

SEPTEMBER 2013



## TABLE OF CONTENTS / 本期内容

### FOREIGN INVESTMENT AND INDUSTRIAL POLICY / 外商投资和产业政策

Shanghai Free Trade Zone Set to Adopt Special Regulatory Regime  
Governing Foreign Investments / 国务院获授权在上海自贸区实施外资准入  
特别制度 2

Private and Foreign Capital Encouraged to Invest in Elderly Care, Energy-  
Saving and Environmentally Friendly Projects / 国务院鼓励民间资本及外  
资投资节能环保产业和养老服务业 2

Mainland China Signed New CEPA Supplements with Hong Kong and  
Macao / 大陆与香港、澳门签署新CEPA补充协议 2

### ANTI-MONOPOLY / 反垄断

NDRC Tightens up Administrative Inspection and Penalties on Monopoly  
Behaviors / 发改委加大反垄断查处力度 多家企业受到行政处罚 2

### PE & VC / 私募股权投资及创业投资

Closing of First PE Investment under RQFLP Scheme Announced /  
RQFLP试点企业完成首单境内股权投资 3

### OTHER DEVELOPMENTS / 其他要闻

New Trademark Law Adopted to Strengthen Trademark Protection /  
全国人大常委会通过新《商标法》，加强商标保护 3

#### Quotes from Han Yi

*If too wrapped up in  
our immediate  
problems, we will  
almost surely fail to see  
the bigger picture in  
our life. - S. Hu*

*People say opportunity  
never sleeps. Question  
is whether we are  
always awake. - J. Ren*

**FOREIGN INVESTMENT AND INDUSTRIAL POLICY / 外商投资和产业政策****Shanghai Free Trade Zone Set to Adopt Special Regulatory Regime Governing Foreign Investments  
国务院获授权在上海自贸区实施外资准入特别制度**

On August 30, 2013, the Standing Committee of the National People's Congress passed a decision, authorizing the State Council to temporarily adjust the government approvals under certain PRC laws in the recently approved Shanghai Free Trade Zone. According to the decision, except for those subject to *Special Access Administrative Measures* to be clarified later, approval requirements under the three fundamental laws governing foreign investments in mainland China, namely, the *PRC Law on Wholly Foreign-Owned Enterprise*, the *PRC Law on Chinese-Foreign Equity Joint Ventures* and the *PRC Law on Chinese-Foreign Contractual Joint Ventures*, would be modified

temporarily for three years and the establishment or change concerning a wholly foreign-owned enterprise, Sino-foreign equity joint venture or Sino-foreign contractual joint venture will be subject to a much simplified filing procedure instead of a government approval as currently required.

The specific scope and other details concerning the so-called *Special Access Administrative Measures* are yet to be spelt out. Nonetheless, it seems fair to expect that such a new system, once finally promulgated and adopted, would become a remarkable change to the current "*Industrial Guidance Catalogue-Based*" foreign investment administrative system which has been adopted for almost two decades since mid-1990s.

8月30日,全国人大常委会审议通过了《关于授权国务院在中国(上海)自由贸易试验区暂时调整有关法律规定的行政审批的决定》。根据该决定,国务院获授权在其最近批准的(上海)自由贸易试验区(“上海自贸区”)内采取一项“准入特别管理措施”制度,对实施准入特别管理措施之外的外商投资,暂时调整《外资企业法》、《中外合资经营企业法》和《中外合作经营企业法》等三部法律规定的有关行政审批,对与这些投资有关的外资企业、中外合资经营企业、中外合作经营企业的设立、变更等由法律规定的审批制改为备案制,调整时间为3年。

“准入特别管理措施”的具体范围、内容、措施、配套文件等细节尚未对外公布。上述措施一旦最终落实,很可能是对中国外商投资领域沿用多年的“产业指导目录”模式的一次重大改革。

**Private and Foreign Capital Encouraged to Invest in Elderly Care, Energy-Saving and Environmentally Friendly Projects  
国务院鼓励民间资本及外资投资节能环保产业和养老服务业**

In an August 2013 circular, the State Council has further specifically encouraged private capital and foreign capital to invest in the energy-saving and environmentally friendly industry as well as elderly care services.

Pursuant to the applicable *Catalogue for the Guidance of Foreign Investment Industries*, elderly care

service industry is already encouraged for foreign investments, while energy-saving and environmentally friendly projects are either encouraged or generally permitted, neither subject to any foreign shareholding restrictions.

