

# 君合专题研究报告



2018 年 11 月 22 日

## 外国投资者以 PIPE 方式投资 A 股上市公司的最新法律问题

中国证监会主席刘士余于 2018 年 10 月 19 日就市场关注的重点问题接受新华社记者采访时表示，鼓励私募股权基金通过参与非公开发行、协议转让、大宗交易等方式，购买已上市公司股票，参与上市公司并购重组。

监管部门鼓励的上述投资方式为对已上市公司的私募股权投资，即 PIPE (Private Investment in Public Equity)。与 Pre-IPO 私募股权投资通常由 PE 采用协议价格机制认购定向增发可转股/债的形式不同，PIPE 是由 PE (Private Equity) 以公开市场交易价格为参照，认购或者购买已经公开上市公司股份的一种投资方式。由于中国的 A 股市场目前还不是一个完全开放的资本市场，外国投资者并不能自由地投资 A 股上市公司，因此外国投资者以 PIPE 方式投资 A 股上市公司经常引起市场关注，并且近年来呈现出投资方式和渠道更加多样化的趋势。就此事宜，我们根据对中国相关法律法规的理解、对市场公开案例的检索和研究以及在以往同类型项目中的操作经验，简析如下：

### 一、外国投资者以 PIPE 方式投资 A 股上市公司的基本法律架构

在中国现有的法律框架下，外国投资者可通过以下方式投资 A 股上市公司：一是外国投资者申请成为或者通过 QFII（即 Qualified Foreign Institutional Investors，即合格境外机构投资者）或 RQFII（即 RMB

Qualified Foreign Institutional Investors，即人民币合格境外机构投资者）投资 A 股上市公司；二是外国投资者作为战略投资者投资 A 股上市公司；三是外国投资者通过上海证券交易所、深圳证券交易所与香港联交所或者其他国家和地区交易所之间的互联互通机制投资 A 股上市公司。由于根据目前监管规定，上述第三种方式仅能通过沪深交易所的竞价交易方式完成外国投资者对 A 股上市公司的投资，与 PIPE 主要投资方式不同，因此本文主要讨论上述第一种及第二种投资方式。

#### （一）QFII/RQFII 的相关规定

就外国投资者申请成为或通过 QFII 投资 A 股上市公司主要适用中国证监会、中国人民银行、国家外汇管理局联合颁布实施的《合格境外机构投资者境内证券投资管理暂行办法》，中国证监会颁布实施的《关于实施〈合格境外机构投资者境内证券投资管理暂行办法〉有关问题的规定》，以及国家外汇管理局 2018 年 6 月颁布实施的《合格境外机构投资者境内证券投资外汇管理规定》（以下合称“《QFII 规定》”）的规定；

就外国投资者申请成为或通过 RQFII 投资 A 股上市公司则主要适用中国证监会、中国人民银行、国家外汇管理局《人民币合格境外机构投资者境内证券投资试点办法》，中国证监会颁布实施的《关于实施〈人民币合格境外机构投资者境内证券投资试点办法〉的规定》，以及中国人民银行、国家外汇管理局

2018年6月12日颁布实施的《关于人民币合格境外机构投资者境内证券投资管理有关问题的通知》(以下合称“**《RQFII规定》**”)。

## (二) 战略投资者的相关规定

外国投资者作为战略投资者投资 A 股上市公司涉及的监管法规较多, 主要包括:

### 1. 涉及外资准入或行业监管的法规

- 1) 商务部、中国证监会、国家税务总局、国家工商行政管理总局、国家外汇管理局于 2015 年 10 月 28 日发布实施了修正后的《外国投资者对上市公司战略投资管理办法》(以下简称“**《战投管理办法》**”), 是外国投资者战略投资 A 股上市公司的核心规定。该办法明确了外国战略投资者的资格要求、战略投资的基本要求(比如投资比例不低于 10%、锁定期不少于 3 年等)、战略投资的方式(协议转让或定向增发)和审批/备案流程等;
- 2) 商务部于 2009 年 6 月 22 日发布实施了修正后的《关于外国投资者并购境内企业的规定》(以下简称“**《外资并购规定》**”), 是外国投资者并购境内企业的一般性规定, 《战投管理办法》未明确规定的, 应适用该规定;
- 3) 国家发改委和商务部《外商投资产业指导目录(2017 年修订)》、《外商投资准入特别管理措施(负面清单)(2018 年版)》<sup>1</sup>(以下简称“**《负面清单》**”), 是关于外商投资行业准入和产业政策的基本规定, 《负面清单》统一列出股权要求、高管要求等外商投资准入方面的特别管理措施, 《负面清单》之外的领域, 按照内外资一致原则

实施管理;

- 4) 《中华人民共和国中外合资经营企业法(2016 修正)》、《中华人民共和国中外合作经营企业法(2017 修正)》、《中华人民共和国外资企业法(2016 修正)》及商务部《外商投资企业设立及变更备案管理暂行办法》(商务部令 2018 年第 6 号)(以下简称“**《外资备案管理办法》**”)是有关外商投资企业设立和变更应当履行相关审批或备案程序的规定, 不涉及国家规定实施准入特别管理措施的外商投资企业设立及变更执行备案管理;
- 5) 《中华人民共和国反垄断法》(以下简称“**《反垄断法》**”)、国务院《关于经营者集中申报标准的规定》和商务部、国家市场监督管理总局反垄断局相关规定, 根据上述法规规定的要求, 外国投资者并购境内企业达到申报标准的, 应当事先向反垄断主管机关申报, 未申报不得实施交易;
- 6) 国务院办公厅《关于建立外国投资者并购境内企业安全审查制度的通知》和商务部《实施外国投资者并购境内企业安全审查制度的规定》, 根据安全审查制度的要求, 外国投资者并购特殊行业的境内企业, 且获得实际控制权的, 应通过安全审查;
- 7) 如果被并购的 A 股上市公司属于有前置审批要求的特定行业的, 还需要按相关规定报请相关行业主管部门审批。

### 2. 涉及国资管理的法规

主要规定是国务院国资委、财政部和中国证监会《上市公司国有股权监督管理办法》, 该办法明确了国有股东向境外投资者转让股权时需遵循的原则规

<sup>1</sup> 在中国的自由贸易试验区内, 国家规定实施准入特别管理措施的范围, 依照《自由贸易试验区外商投资准入特别管理措施(负面清单)(2018 年版)》的规定执行。

定及相关程序要求。

### 3. 涉及证券监管的法规

- 1) 中国证监会《上市公司收购管理办法》（以下简称“《收购管理办法》”）及其配套制度是证券监管的核心规定；
- 2) 如果外国投资者以资产为对价认购 A 股上市公司股份，还应适用中国证监会《上市公司重大资产重组管理办法》及其配套制度。

#### （三）沪港通、深港通的相关规定

外国投资者通过上海证券交易所、深圳证券交易所与香港联交所之间的互联互通机制投资 A 股上市公司时所适用的监管法规主要为：

- 1) 中国证监会《内地与香港股票市场交易互联互通机制若干规定》是内地与香港证券交易所互联互通机制的核心制度，明确了法律法规适用原则、各市场主体的权利义务和职责、沪港通和深港通投资者的适当性管理遵循属地管理原则等重要内容；
- 2) 上海证券交易所《上海证券交易所沪港通业务实施办法（2018 修订）》（以下简称“《沪港通业务实施办法》”），对外国投资者通过联交所证券交易服务公司参与上海证券交易所上市的股票交易的股票范围、交易特别事项、额度控制、持股比例限制等具体事项进行了明确规定；
- 3) 深圳证券交易所《深圳证券交易所深港通业务实施办法（2018 修订）》（以下简称“《深港通业务实施办法》”），对外国投资者通过联交所证券交易服务公司参与深圳证券交易所上市的股票交易的股票范围、交易特别事项、额度控制、持股比例限制等具体事项进行了明确规定；
- 4) 中国证券登记结算有限责任公司《内地与香港股

票市场交易互联互通机制登记、存管、结算业务实施细则》，对内地与香港股票市场交易互联互通机制相关的登记、存管、结算进行了具体规定。

## 二、外国投资者以 PIPE 方式投资 A 股上市公司的主要方式

### （一）申请成为或者通过 QFII 投资 A 股上市公司

根据《QFII 规定》，符合条件的 QFII 可以投资中国证监会批准的人民币金融工具(包括在证券交易所挂牌交易的 A 股股票)。由此，外国投资者可以申请成为或通过 QFII 取得上市公司 A 股股份。

外国投资者申请成为 QFII，需符合一定的资格要求，具体如下：

1. 为中国境外基金管理机构、保险公司、证券公司以及其他资产管理机构。其中：
  - 1) 资产管理机构：经营资产管理业务 2 年以上，最近一个会计年度管理的证券资产不少于 5 亿美元；
  - 2) 保险公司：成立 2 年以上，最近一个会计年度持有的证券资产不少于 5 亿美元；
  - 3) 证券公司：经营证券业务 5 年以上，净资产不少于 5 亿美元，最近一个会计年度管理的证券资产不少于 50 亿美元；
  - 4) 商业银行：经营银行业务 10 年以上，一级资本不少于 3 亿美元，在最近一个会计年度管理的证券资产不少于 50 亿美元；
  - 5) 其他机构投资者（养老基金、慈善基金会、捐赠基金、信托公司、政府投资管理公司等）：成立 2 年以上，最近一个会计年度管理或持有的证券资产不少于 5 亿美元。

