



China Regulatory Updates

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Connotation of "Han Yi"

- › Standardization
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- › 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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RMB FUND

Shanghai First Initiates Foreign-Invested Equity Investment Enterprise Pilot Program

On January 11, 2011, Shanghai Finance Office, MOFCOM Shanghai and SAIC Shanghai jointly issued the *Implementation Measures for Launching Foreign-Invested Equity Investment Enterprise Pilot Program in Shanghai* (the "Measures"), which indicates that Shanghai has taken the lead in initiating the foreign-invested equity investment enterprise pilot program.

According to the Measures, Shanghai Municipal People's Government will set up a joint committee for the foreign-invested equity investment enterprise pilot program (the "Joint Committee"), comprising a wide variety of government authorities such as Shanghai Finance Office, MOFCOM Shanghai, SAIC Shanghai, NDRC Shanghai, SAFE Shanghai, CBRC Shanghai, CSRC Shanghai and Pudong District People's Government. The Joint Committee is responsible to promote the foreign-invested equity investment enterprise pilot program and to formulate and implement various policies and measures. Shanghai Finance Office is the authority in charge of the pilot program and is responsible for the routine work of the Joint Committee.

The Measures set forth in detail the qualifications and procedures for the establishment of foreign-invested equity investment enterprises and foreign-invested equity investment management enterprises as well as the rules for examination of pilot enterprises. According to the Measures, foreign investors of foreign-invested equity investment pilot enterprises shall include offshore sovereign funds, pension funds, endowment funds, charitable funds, funds of funds, insurance companies, banks, securities companies and other foreign institutional investor approved by the Joint Committee. A pilot enterprise shall file an application with the Shanghai Finance Office, which will convene a meeting of the Joint Committee to conduct examination. A qualified foreign-invested equity investment pilot enterprise may conduct domestic equity investments with its foreign exchange capital. A foreign-invested equity investment management enterprise may contribute to an equity investment enterprise promoted by it with foreign exchange capital, up to 5% of the aggregate capital commitments.

Key implications of the pilot program:

- (a) **Breakthrough in Foreign Exchange Settlement.** According to Hui Zong Fa [2008] No. 142 issued by the General Affairs Department of SAFE, unless otherwise permitted, the RMB capital converted from foreign exchange under the capital account of a foreign-invested enterprise may not be used for domestic equity investment. Therefore, foreign-invested equity investment enterprises and foreign-invested equity investment management enterprises previously established generally do not have offshore financing channels. It is however explicitly provided in the Measures that foreign-invested equity investment management enterprises and foreign-invested equity investment enterprises qualified under the pilot program may make domestic investment directly with the foreign exchange contribution of foreign investors (the Measures is however silent on the "foreign exchange quota" available to foreign investors as rumored).
- (b) **Mandatory Custodian Requirement.** To safeguard against the possible inflow of hot money as well to monitor capital more effectively, the Measures require that capital contributed to a pilot enterprise shall be kept in a special custody account. The capital account and the funds thereunder shall be managed by the custodian bank according to relevant regulations and the custodian bank shall periodically report to the Joint Committee information related to the custody assets of the pilot enterprise.
- (c) **Foreign Investment Access Still Unclear.** The Measures provide that a foreign-invested equity investment management pilot enterprise may contribute to an equity investment enterprise promoted by it with foreign exchange capital, up to 5% of the aggregate capital commitments, which will not affect the original nature of such equity investment enterprise. However it is still unclear whether such equity investment enterprise enjoys national treatment and is

free from the *Catalogue for Guidance of Foreign Investment Industries*. Since the Measures will only cover Shanghai, if any portfolio investment is not in Shanghai or is subject to approval of central government authorities, opinions of relevant government authorities are required. In addition, an equity investment enterprise directly

established by foreign investors is subject to the *Catalogue for Guidance of Foreign Investment Industries* and is explicitly prohibited from investing in sectors that are prohibited for investment by the state and from engaging in stock/bonds transaction on the secondary market, investment in non-self use real estate, etc.

OVERSEAS INVESTMENT

RMB Settlement Available to Overseas Direct Investment on Trial Basis

In order to support the RMB settlement pilot program implemented as of July 1, 2009 for cross-border trade activities and to facilitate overseas investment by domestic PRC enterprises, on January 6, 2011, the People's Bank of China issued the *Administrative Measures for the Overseas Direct Investment RMB Settlement Pilot* (the "Administrative Measures"), explicitly permitting non-financial enterprises (the "Enterprises") registered at the cross-border trade RMB settlement pilot area to implement overseas direct investment RMB settlement. The Administrative Measures will come into force as of the date of promulgation.

According to the Administrative Measures, an Enterprise intending to make foreign direct investment (including the acquisition of all or part of the interests of an enterprise or project overseas through establishment, M&A, equity participation, etc.) may directly remit RMB overseas upon approval of overseas direct investment authorities (including MOFCOM offices and NDRC offices).

In addition, the Administrative Measures permit Enterprises to remit outward start-up expenses related to overseas investment. Proceeds obtained from Enterprises' foreign investment may also be remitted to China in RMB.

In addition, it is noteworthy that, with respect to RMB expenses and receipts from the capital increase, capital reduction, equity transfer, liquidation and other matters of overseas-invested enterprises, Enterprises may directly handle RMB capital remittance formalities with banks, bringing together approval documents of overseas direct investment authorities.