2013年8月,国务院印发《关于加快发展节能环保产业的意见》,其中明确提出及需鼓励和引导民间资本及外资进入节

节能环保领域,并不断完善外商投资软环境。同月中旬,国务院常务会议要求支持民间资本投资创办专业化养老机构,并鼓励境外资本投资养老服务业。

根据现行《外商投资产业指导目录》,养老服务机构属于鼓励类外商投资领域,而与节能环保有关的项目则属于鼓励类或允许类,且没有外商投资比例上的限制。

**Mainland China Signed New CEPA Supplements with Hong Kong and Macao  
大陆与香港、澳门签署新CEPA补充协议**

On August 29, 2013, the Ministry of Commerce signed *Supplement No. 10 to the Closer Economic Partnership Arrangement* with Hong Kong and Macao separately, to further open up the mainland market in the service sector to business players from such two special regions, including, for example, that it allows qualified financial institutions from Hong Kong or Macao to set up: (i) a full scope joint venture securities company in each of Shanghai, Guangdong and Shenzhen (*Hong Kong/Macao investors may hold up to 51% equity interest*), and each of

the approved pilot areas for financial reforms (*Hong Kong/Macao investors may hold up to 49%*), and (ii) fund management joint venture companies in which Hong Kong/Macao shareholders may hold more than 50% equity. In addition, the new supplements also set out rules to further strengthen financial cooperation, and facilitate and liberalize trade and investments with Hong Kong and Macao. Both supplements will take effect on January 1, 2014.

2013年8月29日,中国商务部与香港特

区和澳门特区分别签署了《〈关于建立更紧密经贸关系的安排〉补充协议十》,对香港和澳门服务提供者进一步放宽市场准入限制。比如,新补充协议允许港资和澳资服务提供者在上海、广东、深圳各设立1家全牌照证券公司(港资或澳资合并持股不超过51%),在内地批准的“在金融改革方面先行先试”的若干改革试验区内各设1家全牌照证券公司(港资或澳资合并持股不超过49%);同时允许基金管理公司中的港资或澳资比例超过50%。该两份CEPA补充协议均将于2014年1月1日起正式实施。

**ANTI-MONOPOLY / 反垄断****NDRC Tightens up Administrative Inspection and Penalties on Monopoly Behaviors  
发改委加大反垄断查处力度 多家企业受到行政处罚**

Following the verdict of the Shanghai People's High Court in early August, 2013 which penalized two of Johnson & Johnson's China affiliates for violation of the PRC anti-monopoly law by restricting downstream distributors' resale prices (or the so-called "vertical monopoly" acts; for a brief instruction of this case please refer to our August 2013 issue of *China Regulatory Updates*), NDRC, one of the PRC anti-monopoly administrative enforcement agencies responsible for regulation of price-related anti-monopoly behaviors, has escalated its enforcement actions recently. Among other things, NDRC imposed fines of over RMB600 millions on some six well-known multinational infant formula manufactures for their "vertical monopoly" behaviors and directed its local counterpart in Shanghai to impose administrative penalties on the Shanghai Gold & Jewelry Trade Association and several gold retail shops for the alleged "horizontal monopoly" acts (i.e., monopolistic acts adopted by competitive business operators to

illegally eliminate or restrict competitions, which include manipulating prices, production and/or supply volumes of commodities and etc.)

It is noteworthy though that according to the PRC anti-monopoly law and the aforementioned judgment of the Shanghai People's High Court, to conclude whether a behavior has violated the anti-monopoly rules or not, the virtual effect of such behavior (i.e., whether it has effectively eliminated or restricted competitions in the relevant market) would be critically important. For this purpose, such aspects/factors as the competitiveness or concentration of the market concerned, the position or market power of the alleged violating parties and etc. should be duly analyzed. No NDRC opinions in this connection are yet available for analysis based on publicly available information though.

继2013年8月初上海高院判决强生公司构成纵向垄断、违反中国反垄断法之后（本所2013年8月刊《中国法律更新》

对此案有简要介绍），国家发改委对包括美赞臣、惠氏在内的六家知名外资奶粉制造商涉嫌控制下游零售商转售价格的纵向垄断行为进行了行政处罚，罚款金额合计超过6亿元人民币。之后，上海市反垄断执法机构按照国家发改委的要求，对上海黄金饰品行业协会及部分金店的横向垄断行为（即，具有竞争关系的经营者之间协同控制商品价格、供应量等排除或限制竞争的垄断行为）也作出了行政处罚决定。

在中国现行反垄断法律体系下，发改委作为三大反垄断行政执法机构之一，主要负责监管价格垄断行为（另外两大反垄断行政执法机构分别是商务部和工商局，主要负责经营者集中审查及对滥用市场支配地位等不涉及价格的其他垄断行为的监管）。值得注意的是，发改委此次公布的处罚决定并未就受罚行为是否具有排除、限制竞争的效果问题，从相关市场的竞争程度、受罚企业的市场地位、定价能力等方面作出任何说明，而根据反垄断法及上海高院对强生案的判决，限价行为是否具有“排除、限制竞争”的效果而不是行为本身，才是判断是否违反了反垄断法的关键。

## PE & VC / 私募股权投资及创业投资

### Closing of First PE Investment under RQFLP Scheme Announced RQFLP试点企业完成首单境内股权投资

In mid-August 2013, Shanghai INESA SBI Equity Investment Partnership, one of the onshore PE funds established under the pilot RQFLP (i.e., RMB Qualified Foreign Limited Partners) scheme, is reported to have closed its first investment deal (*investment details have not yet disclosed*). It is also the very first closing in the RQFLP experiments.