2. 财务稳健，资信良好，达到中国证监会规定的资产规模等条件；
3. 从业人员符合所在国家或者地区的有关从业资格的要求；
4. 有健全的治理结构和完善的内控制度，经营行为规范，近 3 年未受到监管机构的重大处罚；
5. 所在国家或者地区有完善的法律和监管制度，其证券监管机构已与中国证监会签订监管合作谅解备忘录，并保持着有效的监管合作关系；
6. 中国证监会根据审慎监管原则规定的其他条件。

此外，外国投资者按照《QFII 规定》申请成为 QFII 并获得上市公司股份的，需经中国证监会批准，可通过向国家外汇管理局备案获取不超过其资产规模或管理的证券资产规模一定比例的“基础额度”，超过基础额度的投资额度须由国家外汇管理局批准。关于基础额度标准须判断 QFII 或其所属集团的资产主要在中国境内或是在中国境外：主要在中国境内的，基础额度计算公式为： $1 \text{ 亿美元} + \text{近三年平均资产规模} \times 0.2\%$ —已获取的人民币合格境外机构投资者额度（折合美元计算，以下简称“RQFII 额度”）；主要在中国境外的，基础额度为： $\text{等值 } 50 \text{ 亿元人民币} + \text{上年度资产规模} \times 80\%$ —已获取的 RQFII 额度（折合美元计算）。基础额度不超过 50 亿美元，不低于 2000 万美元。QFII 在经备案及批准的投资额度内，可以投资于中国证监会批准的人民币金融工具，但需委托境内商业银行作为托管人托管资产，并委托境内证券公司办理在境内的证券交易活动。

为通过 QFII 取得上市公司 A 股股份，外国投资者可以委托一家或几家 QFII，QFII 直接在境内证券市场上购买上市公司 A 股股份，在有关信息披露中，QFII 将披露该外国投资者为实际投资人。与申请成

为 QFII 以及本简析所述之其他投资方式投资 A 股上市公司需要取得交易对方的配合和/或涉及多项审批程序不同，通过 QFII 投资 A 股上市公司可由外国投资者单方面实施，除了履行信息披露义务外不涉及政府部门的审批。然而，根据《QFII 规定》，外国投资者通过 QFII 投资 A 股上市公司存在投资比例限制，即单个境外投资者通过 QFII 持有一家上市公司股票的，持股比例不得超过该公司股份总数的 10%；所有境外投资者对单个上市公司 A 股的持股比例总和，不超过该上市公司股份总数的 30%。

在信息披露方面，外国投资者通过 QFII 投资 A 股上市公司时，应适用《上市公司收购管理办法》中关于权益披露的要求。即 QFII 拥有权益的股份达到一个上市公司已发行股份的 5% 时，应当在该事实发生之日起 3 日内编制权益变动报告书，向中国证监会、证券交易所提交书面报告，通知该上市公司，并予以公告。相关案例如台资企业富邦人寿作为 QFII 于 2016 年 2 月认购辽宁成大（600739）非公开发行的股份并依规定披露了权益变动报告书。

## （二） 申请成为或者通过 RQFII 投资 A 股上市公司

根据《RQFII 规定》，经证监会批准的 RQFII 在国家外汇管理局批准的投资额度内可以运用来自境外的人民币资金进行境内证券投资。由此，外国投资者可以申请成为或通过 RQFII 取得上市公司 A 股股份。

外国投资者申请成为 RQFII，需符合一定的资格要求，具体如下：

1. 注册地、业务资格等应当符合下列条件：
  - 1) 境内基金管理公司、证券公司、商业银行、保险公司等香港（或其他试点地区）子公司，或者注册地及主要经营地在中国香港地区（或其他试点地区）

的金融机构；

- 2) 在香港证券监管部门取得资产管理业务资格，并已经开展资产管理业务。
2. 财务稳健，资信良好；
3. 公司治理和内部控制有效，从业人员符合所在国家或地区的有关从业资格要求；
4. 经营行为规范，最近 3 年或者自成立起未受到所在地监管部门的重大处罚；
5. 中国证监会根据审慎监管原则规定的其他条件。

RQFII 的监管与 QFII 监管在许多方面采用了类似或相同的标准。在取得证监会批准后，RQFII 可以向国家外汇管理局备案取得基础额度：RQFII 或其所属集团资产主要在中国境外的，基础额度计算公式为：等值 1 亿美元+近三年平均资产规模×0.2%减去已获取的合格境外机构投资者额度（折合人民币计算，以下简称“QFII 额度”）；资产主要在中国境外的，基础额度为 50 亿元人民币+上年度资产规模×80%减去已获取的 QFII 额度（折合人民币计算）。超出基础额度的额度须由国家外汇管理局批准。对 RQFII 持股比例的限制，与 QFII 相同，即单个境外投资者通过 RQFII 持有一家上市公司股票的持股比例不超过该公司股份总数的 10%；所有境外投资者对单个上市公司 A 股的持股比例总和不超过该上市公司股份总数的 30%。RQFII 也需委托具备资质的境内商业银行作为托管人托管资产，并委托境内证券公司办理买卖证券。

在信息披露方面，外国投资者通过 RQFII 投资 A 股上市公司时，也应适用《上市公司收购管理办法》

中关于权益披露的要求。相关案例如华安资产管理（香港）有限公司通过 RQFII 账户于 2016 年 10 月认购长江润发（002435）为购买资产募集配套资金发行的新股。

### （三） 作为战略投资者投资 A 股上市公司

根据《战投管理办法》的规定，外国投资者作为战略投资者获得上市公司 A 股股份的，需符合一定的资格要求，具体如下：

1. 依法设立、经营的外国法人或其他组织<sup>2</sup>，财务稳健、资信良好且具有成熟的管理经验；
2. 境外实有资产总额不低于 1 亿美元或管理的境外实有资产总额不低于 5 亿美元；或其母公司境外实有资产总额不低于 1 亿美元或管理的境外实有资产总额不低于 5 亿美元；<sup>3</sup>
3. 有健全的治理结构和良好的内控制度，经营行为规范；
4. 近三年内未受到境内外监管机构的重大处罚（包括其母公司）。

根据《战投管理办法》的规定，外国投资者战略投资方式分为上市公司定向发行和协议转让两种方式；根据商务部《战投办法征求意见稿》第二条，外国投资者的战略投资方式不仅包括协议转让、上市公司定向发行新股（包括非公开发行股票募集资金和发行股份购买资产），还包括要约收购。具体如下：

1. 通过上市公司定向发行方式进行战略投资的，按需要履行以下程序：

<sup>2</sup>商务部于 2018 年 7 月 30 日发布了《关于修改〈外国投资者对上市公司战略投资管理办法〉的决定（征求意见稿）》（以下简称“《战投办法征求意见稿》”），能够参与战略投资的主体从“外国法人或其他组织”扩展为“外国的公司、企业和其它经济组织或自然人”。

<sup>3</sup>根据《战投办法征求意见稿》，该征求意见稿将原规定中“境外实有资产总额不低于 1 亿美元或管理的境外实有资产总额不低于 5 亿美

元”修改为“实有资产总额不低于 5000 万美元或管理的实有资产总额不低于 3 亿美元”，并将原先外国投资者通过战投方式取得上市公司 A 股股份三年内不得转让的期限缩短为 12 个月。

- 1) 上市公司董事会通过决议；
- 2) 上市公司股东大会通过决议；
- 3) 上市公司与投资者签订定向发行的合同；
- 4) 上市公司向商务部报送相关申请文件；
- 5) 中国证监会依法予以核准（(4)项下程序可与本步骤可同时进行<sup>4)</sup>；
- 6) 定向发行完成后，上市公司还应当到工商行政管理部门办理变更登记。

关于上述(4)项“上市公司向商务部报送相关申请文件”如何执行，具体分析如下：

根据商务部《外资备案管理办法》等规定，不涉及国家规定实施准入特别管理措施的外商投资企业设立及变更执行备案管理。

根据国家发改委和商务部《外商投资产业指导目录（2017年修订）》，除“境内公司、企业或自然人以其在境外合法设立或控制的公司并购与其有关联关系的境内公司”以外，将不涉及准入特别管理措施的外资并购设立企业及变更，包括上市公司引入外国投资者战略投资在内的相关事项，纳入了备案管理。

综上，在外商投资备案制的背景下，上市公司引入战略投资者适用商务部门审批或是备案，应当根据不同情况予以判断，具体包括：

- 1) 如属于《外资并购规定》的“境内公司、企业或自然人以其在境外合法设立或控制的公司并购

与其有关联关系的境内公司”的，应当按照《外资并购规定》和《战投管理办法》的规定，履行商务部的审批程序；

- 2) 如上市公司所从事的行业属于现行《外商投资产业指导目录》中外商投资准入特别管理措施的范围的，则应当按照《战投管理办法》及外资审批权限的规定向商务部或其地方商务主管部门<sup>5</sup>履行战略投资的审批手续；
- 3) 除前述情况以外，对于实行备案管理的交易，则应当按照《外资备案管理办法》的规定，履行备案手续，而无需取得商务部对战略投资的批复。

通过定向发行方式完成战略投资的代表案例有 Alliance Healthcare Asia Pacific Limited 作为战略投资者于 2017 年认购南京医药(600713)定向增发股票，商务部明确通知，由于南京医药于该次交易前已为外商投资企业，本次投资涉及的外商投资企业变更事项适用《外资备案管理办法》，商务部不再出具关于引入境外战略投资者的批准文件。