The promulgation of the Administrative Measures is helpful to Enterprises to cope with exchange rate risks of overseas investment and frees Enterprises from complicated foreign exchange purchase and settlement formalities, which is expected to effectively encourage domestic enterprises to make overseas investment.

Pilot Wenzhou Measures on Individual Overseas Direct Investment Suspended

On January 7, 2011, Wenzhou Foreign Trade and Economic Cooperation Bureau ("MOFCOM Wenzhou") issued the *Individual Overseas Direct Investment Pilot Program of Wenzhou* and relevant supporting rules (collectively, the "Pilot Program"), becoming the first pilot city in mainland China to establish standardized individual overseas direct investment channel. However, according to report, the Pilot Program has been suspended.

According to the Pilot Program, upon approval of MOFCOM Wenzhou and SAFE Wenzhou, a

qualified individual investor (who is a Wenzhou resident with passport for private affairs, has reached the age of 18 and with civil conduct capacity) may make overseas direct investment (including in Hong Kong, Macao and Taiwan) with self-owned foreign exchange capital, foreign exchange purchased with RMB, and other approved sources of foreign exchange, and may use proceeds obtained from overseas direct investment for overseas reinvestment, subject to certain restrictions on scale and industry. The Pilot Program is a brave try to broaden the overseas

investment channel for the huge amount of social capital in Wenzhou, which aroused heated discussion both in China and overseas.

According to report however, after the promulgation of the Pilot Program, SAFE questioned the approval

authority of SAFE Wenzhou. The Pilot Program has been suspended at the moment and it is not clear when it will be restarted. The failure of the Pilot Program has to some extent reflected the cautious attitude of SAFE on the opening up of capital account foreign exchange.

ANTI-MONOPOLY

NDRC and SAIC Refine Anti-Monopoly Law Enforcement Rules

NDRC and SAIC issued five pieces of supporting rules for the *PRC Anti-Monopoly Law* at the end of 2010, i.e., the *Anti Price Monopoly Regulations*, *Anti Price Monopoly Administrative Law Enforcement Procedures Regulations*, *Rules of SAIC Offices on Prohibition of Monopoly Agreements*, *Rules of SAIC Offices on Prohibition of Abuse of Market Dominant Position*, and *Rules of SAIC Offices on Prohibition of Abuse of Administrative Power for Purposes of Eliminating or Restricting Competition* (collectively, the "Supporting Rules", which will come into force as of February 1, 2011).

These Supporting Rules have refined the provisions on price monopoly, monopoly agreements, abuse of market dominant position, and eliminating or restricting competition through abuse of administrative power. At the same time, these

Supporting Rules have made specific regulations on the forms of price monopoly, concept and forms of monopoly agreements, exemption and leniency systems of monopoly agreements, forms of abuse of market dominant position, and the presumption and exception systems of market dominant position. In addition, punishment measures for various monopoly activities are further refined.

The promulgation of the Supporting Rules not only specifies the basis for determination of monopoly activities such as monopoly agreements, abuse of market dominant position, and abuse of administrative power to eliminate or restrict competition. These Supporting Rules have also set forth respective duties and powers of NDRC and SAIC, which will significantly improve the operability and efficiency of anti-monopoly law enforcement.

CAPITAL FINANCE

PRC Supreme People's Court Cracks Down on Illegal Fundraising

In order to cope with various illegal fundraising activities that are constantly changing in form in practice, on January 4, 2011, the PRC Supreme People's Court issued the *Interpretations of Several Issues on the Specific Application of Law in the Trial of Criminal Cases about Illegal Fundraising* (the "Interpretations"), so as to clarify unclear provisions in judicial practice and deal with difficulties in application of law.

The Interpretations explicitly set out the constituents of a crime related to illegal fundraising as well as the standards for conviction and punishment, which involves such crimes as illegal taking of public deposits, fundraising fraud, and unauthorized issuance of shares or corporate and

enterprise bonds. At the same time, the Interpretations set out provisions on conviction related to unauthorized issuance of fund shares and false advertising involved in illegal fundraising.

In particular, it is noteworthy that the Interpretations explicitly provide that, without the approval of competent authorities, if (i) one issues shares or corporate or enterprise bonds to the general public or for issuance in a disguised form such as equity transfer, or (ii) one issues shares or corporate or enterprise bonds or for issuance in a disguised form to a specified group with a number exceeding 200, it shall be deemed as "unauthorized issuance of shares or corporate or enterprise bonds" and a crime would be constituted if the situation is serious.

There is a substantial amount of illegal fundraising activities through equity transfer, e.g., fabricating false information such as the company is going public on a domestic or overseas stock exchange or

the company's issuance of shares is approved and selling the so-called original shares to the general public, which may constitute a crime.

QFII

QFIIs Expected to Participate in Stock Index Futures Trading

On January 25, 2011, CSRC issued the *Guidance for Qualified Foreign Institutional Investors to Participate in Stock Index Futures Trading (Draft for Comments)* (the "Guidance"), seeking public comments. According to the Guidance, qualified foreign institutional investors ("QFIIs") may participate in domestic stock index futures trading. At the same time, the Guidance has expressly provided for the type of trading, trading scale,

trading activities and account management related to the domestic stock index futures trading that QFIIs may participate in as well as the number of futures companies that QFIIs may engage. The public comments seeking process will last until February 12, 2011. There is however no explicit timetable as to when the official document will be released.

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