Measures introduced a more diversified IPO pricing mechanism, according to which the IPO price can be determined through negotiation and such other legitimate measures as deemed appropriate by issuers and their sponsors, in addition to the IPO pricing inquiry system provided in the previous rules. Further, the Measures borrowed the “quiet period” (or *waiting period*) mechanism from the more mature markets such as the U.S. and Hong Kong, pursuant to which the issuer is prohibited from making any kind of presentation publicly starting from CSRC’s acceptance of its IPO application and the publication of the relevant prospectus. Meanwhile, the Measures also provided detailed provisions concerning relevant principles set forth in the Guiding Opinions such as allowing more different types of investors to participate in the IPO pricing inquiry process, establishing a two-way clawback mechanism between the offline and online placements, lifting the offline placement ratio, and

5月18日，证监会发布了新修改的《证券发行与承销管理办法》（“《管理办法》”），以落实新股发行体制改革，并对其于上个月发布的《关于进一步深化新股发行体制改革的指导意见》（证监会公告[2012]10号，“10号公告”）的有关原则性规定进行了细化。《管理办法》于发布之日起生效。

《管理办法》丰富了新股发行定价机制。根据《管理办法》，发行价格的确定方式不再局限于通过询价方式确定，也可以通过发行人与主承销商自主协商直接定价等其他合法可行的方式确定。此外，借鉴美国、香港等成熟市场的安排，《管理办法》引入了新股发行的“静默期”制度，即在首发申请文件受理后至证监会核准发行、招股意向书刊登前，发行人不得采取任何公开方式进行相关推介活动。《管理办法》对10号公告中提及的放宽询价对象的范围、建立网上发行和网下配售份额的双向回拨机制以及调高网下配售的比例、取消3个月的持股期限等方面的规定也进行了细化和落实。

removing the 3-month lock-up period applicable to offline subscription, among others.

Although most revisions under the Measures have mirrored CSRC's multiple attempts to create a less regulated and controlled securities market which is expected to be balanced by more intensified information disclosure requirements, some of the new provisions have resulted in hot debates in the market. For example, observers commented that the new pricing system allowing issuers and sponsors to decide the IPO price through negotiation will make the IPO pricing process even less transparent and will hurt investors' rights more likely.

本次修订体现了监管层放松管制、加强信息披露要求等方面的努力。但是,《管理办法》中的允许发行人与主承销商自主协商定价的规定也引发了广泛的争议,评论称这将使新股定价更加不透明,不利于保护投资者利益。

SMEs Private Placement Bonds Put on Pilot Scheme

中小企业私募债试点开始

Upon approval of CSRC, the Shanghai Stock Exchange (the "SSE") and Shenzhen Stock Exchange (the "SZSE") issued their respective *Pilot Measures for Private Placement Bonds of Small and Medium Sized Enterprises* (collectively, the "Measures") on May 22, 2012, aiming to broaden the financing channel for SMEs (see definition below). Bonds to be issued by the first batch of SMEs are expected to hit the market by mid-June.

为拓宽中小企业融资渠道,经证监会批准,5月22日,上交所和深交所分别发布了《中小企业私募债券业务试点办法》(二者主要内容类似;以下不做区分,统称为“《试点办法》”)。首批中小企业私募债品种有望于6月中旬面世。

According to the Measures, small, medium and micro enterprises not listed on SSE or SZSE ("SMEs", excluding real estate enterprises and financial enterprises for the time being) are qualified to issue and transfer bonds by means of non-public method ("Private Bonds"). The number of investors for each issuance of Private Bonds shall not exceed 200. The SSE Integrated Electronic Platform for Fixed-income Securities, the SZSE Integrated Agreement Trading Platform and the counters of relevant securities companies will provide the trading service for such Private Bonds.

《试点办法》规定,私募债券发行人为未在深沪交易所上市的中小微型企业,暂不包括房地产企业和金融企业;每期投资者合计不得超过200人。上交所的固定收益证券综合电子平台、深交所的综合协议交易平台或证券公司柜台将为私募债券提供转让服务。

Note that no mandatory requirement concerning the net asset value or profitability of relevant Private Bond issuers has been set forth in the Measures and the issuers will have the autonomy to determine with their sponsors and investors about the issuance volume, interest rate, and term of their Private Bonds, subject to some minor restrictions that the bonds' term should be longer than one year and the interest rate shall be capped at three times of the bank's lending rate applicable to the same term. Meanwhile, issuance of Private Bonds is only required to go through a filing procedure with the relevant stock exchanges, which seems to be a convenient one compared with the burdensome CSRC approval required for any public offering.

鉴于中小企业私募债券试点对发行人净资产和盈利能力等没有硬性要求,债券的各种要素,诸如发行金额、利率、期限等,均由发行人、承销商和投资者自行协商确定(但债券期限应在一年以上,发行利率不得超过同期银行贷款基准利率的3倍),且债券采取交易所备案发行制,凸显了中小企业私募债市场化的原则。

To control risks, the Measures adopt a strict entrance policy for qualified investors during the pilot period, according to which qualified investors of Private Bonds will only include financial institutions, financial products issued by financial institutions, and corporate or partnership type of enterprises with capital commitment not less than RMB10,000,000 or RMB50,000,000 (only SSE's Measures recognize individual investors who should however meet some strict conditions such as having a minimum

但为控制风险,《试点办法》要求对试点初期参与私募债认购和转让的投资者实行严格的投资者适当性管理,比如规定投资人应为金融机构、金融机构发行的理财产品以及达到一定资本规模(人民币1,000万、5,000万不等)的企业法人、合伙企业(仅上交所的《试点办法》承认个人投资者,且要求较严

personal asset value of RMB5,000,000).

格，最低需拥有人民币 500 万元的资产)。

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

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