2. 通过协议转让方式进行战略投资的，需要履行以下程序<sup>6)</sup>：

- 1) 上市公司董事会通过决议；
- 2) 上市公司股东大会通过决议；
- 3) 转让方与投资者签订股份转让协议；
- 4) 投资者向商务部或上市公司所在地商务主管部门报送相关申请文件；

<sup>4</sup>2015 年 10 月 28 日，商务部发布了《商务部关于修改部分规章和规范性文件的决定》，根据该《决定》，原《战投管理办法》中对通过定向发行方式进行战略投资程序中“外国投资者通过上市公司定向发行方式进行战略投资，在取得商务部的原则批复函后，上市公司向中国证监会报送定向发行申请文件，中国证监会予以核准”的规定被删去。

<sup>5</sup> 根据《战投办法征求意见稿》第三条，涉及国家规定实施准入特别管理措施的战略投资，由中华人民共和国商务部或省、自治区、直辖市、计划单列市、新疆生产建设兵团商务主管部门按照国务院规

定的权限负责审批和管理。其中限额以下的战略投资，由省级商务主管部门负责审批和管理。

<sup>6</sup> 根据《战投办法征求意见稿》，战略投资涉及国家规定实施准入特别管理措施并通过协议转让方式实施的，按以下程序办理：（一）上市公司按法律法规和公司章程规定履行有关内部程序；（二）转让方与外国投资者签订股份转让协议；（三）外国投资者根据该办法向上市公司所在地商务主管部门报送相关申请文件，有特殊规定的从其规定。

- 5) 投资者参股上市公司的,获得前述批准后向证券交易所办理股份转让确认手续、向证券登记结算机构申请办理登记过户手续,并报中国证监会备案;若投资者拟通过协议转让方式构成对上市公司的实际控制,投资者应向中国证监会报送上市公司收购报告书及相关文件,经中国证监会审核无异议后方可向证券交易所办理股份转让确认手续、向证券登记结算机构申请办理登记过户手续;
- 6) 协议转让完成后,上市公司还应当到工商行政管理部门办理变更登记。

关于上述(4)项“投资者向商务部报送相关申请文件”如何执行,参见上文第1部分的分析。

外国投资者通过协议转让方式投资A股上市公司代表性案例有周大福投资有限公司(台港澳法人独资企业)作为战略投资者通过协议转让方式收购小康控股持有ST景谷(600265)30%股权,CVC战略投资珠海中富(000659)和嘉士伯香港协议收购重庆啤酒(600132)。

无论采用何种战略投资方式,外国投资者取得的上市公司A股股份三年内不得转让。投资可分期进行,首次投资完成后取得的股份比例不低于该公司已发行股份的百分之十。<sup>7</sup>

### 3. 通过要约收购方式投资A股上市公司

根据商务部《战投办法征求意见稿》第十二条,战略投资涉及国家规定实施准入特别管理措施并通过要约收购方式实施的,按以下程序办理:

- 1) 外国投资者依法编制要约收购报告书摘要;
- 2) 外国投资者、上市公司及相关方按照法律法规和

中国证监会的相关规定履行报告、公告等程序;

- 3) 上市公司根据《战投办法征求意见稿》相关规定向所在地商务主管部门报送相关申请文件,有特殊规定的从其规定。

商务主管部门就外国投资者实施战略投资作出原则批复后,外国投资者按照有关规定办理要约收购手续;要约收购完成后,上市公司向商务主管部门申请核发外商投资企业批准证书。

本方式下代表案例有Grand Metropolitan International Holdings Limited于2018年8月部分要约收购水井坊(600779)。

### 4. 通过间接收购方式投资A股上市公司

- 1) 外国投资者通过由其控股的外商投资企业并购上市公司

外国投资者可以通过由其控股的具有中国法人资格的外商投资企业并购A股上市公司。外国投资者通过该种方式无需按照前述《战投管理办法》和《QFII相关规定》、《RQFII规定》达到战略投资者或QFII/RQFII的资质要求,也无需履行战略投资者和QFII/RQFII的审批程序。

外国投资者通过由其控股的外商投资企业并购A股上市公司的,应按照《收购管理办法》、《上市公司证券发行管理办法》以及《上市公司非公开发行股票实施细则》的规定,通过要约收购、协议收购、认购上市公司定向发行股票的方式履行相应的并购程序。

需要指出的是,中国外汇管理部门目前对外商投资企业资本金用于境内股权投资有非常严格限制,因此外国投资者拟通过境内已设立的外商投资企业实

<sup>7</sup> 《战投办法征求意见稿》取消了现行《战投管理办法》中外国投资者首次投资完成后取得的股份比例不低于该公司已发行股份的百分之十的要求。



施上市公司收购的,该等外商投资企业应有收购的自有资金。

本方式下代表案例有 Everwin Pacific Limited 2007 年通过中皇公司收购酒鬼酒(000799)。

2) 外国投资者通过其在中国境内设立的投资性公司并购上市公司

外商设立的投资性公司,根据现行规定,其可以对境内上市公司实施战略投资。根据《商务部关于外商投资举办投资性公司的规定(2015 修正)》,申请设立投资性公司应符合下列条件:

- a) 外国投资者资信良好,拥有举办投资性公司所必需的经济实力,申请前一年该投资者的资产总额不低于四亿美元,且该投资者在中国境内已设立了外商投资企业,其实际缴付的注册资本的出资额超过一千万美元,或者;外国投资者资信良好,拥有举办投资性公司所必需的经济实力,该投资者在中国境内已设立了十个以上外商投资企业,其实际缴付的注册资本的出资额超过三千万美元;
- b) 以合资方式设立投资性公司的,中国投资者应为资信良好,拥有举办投资性公司所必需的经济实力,申请前一年该投资者的资产总额不低于一亿元人民币;
- c) 投资性公司的注册资本不低于三千万美元。

申请设立投资性公司的外国投资者应为一家外国的公司、企业或经济组织,若外国投资者为两个以上的,其中应至少有一名占大股权的外国投资者符合上述(a)项规定。

本方式的代表案例有 Hony Capital Fund V LP 通过在境内设立弘毅(上海)股权投资基金中心(有限合伙)并于 2016 年战略投资锦江股份(600754)。

3) 外国投资者通过并购上市公司的控股股东间接控股上市公司

外国投资者可根据《关于外国投资者并购境内企业的规定》和《收购管理办法》所规定的程序,以及《外商投资产业指导目录》中鼓励和支持的投资方向,整体或部分买断上市公司的母公司或控股股东企业,将该企业变成外商独资企业或外商投资企业,从而间接控股上市公司。提请注意,如果上市公司的母公司为国有性质,还需要履行相应的国资审批程序。

本方式下代表案例有鼎晖于 2011 年间接入股鲁西化工(000830)以及 Ulysses Parent 于 2018 年间接投资鲁阳节能(002088)。

4) 通过以资产认购股份方式取得 A 股上市公司股份

外国投资者除了以现金购买上市公司股票外,还可以其依法拥有的境内、外资产作为对价认购上市公司向其定向发行的 A 股股票,若其拟注入上市公司的资产达到一定标准,则将构成上市公司重大资产重组。即使交易金额未达到重大资产重组的标准,由于该交易系上市公司向外国投资者发行股份购买其所持境内外资产,其本身也需要中国证监会的审批。

本方式下近期的代表性案例有 COFCO Biochemical Investment Co., Ltd. 于 2018 年以所持资产认购中粮生化(000930)向其增发的股份、万华化学(600309)于 2018 年 9 月通过向万华化工的股东(Prime Partner International Limited 等)发行股份吸收合并万华化工,益圣国际及 Easunlux 以其所持 Hiwinglux 和 IEE 的股权认购航天科技(000901)向其增发的股份。

值得关注的是,商务部发布的《关于修改<外国投资者对上市公司战略投资管理办法>的决定(征求意见稿)》第六条明确了外国投资者可以以其持有的



境外公司股权或外国投资者以其增发的股份作为战略投资的支付手段，并且相较于《商务部关于外国投资者并购境内企业的规定》的规定，不再要求该等境外公司为上市公司或特殊目的公司。此外，如战略投资采用跨境换股，《战投办法征求意见稿》还要求境内公司或其股东应聘请在中国注册登记的中介机构担任顾问，就并购申请文件的真实性、境外公司财务状况以及并购是否符合跨境换股条件做尽职调查，提交顾问报告。

#### （四） 通过沪股通及深股通投资 A 股上市公司

##### 1. 沪股通

沪股通机制下，外国投资者可以委托香港经纪商，经由香港联交所在上海设立的证券交易服务公司，向上交所进行申报，买卖沪港通规定范围内的上海证券交易所上市的股票。根据《沪港通业务实施办法》的规定，外国投资者通过沪股通所能购买的股票范围为：

（a）上证 180 指数成份股；（b）上证 380 指数成份股；（c）A+H 股上市公司的上交所上市 A 股。

根据上述法律的规定，沪股通的股票以人民币报价和交易，具体的交易日和交易时间由联交所证券交易服务公司在其指定网站公布，其交易采用竞价交易方式。

外国投资者通过沪股通进行交易的，根据《内地与香港股票市场交易互联互通机制若干规定》的规定，应当遵循下列持股比例限制：（a）单个境外投资者对单个上市公司的持股比例，不得超过该上市公司股份总数的 10%；（b）所有境外投资者对单个上市公司 A 股的持股比例总和，不得超过该上市公司股份总数的 30%。境外投资者依法对上市公司战略投资的，其战略投资的持股不受上述比例限制。