RQFLP program is firstly adopted by Shanghai in late 2012 based on its pilot QFLP scheme (*Shenzhen Qianhai Development Zone has also reportedly applied for implementing an RQFLP program*), which allows qualified overseas institutional investors to become limited partners of onshore PE funds and use legally-

obtained RMB to invest in mainland China. In addition to the RFDI and RQFII exercises, it offers a new channel to cycle offshore RMB back to China. It is noteworthy that RMB funds under RQFLP program are deemed foreign capital and any investment thereof should generally comply with foreign investment requirements. Further, it is reported that while currently there is no aggregate investment quota on RQFLP scheme in Shanghai, any single RQFLP fund is still subject to certain cap of investment quota.

参与RQFLP（人民币合格境外有限合伙人）制度首批试点的股权投资企业——上海仪电思佰益股权投资合伙企业据报道已于2013年8月中旬完成了该制度

模式下的首单境内股权投资（*投资对象及金额等细节尚未对外公布*）。

RQFLP是2012年上海在试点QFLP制度基础上的率先尝试（*深圳前海开发区据报道也已申请试行RQFLP制度*），其允许境外合格的机构投资者作为有限合伙人在上海参与设立外商投资股权投资企业，并以其在境外合法获得的人民币资金在境内进行股权投资。这也是继人民币外商直接投资（RFDI）和人民币合格境外机构投资者（RQFII）之后，境外人民币回流的又一渠道。值得注意的是，RQFLP项下从境外投入的人民币资金仍将被视同为外资。相比上海QFLP首期30亿美元的外汇结汇总额度限制，RQFLP据报道目前并无总额度上限，但对单个RQFLP仍有额度控制。

## OTHER DEVELOPMENTS / 其他要闻

### New Trademark Law Adopted to Strengthen Trademark Protection 全国人大常委会通过新《商标法》，加强商标保护

On August 30, 2013, the Standing Committee of the National People's Congress approved the amended Trademark Law, which will take effect on May 1, 2014. The new law has introduced several noteworthy amendments in such areas as

expansion of the scope of trademark protection, streamlining of well-known trademark protection, enhancement of government administrative efficiency concerning trademark approvals, and tightening up of penalty against trademark infringements.

According to the new Trademark Law, (i) *sound*, in addition to visible marks under the current Trademark Law, could also be applied to become subject to trademark protection; (ii) well-known trademarks should be protected on a case-by-case basis, to

be passively recognized as a factual matter only by the Trademark Office, Trademark Appeal Board or competent people's courts in connection with trademark related cases. Business operators will no longer be allowed to freely use the words *well-known trademark* in any advertisement or other business activities simply to brag. (According to applicable laws, well-known trademarks are entitled to stronger and broader protection than ordinary trademarks to prevent business players from trademark related unfair competitions.) The amended rules seem to have been tuned to better fit the original legislative intention.

In addition, the new Trademark Law sets out various time limits for the Trademark Office and Trademark Appeal Board to follow in their trademark review and approval

processes. For example, a preliminary approval should be made within 9 months upon receipt of a trademark application and, if a trademark is challenged, a review decision should be made in 12 months following the expiry of the announcement period of a preliminary approval. The new law has also raised the upper limit of statutory indemnification and introduced for the first time the punitive damages for trademark infringements.

2013年8月30日,全国人大常委会通过了修改《商标法》的决定。新《商标法》(“新法”)将于2014年5月1日起施行。新法在扩大商标保护范围、规范驰名商标保护、提高行政审批效率以及加强商标侵权行为的惩罚力度等方面作了较大幅度的修改。

具体内容包括: (i) 在现行商标法“可视性标志”的基础上,首次将“声音”纳入可以作为商标申请注册的范畴;

(ii) 针对实践中驰名商标的认定较随意、欠规范的情形,新法确认了驰名商标“个案认定、被动保护”的原则,规定“驰名商标”应当根据当事人的请求、由商标局、商标评审委员会或有关法院作为处理涉及商标案件需要认定的事实进行认定,相关商家不得再将“驰名商标”作为荣誉用于广告以及其他商业活动。根据相关法律法规,为防止他人“傍名牌”等不正当竞争行为,驰名商标获得的保护力度和范围均高于普通商标,上述修改更贴近驰名商标制度的立法本意。

此外,新法还对商标局、商标评审委员会进行商标审查的时间做出了限定(比如初步审定时限为自收到商标注册申请文件之日起9个月,异议案件审理时限为自初步审定公告期届满之日起12个月等),并显著加强了商标侵权行为的惩罚力度(比如提高法定赔偿额上限、首次引入了惩罚性赔偿等)。

*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.*

*For further information, please write us at [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com).*

## CONTACT US

### 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

Unit B039, 12/F South Tower  
8 East Guanghua Dongli  
Beijing 100020, China  
Tel: (86-10) 5989-2212  
Fax: (86-10) 5989-2296