##### 2. 深股通

深股通机制下，外国投资者委托香港经纪商，经

由香港联交所在深圳设立的证券交易服务公司，向深交所进行申报，买卖深港通规定范围内的深交所上市的股票。根据《深港通业务实施办法》的规定，外国投资者通过深股通所能购买的股票范围为：（a）深证成份指数及深证中小创新指数的成份股，且成份股定期调整考察截止日前六个月 A 股日均市值不低于人民币 60 亿元，上市时间不足六个月的按实际上市时间计算市值；（b）A+H 股上市公司在深交所上市的 A 股。

根据上述法律的规定，深股通的股票以人民币报价和交易，具体的交易日和交易时间由联交所证券交易服务公司在其指定网站公布，其交易采用竞价交易方式。

此外，外国投资者通过深股通进行交易的，亦需要遵循《内地与香港股票市场交易互联互通机制若干规定》的规定，即：（a）单个境外投资者对单个上市公司的持股比例，不得超过该上市公司股份总数的 10%；（b）所有境外投资者对单个上市公司 A 股的持股比例总和，不得超过该上市公司股份总数的 30%。境外投资者依法对上市公司战略投资的，其战略投资的持股不受上述比例限制。

### 三、外国投资者以 PIPE 方式投资 A 股上市公司应注意的问题

#### （一） 行业准入

已如前述，外国投资者投资 A 股上市公司应取得中国相关政府部门的审批或备案，且应符合相关行业外资准入政策。《外商投资准入特别管理措施（负面清单）（2018 年版）》列举了外商投资的限制类、禁止类领域，还对部分外商投资项目的具体外资持股比例作出了明确限制。根据《战投管理办法》的规定，法律法规对外商投资持股比例有明确规定的行业，投资者持有上述行业股份比例应符合相关规定；属法律法规禁止外商投资的领域，投资者不得对上述领域的

上市公司进行投资。

## （二） 反垄断审查

外国投资者投资 A 股上市公司可能需要进行反垄断审查。自 2008 年《反垄断法》颁布后，国务院、商务部及国家市场监督管理总局反垄断局相继发布了《关于经营者集中申报标准的规定》、《经营者集中审查办法》、《关于评估经营者集中竞争影响的暂行规定》、《国家市场监督管理总局反垄断局关于经营者集中申报的指导意见》、《经营者集中反垄断审查办事指南》等规定，就反垄断审查的程序、申报文件作出具体规定。根据前述法规，外国投资者在收购上市公司时，如果取得上市公司的控制权(包括共同控制权)，且参与集中的所有经营者上一会计年度在全球范围内的营业额合计超过 100 亿元人民币，并且其中至少两个经营者上一会计年度在中国境内的营业额均超过 4 亿元人民币；或参与集中的所有经营者上一会计年度在中国境内的营业额合计超过 20 亿元人民币，并且其中至少两个经营者上一会计年度在中国境内的营业额均超过 4 亿元人民币的，外国投资者要向反垄断审查机构申报，取得其批准。

相关案例有 CVC 通过子公司 Asia Bottles (HK) Company Limited 战略投资境内 A 股上市公司珠海中富时，曾向商务部递交了反垄断申报文件；COFCO Bio-chemical Investment Co., Ltd. 于 2018 年 7 月以所持资产认购中粮生化（000930）定增股票时，中粮国际向国家市场监督管理总局反垄断局申报了反垄断审查。

## （三） 安全审查

外资并购涉及下述安全审查范围的，外国投资者应当在申请并购交易前，向商务部申请进行安全审查。安全审查的范围包括国防安全、涉及国家安全的重要农产品、重要能源和资源、重要基础设施、重要运输服务、关键技术、重大装备制造等。对于涉及国家安

全的外资并购，外国投资者只有在可能通过并购取得相关企业实际控制权的情况下才需申请安全审查；但对于涉及国防安全的企业并购，不论外国投资者是否可能取得实际控制权，都要求申请安全审查。需要说明的是，由于目前商务部门并未公布安全审查范围涉及的具体行业目录，所以，为降低法律风险，外国投资者可通过预约商谈程序与商务部门就其并购是否涉及安全审查进行事前沟通。

## （四） 要约收购豁免

根据《收购管理办法》的规定，收购人拥有权益的股份达到上市公司已发行股份的 30% 时，继续进行收购的，应当依法向该上市公司的股东发出全面要约或者部分要约。符合《收购管理办法》规定情形的，收购人可以向中国证监会申请免除发出要约。前述可以向中国证监会提出免于以要约方式增持股份申请的情形包括：

1. 收购人与出让人能够证明本次转让未导致上市公司的实际控制人发生变化；
2. 上市公司面临严重财务困难，收购人提出的挽救公司的重组方案取得该公司股东大会批准，且收购人承诺 3 年内不转让其在该公司中所拥有的权益；
3. 中国证监会为适应证券市场发展变化和保护投资者合法权益的需要而认定的其他情形。

## （五） 同业竞争与关联交易

根据《收购管理办法》，外国投资者就其投资 A 股上市公司所编制、公告的信息披露文件中应披露投资者、一致行动人及其控股股东、实际控制人所从事的业务与上市公司的业务是否存在同业竞争或者潜在的同业竞争，是否存在持续关联交易；存在同业竞争或者持续关联交易的，是否已做出相应的安排，确保投资者、一致行动人及其关联方与上市公司之间避

免同业竞争以及保持上市公司的独立性。

若外国投资者投资 A 股上市公司达到《上市公司重大资产重组管理办法》所规定的借壳上市标准，则根据前述《重组管理办法》的规定，该等重大资产重组完成后，上市公司应当符合中国证监会关于上市

公司治理与规范运作的相关规定，在业务、资产、财务、人员、机构等方面独立于控股股东、实际控制人及其控制的其他企业，与控股股东、实际控制人及其控制的其他企业间不存在同业竞争或者显失公平的关联交易。

邵春阳 合伙人 电话：86-21-2208 6241 邮箱地址：shaochy@junhe.com

冯 诚 合伙人 电话：86-21-2208 6356 邮箱地址：fengch@junhe.com

牛元栋 律 师 电话：86-21-2208 6232 邮箱地址：niuyd@junhe.com

本文仅为分享信息之目的提供。本文的任何内容均不构成君合律师事务所的任何法律意见或建议。如您想获得更多讯息，敬请关注君合官方网站“[www.junhe.com](http://www.junhe.com)”或君合微信公众号“君合法律评论”/微信号“JUNHE\_LegalUpdates”



# JUNHE SPECIAL REPORT



November 22, 2018

## A Brief Introduction to the Latest Legal Issues for PIPE by Foreign Investors in A-Share Listed Companies

In a recent interview addressing some of the major issues in the market, Shiyu Liu, Chairman of the China Securities Regulatory Commission (CSRC) indicated that private equity (PE) firms should be encouraged to purchase shares and become involved in mergers and acquisitions (M&As) of listed companies through participating in private placements, transfer agreements and bulk deals.<sup>1</sup>

The type of private equity investment in publicly-owned assets, or as they are more commonly known, “listed companies”, that the regulatory authority is encouraging is sometimes referred to as “PIPE” (private investment in public equity.)

Unlike PE investment in companies prior to their initial public offering (IPO), which usually happens via private placement of convertible shares/bonds using a negotiated pricing mechanism, PIPE takes the form of PE investment through subscription in or purchase of shares of a publicly listed company based on the open market price. With the PRC A-Share<sup>2</sup> securities market not yet fully open, foreign investors have not been able to directly invest in A-share listed companies, and so the opportunity to enter the market through a range of PIPE mechanisms has been attractive. Based on

our understanding of relevant PRC laws and regulations, our research and analysis of various cases and our practical experience on similar projects, we have prepared this report for your general reference.

### **I. Legal Framework for PIPE in A-Share Listed Companies by Foreign Investors**

Within the current PRC legal framework, foreign investors can invest in A-Share listed companies through the following methods: (i) foreign investors can apply for a QFII (Qualified Foreign Institutional Investor) or an RQFII (RMB Qualified Foreign Institutional Investor) license, or invest via the QFII/RQFII program; (ii) foreign investors can invest in A-Share listed companies as strategic investors; and (iii) foreign investors can invest in A-share listed companies through the interconnection mechanism between the Shanghai, Shenzhen and Hong Kong Stock Exchanges, and the stock exchanges of other countries or regions. Under the current regulations for this final method, foreign investors are permitted to invest in A-share listed companies only by participating in competitive bidding on the Shanghai and Shenzhen Stock Exchanges, which

<sup>1</sup> Xinhua, October 19, 2018.

<sup>2</sup> A-share refers to mainland China domestic shares, denominated in RMB and traded on the Shanghai and Shenzhen stock exchanges.

is not one of the primary means of investment for PIPE. The focus of this article will therefore be primarily upon the first and second investment methods.

### 1.1 Relevant regulations on QFII/RQFII

To apply for a QFII license or invest in an A-Share listed company via the QFII program, a foreign investor must satisfy the requirements of the *Administrative Measures for the Domestic Securities Investment by Qualified Foreign Institutional Investors* jointly promulgated by the CSRC, the People's Bank of China (PBOC) and the State Administration of Foreign Exchange (SAFE), the *Regulations regarding the Implementation of Administrative Measures for Domestic Securities Investment by Qualified Foreign Institutional Investors* promulgated and implemented by the CSRC and the *Provisions on the Foreign Exchange Administration of Domestic Securities Investment by Qualified Foreign Institutional Investors* promulgated and implemented by SAFE in June, 2018 (collectively, the "QFII Regulations").

To apply for an RQFII license or invest in an A-Share listed company via RQFII, a foreign investor must satisfy the requirements of the *Measures for the Pilot Program of Securities Investment in China by RMB Qualified Foreign Institutional Investors* enacted by the CSRC, the PBOC and SAFE, the *Provisions on the Implementation of the Measures for the Pilot Program of Securities Investment in China by RMB Qualified Foreign Institutional Investors* enacted by the CSRC, as well as the *Notice of the People's Bank of China and the State Administration of Foreign Exchange on Issues concerning Domestic Securities Investment by RMB Qualified Foreign Institutional*

*Investors* jointly issued and implemented by the PBOC and SAFE on June 12, 2018 (collectively, the "RQFII Regulations")

### 1.2 Regulations for strategic investors

Most of the regulations relating to foreign strategic investors' investment in A-Share listed companies are supervisory in nature, and can be categorized into:

- A. Regulations concerning foreign investment access and industry supervision
  - a) The main regulation governing strategic investment in A-Share listed companies by foreign investors is the *Administrative Measures on the Strategic Investment in Listed Companies by Foreign Investors* (the "Strategic Investment Measures") revised and promulgated by the Ministry of Commerce (MOFCOM), the CSRC, the State Administration of Taxation (SAT), the State Administration of Industry and Commerce (SAIC) and SAFE on October 28, 2015. The *Strategic Investment Measures* specifies: the qualifications required for foreign strategic investors; the basic requirements for the strategic investment, including that the investment ratio shall be more than 10% and there be a minimum three-year lock-up period; the methods of the strategic investment, which shall be share transfer by agreement or private placement of shares; and the approval/record-filing process. MOFCOM published the *Decision on Revising the Administrative Measures for Foreign Investors' Strategic Investment in Listed Companies (Exposure Draft)* on July 30, 2018 (the "Strategic Investment Measures Exposure Draft") for public comment:

- b) The key regulation governing M&A of domestic enterprises by foreign investors is the *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors* (the “Foreign M&A Provisions”) revised by MOFCOM on June 22, 2009. When matters are not clear under the *Strategic Investment Measures*, the *Foreign M&A Provisions* applies as the default rule.
- c) The fundamental regulations governing the industry access and foreign investment policies are the *Catalogue of Industries for Guiding Foreign Investment* (2017 revision) and the *Special Administrative Measures (Negative List) for Foreign Investment Access* (2018)<sup>3</sup> (collectively, the “**Negative List**”) promulgated by the National Development and Reform Commission (NDRC) and MOFCOM. The Negative List brings together special administrative measures on foreign investment access, such as the shareholding ratio requirements and the obligations of senior executives. Any administrative measures that apply to foreign investments in industries that fall outside the Negative List shall be consistent with those applicable to domestic investments.
- d) The *Law of the People's Republic of China on Sino-foreign Joint Venture Enterprise* (2016 revision), the *Law of the People's Republic of China on Chinese-foreign Cooperative Enterprise* (2017 revision), the *Law of the People's Republic of China on Foreign Investment Enterprises* (2016 revision), and the *Interim Measures for the Administration of Filing for the Incorporation and Change of Foreign-invested Enterprises* (MOFCOM No. 6, 2018) (the “Measures on the Administration of the FIE Filing”) enacted by MOFCOM specify that the incorporation of or any changes to a foreign-invested enterprise (FIE) shall be subject to the relevant approval or record-filing procedures. FIEs that are not subject to special administrative measures shall follow the record-filing measures.
- e) The *PRC Anti-Monopoly Law* (the “Anti-Monopoly Law”), the *Regulations on the Declaration Threshold for the Concentration of Business Operators* published by the State Council, and other relevant regulatory requirements issued by MOFCOM and the Anti-Monopoly Bureau of the State Administration of Market Supervision specify that if the M&A of a domestic enterprise means the foreign investor will reach the declaration threshold, the foreign investor will be required to submit a concentration declaration with the anti-trust authorities, before the M&A transaction can proceed.
- f) The *Notice on Establishing the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors* promulgated by the General Office of the State Council and the *Implementation of Security Review System of Merger and Acquisition of Domestic Enterprises by Foreign Investors* promulgated by MOFCOM specify that if the target domestic enterprise that is merged with or is acquired by a foreign investor is of certain restricted industries, and the foreign investor

<sup>3</sup> In China's pilot free trade zones, if the investments fall within the state-specified scope of implementation of special access administrative measures, the *Provisions of the Special Access*

*Administrative Measures for Foreign Investment in the Pilot Free Trade Zone (Negative List)* (2018 Edition) shall apply.

will have de facto control of such domestic enterprise following the M&A transaction, a security review is required.

- g) If the target A-Share listed companies are in special industries that are subject to pre-approval requirements, an application for approval by the competent department of the special industry shall be filed according to applicable rules.
- B. Laws and regulations on the management of state-owned assets

The major regulation on the management of state-owned assets is the *Measures for the Supervision and Administration of State-Owned Stock Rights of Listed Companies*, jointly promulgated by the state-owned Assets Supervision and Administration Commission of the State Council (SASAC), the Ministry of Finance and the CSRC, and constitutes and sets out the principles, rules and relevant procedural requirements that state-owned shareholders shall follow when transferring their shares to foreign investors.

C. Regulations governing securities supervision

- a) The key regulation governing securities supervision is the *Administrative Measures on the Takeover of Listed Companies* (the “Administrative Measures on Takeovers”) promulgated by the CSRC and its supporting systems.
- b) If the foreign investor subscribes for shares of A-Share listed companies using assets as consideration, the *Administrative Measures for the Material Asset Reorganization of Listed Companies* promulgated by the CSRC and its supporting rules will additionally apply.

### 1.3 Relevant regulations on the Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect

The regulations applicable to foreign investors investing in A-share listed companies through the interconnection mechanism between Shanghai Stock Exchange (SSE), Shenzhen Stock Exchange (SZSE) and Hong Kong Stock Exchange (SEHK) are as follows:

- a) The framework for the regulatory system is provided by the *Several Provisions on the Interconnection Mechanism for Transactions in the Mainland and Hong Kong Stock Markets* enacted by the CSRC, which clarifies the application principles of relevant laws and regulations, the rights, obligations and duties of the main market entities and the appropriate territorial administration of Shanghai and Hong Kong investors, among other important content;
- b) The *Implementation Measures of the Shanghai Stock Exchange for the Shanghai-Hong Kong Stock Connect* (2018) enacted by the SSE stipulates specific rules regarding the scope of shares, special transaction matters, quota control and limit of shareholding ratio of foreign investors participating in the trading of stocks listed on the SSE Exchange through a SEHK subsidiary in Shanghai providing relevant securities trading services (SEHK Shanghai Subsidiary);
- c) The *Implementation Measures of the Shenzhen Stock Exchange for the Shenzhen-Hong Kong Stock Connect* (2018) enacted by the SZSE, stipulates specific rules regarding the scope of shares, special transaction matters, the quota control and limit of



shareholding ratio of foreign investors participating in the trading of stocks listed on the SZSE through a SEHK subsidiary in Shenzhen providing relevant securities trading services (SEHK Shenzhen Subsidiary);

- d) The *Detailed Implementation Rules for Registration, Depository and Clearing Services under the Interconnection Mechanism for Transactions in the Mainland and Hong Kong Stock Markets* enacted by the China Securities Depository and Clearing Corporation contains specific provisions on the registration, deposit and settlement of stock market transactions between the mainland and Hong Kong.

## **II. General Methods for PIPE in A-Share Listed Companies by Foreign Investors**

### **2.1 Applying for a QFII license or investing in A-Share listed companies via QFII**

According to the QFII Regulations, licensed QFIIs can invest in the RMB financial instruments approved by the CSRC (including trading listed A-shares at a securities exchange). Therefore, foreign investors can acquire the A-shares of the listed companies by applying for a QFII license or via the QFII program.

To become a licensed QFII, the foreign investor applicant must satisfy following requirements:

- a) The applicant should be an overseas fund management institution, insurance company, securities company or other asset management institution;
- b) The applicant should have financial stability and good credit standing and should meet the following the CSRC criteria for asset size and other factors:

- i. for an asset management institution, it should have at least two years' experience in asset management and have managed at least USD 0.5 billion worth of securities assets in the last fiscal year;
  - ii. for an insurance company, it should have operated for at least two years and held at least USD 0.5 billion worth of securities assets in the last fiscal year;
  - iii. for a securities company, it should have at least five years of experience in securities operation with a minimum USD 0.5 billion net assets and have managed at least USD 5 billion worth of securities assets in the last fiscal year;
  - iv. for a commercial bank, it should have at least 10 years of experience in the banking business with tier one capital of at least USD 0.3 billion, and have managed at least USD 5 billion worth of securities assets in the last fiscal year; and
  - v. for any other institutional investor (such as pension fund, charitable foundation, donation foundation, trust company, and government investment management company), it should have operated for at least two years and have managed or held at least USD 0.5 billion securities assets in the last fiscal year.
- c) Employees of the applicant should possess the relevant professional qualifications required in their home country/region;
  - d) The applicant should have a sound management structure and a well-established internal control system, conduct business operations according to applicable laws and

regulations and should not have been subject to any major punishment by regulatory authorities during the past three years;

- e) The home country/region of the applicant should have a well-established legal and regulatory system, and the securities regulatory authority should have signed a memorandum of understanding with the CSRC and have maintained an effective cooperative supervisory relationship with the CSRC; and
- f) Any other conditions stipulated by the CSRC, based on the principal of prudent supervision.

In addition, the QFII Regulations stipulate that the acquisition of shares of listed companies by foreign investors requires approval from the CSRC and quota record-filing or approval by SAFE. In practice, this means that once approval has been granted by the CSRC, a QFII can file a “basic quota” with SAFE based the proportion or the overall size of the security assets that will be managed by the applicant. A foreign exchange quota in excess of the basic quota requires approval by SAFE. The calculation of the basic quota will be significantly affected by whether or not the material assets of the company or its group are in the PRC.

If the material assets are in the PRC, the basic quota will be 0.1 billion USD plus 0.2% of the average asset size over the past three years, minus any RMB Qualified Foreign Institutional Investor’s quotas (“RQFII quota”, in US Dollar terms) already granted to the company. If the material assets are outside the PRC, the basic quota would be 5 billion RMB plus 80% of the average asset size during the last year, minus any RQFII quota granted to the company. A QFII can invest in an RMB financial instrument

approved by the CSRC within the recorded and approved quota. However, the QFII must entrust a domestic commercial bank as their custodian to manage the assets on behalf of the QFII, and also must entrust a domestic securities company to handle any domestic securities exchange transactions.

In order to acquire the shares of A-Share listed companies via the QFII program, foreign investors can entrust one or several institutions with QFII qualification. The licensed QFII will directly purchase the shares of A-Share listed companies on the domestic securities market and will disclose in the relevant documents that such foreign investor is the actual investor. While investment in A-Share listed companies by applying a QFII license or other investment methods above requires cooperation from counter-parties of the transactions and/or multiple approval procedures, foreign investment through the QFII program requires no prior approval from governmental authority (though the foreign investor must fulfill its disclosure obligation). However, foreign investment in A-Share listed companies via the QFII program is subject to an investment ratio limitation under the QFII Regulations: a single foreign investor shall hold no more than 10% of the issued shares of a listed company via the QFII program; and the total equity interest held by all foreign investors shall not exceed 30% of the issued shares of a listed company.

Foreign investors that purchase shares in A-Share listed companies via the QFII program should observe the requirements on the disclosure of interests under the *Administrative Measures on Takeovers*. Specifically, if securities transactions at securities exchanges result in a QFII holding

more than 5% of the issued shares of a listed company, the QFII shall prepare a report on the equity interest change within three days of the occurrence of the transaction and submit to the CSRC and to the relevant securities exchange. The listed company shall be notified of the same, and a public announcement shall also be made. An example of this is provided by Fubon Life Insurance, a QFII in the Taiwan region, which published a report on equity changes about the February 2016 purchase of shares in Liaoning Chengda (600739) made through private placement.

## **2.2 Applying for an RQFII license or investing in A-Share listed companies via the QFII program**

According to the RQFII Regulations, licensed RQFII can use RMB capital from abroad within the investment quota approved by SAFE to invest in listed securities in the PRC, thereby providing a means for foreign investors to acquire A-Shares of listed companies by applying for an RQFII license or via the RQFII program.

To become a licensed RQFII, the following requirements must be satisfied:

### **a) Place of registration and qualification:**

- i. The applicant should be a Hong Kong (or another pilot area) subsidiary of a mainland fund management company, securities company, commercial bank or insurance company, or a financial institution whose place of registration and principal place of business is Hong Kong (or another pilot area); and
- ii. The applicant should have obtained its asset management business qualification

from the Hong Kong securities regulatory authority and have already carried out asset management activities;

- b) It should have financial stability and good credit standing;
- c) It should have sound corporate governance and internal controls, and its practitioners should hold the relevant qualifications to practice as required by its home country or region;
- d) It should be operating in compliance with applicable provisions, and should not have been subject to any major punishment by local regulatory authorities within the past three years or since its incorporation; and
- e) It should satisfy other conditions prescribed by the CSRC pursuant to principles of prudent regulation.

The RQFII Regulations adopt the same, or very similar standards to the QFII Regulations. With the approval from the CSRC, an RQFII can obtain a “basic quota” through record-filing with SAFE. If the material assets of an RQFII or its group are within the PRC, the basic quota would be 0.1 billion USD (in RMB terms) plus 20% of the average asset size over the past three years, minus any Qualified Foreign Institutional Investors quotas (“QFII quota”, in RMB terms) already granted to the company. If the material assets are outside the PRC, the basic quota would be 5 billion RMB plus 80% of the asset size of the last year, minus any QFII quota already granted to the company. Quotas in excess of the basic quota shall be approved by SAFE. The investment ratio limitation on the investment in A-Share listed companies via RQFII is the same as for the QFII Regulations: a single overseas

investor shall not hold more than 10% of the issued shares of a listed company, and the total equity interest held by all overseas investors shall not exceed 30% of the issued shares in a listed company. An RQFII is also required to entrust a domestic commercial bank as their custodian and entrust a domestic securities company to handle the domestic securities exchange transaction.

In the *Administrative Measures on Takeovers*, there is a general requirement to disclose any equity interests and this applies to investment by foreign investors in A-share listed companies via RQFII program. A recent example is: in October 2016, Hua An Asset Management (Hong Kong), using fund from its RQFII account, subscribed to the new shares issued by Changjiang Runfa (002435) to raise the supporting funds for asset acquisitions.

## 2.3 Investment in A-Share listed companies by strategic investors

### 2.3.1 Qualification Requirements

The *Strategic Investment Measures* stipulate that in order to acquire the shares of an A-Share listed company as a strategic investor, a foreign investor shall meet the following requirements:

- a) It is a legally established and operated foreign legal person or other organization,<sup>4</sup> with sound financials, good credit standing and well-established management experience;
- b) The total value of its overseas assets is more than USD 100 million; or the overseas assets

managed by it shall be worth more than USD 500 million; or the total value of its parent company's overseas assets is more than USD 100 million or the overseas assets managed by its parent company are worth more than USD 500 million;<sup>5</sup>

- c) It has a sound management structure and a well-established internal control system, and its business operations comply with applicable laws and regulations;
- d) It and its parent company have not received any substantial punishment from an overseas or domestic regulatory authority within the last three years.

### 2.3.2 Investment Channels

The *Strategic Investment Measures* stipulate that a foreign investor may conduct strategic investment either by private placement or transfer by agreement. Article 2 of the *Strategic Investment Measures Exposure Draft* adds a third method, tender offer.

The requirements for these three methods are as follows:

- a) Strategic investment through private placement of shares of listed companies shall comply with the following procedures:
  - i. The board of directors of the listed company adopts a board resolution;
  - ii. The shareholder general meeting of the listed company adopts a resolution;

<sup>4</sup> The Strategic Investment Measures Exposure Draft expands the definition of entities of strategic investments from "foreign legal persons or other organizations" to "foreign companies, enterprises and other economic organization or individuals".

<sup>5</sup> The Strategic Investment Measures Exposure Draft amends the current requirement of "the total amount of its actual overseas assets

is not less than USD100 million or the total amount of its managed actual overseas assets is not less than USD500 million" to "actual total assets of the foreign investor shall be not less than USD50 million or the actual total assets managed by the foreign investor shall be not less than USD300 million", and the last three-year sales limitation for foreign investors acquiring shares of A-share listed company through strategic investment is reduced to twelve months.

- iii. The listed company and the investor conclude a subscription agreement for the private placement of shares;
- iv. The investor submits relevant application documents to MOFCOM;
- v. The investor obtains the CSRC approval;<sup>6</sup> and
- vi. The listed company applies for a change of registration with the relevant market supervision bureau after completion of the private placement transaction.

For item iv, “The investor submits relevant application documents to MOFCOM”, the following details apply:

According to the *Measures on the Administration of the FIE Filing* and other regulations promulgated by MOFCOM, the incorporation of and changes to foreign-invested enterprises not subject to special administrative measures shall go through record-filing.

According to the *Catalogue of Industries for Guiding Foreign Investment* (2017 Revision) promulgated by the NDRC and MOFCOM, unless a domestic company, enterprise or natural person, in the name of an overseas company legally established or controlled by it, merges with or acquires its domestic affiliated company, the incorporation of or changes to foreign-invested enterprises, including foreign strategic investment

in the listed companies and relevant matters, are not subject to special administrative measures and the record-filing shall be adopted instead.

In order to determine whether a strategic investment shall be subject to examination and approval or record-filing, there is a need to consider the following circumstances:

- i. According to the *Foreign M&A Provisions* and the *Strategic Investment Measures*, approval from MOFCOM is required where a domestic company, enterprise or natural person, in the name of an overseas company legally established or controlled by it, merges with or acquires its domestic affiliated company;
- ii. According to the *Strategic Investment Measures* and regulations on the delegation of approval authority for foreign investment, approval from MOFCOM or the local commerce department is required if the listed company is among the industries subject to special administrative measures under the *Catalogue of Industries for Guiding Foreign Investment*;<sup>7</sup> and
- iii. MOFCOM approvals are not required for other transactions subject to record-filing. Record-filings shall be completed according to the *Measures on the Administration of the FIE Filing*.

A typical example of strategic investment by

<sup>6</sup> The *Decision of the Ministry of Commerce on Revising Certain Regulations and Normative Documents* promulgated by MOFCOM on December 28, 2015, deletes the provision that “after receiving the letter of in-principle approval issued by MOFCOM concerning the Investor’s Strategic Investment in the Listed Company, the Listed Company submits, to the CSRC, the application documents for directed issue of new shares, and the CSRC carries out verification and approval on the application pursuant to the law”.

<sup>7</sup> According to Article 3 of the *Strategic Investment Measures Exposure Draft*, strategic investment in areas within the scope of special

administrative measures shall be approved and administered by MOFCOM and the commerce authorities of all provinces, autonomous regions, centrally-administered municipalities, municipalities with unilateral planning and the Xinjiang Production and Construction Corps (the “provincial commerce authorities”) within their respective area of authority. For strategic investment where the investment amount is below the quota, the provincial commerce authorities are responsible for approval and administration.

private placement is Alliance Healthcare Asia Pacific's 2017 subscription for new shares in Nanjing Pharmaceutical (600713) through private placement as a strategic investor. The MOFCOM explicitly stated that since Nanjing Pharmaceutical was already an FIE prior to the transaction, the *Measures on the Administration of the FIE Filing* and relevant regulations should apply to the change of significant matters of the company, meaning that MOFCOM approval was not required for introducing the foreign strategic investors.

b) A strategic investment through transfer of shares of the listed company by agreement shall comply with the following procedures:<sup>8</sup>

- i. The board of directors of the listed company adopts a board resolution;
- ii. The shareholder general meeting of the listed company adopts a shareholder resolution;
- iii. The transferor and the investor conclude the share purchase agreement;
- iv. The investor submits the relevant application documents to MOFCOM;
- v. If the investor is an equity holder of the listed company and has obtained the aforementioned approval, the investor must complete the formalities to confirm the share transfer at a securities exchange, complete the formalities for the registration at a securities registration

and settlement institution, and file with the CSRC; if the investor intends to have de facto control of the listed company through transfer by agreement, the investor shall submit an acquisition report and relevant documents to the CSRC for its review, and only if the CSRC raises no objection after the review can it proceed with the share transfer confirmation formalities at a securities exchange and apply for registration at a securities registration and settlement authority; and

vi. After the transfer by agreement is completed, the listed company shall make an amendment registration at SAIC based on such approval.

Please refer to section a) above for further details on item iv. "The investor submits the relevant application documents to MOFCOM."

Some examples of foreign investors investing in A-share listed companies through transfer agreement include Chow Tai Fook Investment's<sup>9</sup> purchase as a strategic investor in a 30% share of ST Jinggu Forest (600265) from its shareholder Xiaokang Holding through contract, CVC's strategic investment in Zhuhai Zhongfu (000659), and the negotiated acquisition of Chongqing Beer (600132) by Carlsberg Hong Kong.

Regardless of which strategic investment channel is adopted, the A-shares of a listed company acquired by foreign investors may not

<sup>8</sup> According to the *Strategic Investment Measures Exposure Draft*, for strategic investment through negotiated transfer and which is subject to state-specified special administrative measures on industry admittance, the transaction shall comply with the following procedures: (1) internal procedures of the listed company pursuant to applicable laws, regulations and articles of association of the company; (2) a share transfer agreement has been concluded

between the transferor and the investor; and (3) the foreign investor shall submit a relevant application to the local commerce authorities of the place of the listed company for the transaction. If there are applicable special provisions, such provisions shall prevail.

<sup>9</sup> Defined as a foreign investor since it is a legal entity wholly owned by Taiwan, Hong Kong or Macao investors

be transferred within three years. While the investment fund can receive injection by installment, the shareholding ratio of the investor after the initial investment must be more than 10% of the shares issued by the company.<sup>10</sup>

c) Strategic investment by tender offer

According to the *Strategic Investment Measures Exposure Draft*, strategic investments that are subject to state-specified special administrative measures shall comply with the following procedures:

- i. The foreign investor shall prepare a summary tender offer report;
- ii. The foreign investor, the listed company or relevant parties shall fulfill the relevant reporting and notification obligations under applicable laws and regulations and the CSRC rules; and
- iii. The listed company shall submit the relevant application as per the *Strategic Investment Measures Exposure Draft* to the local commerce authority and shall comply with specific rules, if any.

Once the competent commerce authority approves in principle the strategic investment by the foreign investor, the foreign investor shall conduct the tender offer transaction based on applicable regulations; when the transaction is completed, the listed company shall apply to the commerce authority for the Certificate of Approval for a Foreign Invested Enterprise.

A recent example of this approach is the August, 2018 tender of by Grand Metropolitan

International Holdings Limited to acquire Swellfun (600779).

d) Investing in A-Share listed companies by indirect acquisition

1) M&A of a listed company via its controlling FIE

Foreign investors can merge with and acquire A-Share listed companies via FIEs established in the PRC that have PRC legal person status. Under such foreign investment mechanism, the foreign investor does not need to be qualified as a strategic investor or a QFII/RQFII, and the approval procedures for foreign investment by a strategic investor or QFII/RQFII investment do not apply.

The M&As of A-Share listed companies by foreign investors via foreign invested enterprises controlled by the investors shall be conducted according to the *Administrative Measures on Takeovers*, the *Administrative Measures on the Issuance of Securities by Listed Companies*, and the *Implementation Rules on the Private Placement of Shares by Listed Companies*, through tender offer, negotiated acquisition or subscription of private placement of shares of listed companies.

It should be noted that due to the current tight SAFE policies on foreign exchange control, restrictions apply to an FIE using its capital funds for an equity investment. If a foreign investor intends to acquire the listed company via an FIE established by the investor, the FIE shall use only its own funds for the acquisition.

---

<sup>10</sup> The *Strategic Investment Measures Exposure Draft* discontinues the 10% shareholding ratio requirement after initial investment that was included in the current *Strategic Investment Measures*.



A typical case of a listed company using its controlling FIE to make such investment, is Everwin Pacific's 2007 acquisition of Jiugui Liquor (000799) via Zhonghuang Company Limited.

- 2) M&A of a listed company via a domestic investment company established by a foreign investor.

Under the current regulations, an investment company established by a foreign investor is able to make strategic investments in a listed domestic company. According to the *Provisions of the Ministry of Commerce on the Establishment of Investment Companies by Foreign Investors* (amended in 2015), in order to establish an investment company, a foreign investor shall meet the following conditions:

- i. The foreign investor has good credit standing and the necessary financial soundness to establish the investment company, with total assets valuing more than USD 400 million for the year prior to the establishment, and it has established an FIE in China with paid-in capital of more than USD 10 million, or it has good credit and the financial soundness necessary to establish the investment company, it has established ten or more FIEs in China, and the foreign investor has a paid-in capital of more than USD 30 million;
- ii. To establish an investment company in the form of a joint equity venture, the Chinese investor shall have good credit standing and the financial soundness necessary to establish an investment company, and have total assets valuing more than RMB100 million for the year prior to the application;

and

- iii. The registered capital of the investment company shall be a minimum USD 30 million.

A foreign investor seeking to establish an investment company shall be a foreign company, enterprise or economic organization. If there are two or more foreign investors, the foreign investor with the highest proportion of shares shall meet the requirements under item i above.

A typical example of is Hony Capital Fund V LP's 2016 acquisition of Jinjiang Shares (600754) via the Hony (Shanghai) Equity Investment Fund Center (limited partnership).

- 3) M&A of the controlling shareholder of the listed company by the foreign investor to indirectly control the listed company

According to the *Foreign M&A Provisions* and the *Administrative Measures on Takeovers*, foreign investors are permitted to wholly or partially acquire the parent company or the controlling shareholder of listed companies from supported or encouraged industries in the *Foreign Investment Industrial Guidance Catalogue*, and to convert such listed companies to wholly foreign owned enterprises or FIEs in order to gain indirect control of the listed companies. If the parent company of the listed company is a state-owned company, the relevant approval procedures for the transfer of state-owned assets shall be performed.

Some typical cases include CDH Investment's 2011 indirect equity investment in Luxi Chemical (000830) and Ulysses Parent's 2018 indirect equity investment in Luyang Energy-Saving Materials (002088).

Apart from using cash to purchase shares of listed

companies, foreign investors can also use their legally owned domestic or overseas assets as consideration to subscribe to private placement of A-shares of listed companies. If the assets contributed by foreign investors reach a defined threshold, then the transaction will constitute a material asset reorganization of the listed company. Even if the transaction amount does not reach the statutory threshold, since the listed companies have acquired assets with the increased company shares, the CSRC approval is still required.

Recent relevant examples include COFCO Biochemical Investment's acquisition of the shares of COFCO Biochem (000930) through private placement; the acquisition of Wanhua Chemical Industry by Wanhua Chemicals (600309); and the subscription of private placement shares of Aerospace (000901) by Eashine International and Easunlux using the shares of Hiwinglux and IEE as consideration.

Please note that the *Strategic Investment Measures Exposure Draft* specifies that foreign investors are able to use the shares of foreign companies held by them and/or the newly issued shares of the foreign investors as consideration of strategic investment. The *Strategic Investment Measures Exposure Draft* no longer requires that foreign companies be listed companies or SPVs, as was required in the *Foreign M&A Provisions*. According to the *Strategic Investment Measures Exposure Draft*, if the strategic investment involves a cross-border share swap, the domestic companies and their shareholders shall engage agencies registered in the PRC as consultants to conduct due diligence on the authenticity of the acquisition application documents and the financial situation of the relevant foreign companies, to ascertain whether the conditions

for the cross-border share swap are satisfied, and shall submit consultant reports.

### **III. Investment in A-Share listed companies via Northbound Trading Link (“NTL”) of Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect**

#### **3.1 NTL of Shanghai-Hong Kong Stock Connect**

Under the mechanism of Shanghai-Hong Kong Stock Connect, foreign investors may delegate Hong Kong brokers and apply to the SSE to transact shares in A-Share listed companies as specified in the relevant regulations via an SEHK securities trading-service company in Shanghai. According to the *Implementation Measures for the Business of Shanghai-Hong Kong Connect*, the stocks available for trading to foreign investors under the NTL of Shanghai-Hong Kong Stock Connect include: (i) the SSE Constituent Index; (ii) the SSE 380 Index; and (iii) A-shares listed on the SSE by companies listed on both the SSE and SEHK.

The above regulations require that stocks of the NTL of Shanghai-Hong Kong Stock Connect shall be quoted and traded in RMB. The trading days and transaction time shall be announced by the SEHK Shanghai Subsidiary on a designated website, and will be traded via competitive bidding.

In addition, foreign investors who conduct a transaction via the NTL of Shanghai-Hong Kong Stock Connect shall obey the following requirements of the *Several Provisions on the Interconnection Mechanism for Transactions in the Mainland and Hong Kong Stock Markets*:

- i. The shareholding ratio of a foreign investor in a listed company shall not exceed 10% of

the total number of shares of such listed company; and

- ii. The aggregate number of A-shares held by all foreign investors in a listed company shall not exceed 30% of the total number of shares of such listed company.

However, in the case of a strategic investment, these ratio restrictions will not apply to a foreign investor's shareholding.

### **3.2 NTL of Shenzhen-Hong Kong Stock Connect**

Under the mechanism of Shenzhen-Hong Kong Stock Connect, foreign investors may delegate Hong Kong brokers and apply to the SZSE to transact shares in A-Share listed companies as specified in the relevant regulations via the SEHK Shenzhen Subsidiary. According to the *Implementation Measures for the Business of Shenzhen-Hong Kong Connect*, the stocks available for trading to the foreign investors under the NTL of Shenzhen-Hong Kong Stock Connect include:

- i. The SZSE Constituent Index and SZSE Small/Mid Cap Innovation Index stocks with a daily average market capitalization of more than six billion RMB in the six months before the deadline for periodical adjustment review. The market capitalization is calculated based on the actual time of listing if such time is less than six months; and
- ii. A-shares listed on the SZSE by companies listed on both the SZSE and the SEHK.

According to the *Implementation Measures of the Shenzhen Stock Exchange for Shenzhen-Hong Kong Stock Connect*, the Stocks of NTL of Shenzhen-Hong Kong Stock Connect shall be

quoted and traded in RMB. The trading days and transaction time shall be announced by the SEHK Shenzhen Subsidiary on a designated website, and will be traded via competitive bidding.

In addition, foreign investors shall comply with the following requirements listed in the *Several Provisions on the Interconnection Mechanism for Transactions in the Mainland and Hong Kong Stock Markets*:

- i. The shareholding ratio of a foreign investor in a listed company shall not exceed 10% of the total number of shares of such listed company; and
- ii. The aggregate number of A-shares held by all foreign investors in a listed company shall not exceed 30% of the total number of shares of such listed company.

In the case of a strategic investment, these ratio restrictions will not be applied to shares held by foreign investors.

## **IV. Issues for PIPE in A-Share Listed Companies by Foreign Investors**

### **4.1 Industry Access**

As discussed above, investment by foreign investors in A-Share listed companies is subject to the approval or record-filing of relevant PRC government authorities and must also comply with any relevant foreign investment access policies. The *Negative List* specifies the restricted and prohibited areas for foreign investment and imposes limitations on shareholding ratios for a foreign investor's investment in certain industries. The *Strategic Investment Measures* stipulate that where laws and regulations have expressly specified limitations on the shareholding ratio of foreign investors for companies in specific listed

industries, the foreign investor shall comply with shareholding restrictions and the investor shall not invest in listed companies of those industries in the prohibited category of the Negative List.

#### **4.2 Anti-Monopoly Review**

Investment by foreign investors in A-Share listed companies may be subject to anti-monopoly review. Since the promulgation of the *Anti-Monopoly Law* in 2008, the State Council, MOFCOM and the State Administration of Market Supervision have consecutively promulgated the *Regulation on the Declaration Threshold for the Concentration of Business Operators*, the *Measures for the Review of the Concentration of Business Operators*, the *Interim Measures for the Evaluation of the Competitive Effect on the Concentration of the Business Operators*, the *Guiding Opinions for the Declaration of the Concentration of the Business Operators*, the *Anti-monopoly Review Guidance for Concentrations of the Business Operators* and other regulations that detail anti-monopoly review procedures and the required filing documents. According to such regulations, if a foreign investor has acquired the control (including the common control) of a listed company and the total worldwide revenue for the last fiscal year of all business operators participating in the concentration exceeds RMB 10 billion, and at least two business operators' revenue in China for the last fiscal year each exceeds RMB 40 million; or the total domestic revenue (in China) for the last fiscal year of all business operators participating in the concentration exceeds RMB 2 billion, and at least two of the business operators' revenue in China for the last fiscal year exceeds RMB 40 million each, such foreign investor is required to

make a declaration to the anti-trust authorities and to obtain approval.

Some related cases include CVC's 2007 submission of anti-monopoly declaration documents to MOFCOM for its strategic investment in the domestic A-Share listed company, Zhuhai Zhongfu, via its subsidiary Asia Bottles (HK) Company Limited, and the July, 2018, COFCO Bio-chemical Investment submission of anti-monopoly declaration documents to the Anti-Monopoly Bureau of the State Administration of Market Supervision for the subscription of private placement shares issued by COFCO Biochem (000930).

#### **4.3 Security Review**

When the M&A of a domestic enterprise by a foreign investor falls within the following scope, the foreign investor shall apply to MOFCOM for a security review before the filing for the M&A transaction. Industries likely to trigger the need for a security review include national security and defense-related products or services, agricultural products, key infrastructure, significant transport services, key technology and heavy equipment manufacturing. If the M&A transaction has implications for national security, a security review will be required only if the foreign investor will have de facto control of the domestic enterprise, however, if the national security implication is related to national defense, a security review is required regardless of whether or not the foreign investor will have de facto control of the domestic enterprise. Please note that MOFCOM has not yet published a detailed catalogue specifying the scope of industries for security review. Therefore, to mitigate any legal risk, it is

suggested that a foreign investor consult with MOFCOM in advance to verify whether the M&A transaction in question may be subject to a security review.

#### **4.4 Waiver of Tender Offer**

According to the *Administrative Measures on Takeovers*, if the plan to acquire shares of a listed company would mean that the total proportion of shares held by a purchaser will reach 30% of the issued shares of the company, the purchaser will be required to deliver a general offer or partial offer to the shareholders of the listed company before the acquisition can proceed. Under the following circumstances specified in the *Administrative Measures on Takeovers*, the purchaser may apply to the CSRC to waive such a tender offer requirement:

- i. The purchaser and the transferor of shares can prove that the share transfer will not alter the actual controlling person of the listed company;
- ii. The listed company is facing a severe financial crisis, the reorganization plan proposed by the purchaser to save the company has been approved by a general shareholder meeting of the company, and the purchaser guarantees that it will not transfer its interest in the company within three years; and
- iii. Other circumstances approved by the CSRC as necessary for the development of securities market and for the protection of the legal interest of the investor.

#### **4.5 Business Competition and Related Party Transactions**

According to the *Administrative Measures on Takeovers*, a foreign investor shall make known

in the disclosure documents prepared and published for its investment in the A-Share listed company: any current or potential business competition between the business of the investor and persons acting in concert with the investor and their controlling shareholders, the actual controlling person and the business of the listed company, and any ongoing related party transactions. The disclosure documents shall outline any business competition or related party transactions or relevant arrangement to ensure the avoidance of business competition between the investor, person acting in concert and its related party and the listed company and to maintain the independence of the listed company.

If the investment in an A-Share listed company by the foreign investor meets the back-door listing requirements specified in the *Administrative Measures for the Material Asset Reorganization of Listed Companies*, the listed company shall comply with the CSRC's relevant requirements on corporate governance and standard operation of the listed company after the completion of such material asset reorganization in order to maintain its independence from the controlling shareholder, the actual controlling person and other enterprises that are controlled by such persons whether in terms of business, assets, finance, employees, organization or other aspects, and to ensure there is no business competition or other unconscionable related party transaction with the controlling shareholder, actual controlling person or other enterprises that are controlled by such person.

|               |           |                      |                          |
|---------------|-----------|----------------------|--------------------------|
| Chunyang SHAO | Partner   | Tel: 86 21 2208 6241 | Email: shaochy@junhe.com |
| Cheng FENG    | Partner   | Tel: 86 21 2208 6356 | Email: fengch@junhe.com  |
| Yuandong NIU  | Associate | Tel: 86 21 2208 6232 | Email: niuyd@junhe.com   |

---

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of JunHe Law Offices. For more information, please visit our official website at [www.junhe.com](http://www.junhe.com) or our WeChat public account “君合法律评论”/WeChat account “JUNHE LegalUpdate”.

