外商投资要闻简讯

JUNHE

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国家外汇管理局深圳市分局获准开展逐笔审核辖区内机构提出的境内银行不良资产跨境转让试点业务。

国务院办公厅发布新版《自贸区负面清单》，进一步放宽现有的 11 个自贸区外商投资准入范围。

国家发展和改革委员会、商务部发布《外商投资产业指导目录（2017 年修订）》，外商投资负面清单制度正式在全国范围内开始适用。

中国人民银行通过《内地与香港债券市场互联互通合作管理暂行办法》，债券通“北向通”正式落地。

2017 年 6 月 28 日，商务部副部长与香港特别行政区政府财政司司长于香港签署了《<内地与香港关于建立更紧密经贸关系的安排>投资协议》和《<内地与香港关于建立更紧密经贸关系的安排>经济技术合作协议》，将推动内地与香港的投资自由化及便利化、提升经济技术交流与合作的水平。

商务部修改《外商投资企业设立及变更备案管理暂行办法》，将外资并购内资企业及战略投资上市公司纳入备案管理。

一、 境内银行不良资产跨境转让在深圳试点

2017 年 6 月 1 日，国家外汇管理局（简称“外管局”）印发《关于深圳市分局开展辖区内银行不良资产跨境转让试点业务有关事项的批复》（汇复[2017]24 号）（简称“24 号批复”），同意授权外管局深圳市分局对辖区内机构提出的银行不良资产跨境转让试点业务（简称“试点业务”）申请进行逐笔审核。

（一）背景

财政部、中国人民银行及原对外贸易经济合作部于 2001 年 10 月 26 日联合发布的《金融资产管理公司吸收外资参与资产重组与处置的暂行规定》最早为境外投资者参与中国不良资产处置提供制度依据。由于境内银行将其对境内债务人的不良资产向境外投资者转让将形成境内债务人对外负债，因此该等转让长期以来受到外汇管理部门以及国家发展和改革部门等外债管理机构的双重监管。

近年来，尽管相关立法规定及政府监管措施逐渐宽松，但始终未就境内银行直接跨境转让不良资产业务制定出相关规定。因此，在现行制度下，“借道”金融资产管理公司（简称“AMC”）投资境内银行不良资产仍然为境外投资者可选择的唯一合规途径。境外投资者往往需要参与 AMC 转让不良资产的公开处置程序，而在 AMC 遵循财政部、银行业监督委员会发布的《金融企业不良资产批量转让管理办法》等规定所述的公开透明、竞争择优、价值最大化等原则下，境外投资者投资不良资产的议价空间小，同时也需要面对公开处置程序内在的极大不确定性。根据相关规定，在通过公开处置程序成交后，AMC 还需要向国家发展和改革委员会就对外转让债权事宜申请办理备案登记手续，境外投资者需要凭国家发展和改革委员会出具的备案

登记证明文件向银行办理投资不良资产所获收益的对外购付汇手续。

(二)法律点评

24 号批复规定，外管局深圳市分局获授权审核的对外转让资产仅限于自境内银行出让的银行不良资产。因试点业务形成的外债不纳入申请人的跨境融资风险加权余额（或短期外债余额指标）计算。外管局深圳市分局对试点业务负监管义务，并须按季度向外管局报告试点业务审核和进展情况。24 号批复自批复之日起一年内有效。

24 号批复其中还规定，外管局深圳市分局辖区内的申请人应按照《外债登记管理办法》等相关规定代境内债务人办理相关外债登记和汇兑等手续，但未明确该等“辖区内申请人”的身份条件和要求。我们理解，可以直接就试点业务向外管局深圳市分局申请的申请人应包括深圳市内的境内银行业金融机构。同时，我们注意到 24 号批复系外管局针对外管局深圳市分局上报的《关于深圳前海金融资产交易所银行资产跨境转让试点业务审核授权的请示》所做的批复。据悉，前交所也可通过其为试点业务创设的“跨境通”平台，为深圳市内外的境内金融机构发布转让不良资产的信息，当发生对外转让的情况下，前交所可代为向外管局深圳市分局申请办理相关外债登记和汇兑手续。前交所为交易双方提供信息发布、交易撮合、资产登记、资金监管、监管合规等服务。

(三)关注要点

外管局深圳分局此次获批开展不良资产跨境转让试点业务，境内银行据此可经其审核向境外转让不良资产。但囿于财政部发布的《金融企业不良资产批量转让管理办法》以及银行业监督委员会发布的其他相关规定，境内银行出让的不良资产如果达到或者超过 3 户，还是需要按照原规定通过 AMC 通道进行。

二、 新版《自贸区负面清单》实施

2017 年 6 月 5 日，国务院办公厅发布《自由贸易试验区外商投资准入特别管理措施（负面清单）（2017 年版）》（简称“新版《自贸区负面清单》”）。新版《自贸区负面清单》于 2017 年 7 月 10 日起实施。

(一)背景

国务院办公厅曾于 2015 年 4 月 8 日发布《自由贸易试验区外商投资准入特别管理措施（负面清单）》（简称“旧版《自贸区负面清单》”），适用于上海、广东、天津、福建四个自贸区，并明确在负面清单之外的领域，在自贸区内按照内外资一致原则实施管理。

2016 年 9 月 3 日，全国人民代表大会常务委员会发布了《全国人民代表大会常务委员会关于修改<中华人民共和国外资企业法>等四部法律的决定》，在《外资企业法》《中外合资经营企业法》《中外合作经营企业法》及《台湾同胞投资保护法》四部法律中分别增加一条规定，即，将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，由审批改为备案管理。随后，国家发展和改革委员会会同商务部于 2016 年 10 月 8 日发布了 2016 年第 22 号公告，明确外商投资准入特别管理措施范围按《外商投资产业指导目录（2015 年修订）》中限制类和禁止类，以及鼓励类中有股权要求、高管要求的有关规定执行。

实践中，自贸区内适用现行有效的自贸区负面清单，自贸区外则应依据现行有效的外商投资产业

指导目录确定外商投资准入特别管理措施的范围。

(二)法律点评

新版《自贸区负面清单》共 40 个条目、95 项特别管理措施，与旧版《自贸区负面清单》相比，共减少了 10 个条目、27 项措施。其中，减少的条目包括轨道交通设备制造、医药制造、道路运输、保险业务、会计审计、其他商务服务等 6 条，同时整合减少了 4 条 。新版《自贸区负面清单》主要体现以下特点：

一是进一步放开交通运输业的外资准入。例如取消轨道交通设备制造条目，轨道交通设备制造不再限于合资、合作，并废除对城市轨道交通项目设备国产化比例的要求。又如，将公路旅客运输公司从限制类中移除，意即外商投资公路旅客运输公司适用国民待遇。

二是向外资逐步开放互联网相关服务准入。例如允许外商投资互联网上网服务营业场所。

三是小幅放松对外资进入文化、体育、娱乐业的准入限制。例如允许外商从事美术品和数字文献数据库及其出版物等文化产品进口业务。又如将大型主题公园的建设、经营从限制类中移除。

(三)关注要点

国务院曾于 2015 年 10 月 2 日发布《关于实行市场准入负面清单制度的意见》，提出从 2015 年 12 月 1 日至 2017 年 12 月 31 日，在部分地区试行市场准入负面清单制度，积累经验、逐步完善，探索形成全国统一的市场准入负面清单及相应的体制机制，从 2018 年起正式实行全国统一的市场准入负面清单制度。为准确把握今后适行全国的外商投资准入特别管理措施，《自贸区负面清单》的修订尤其值得关注。

三、 《外商投资产业指导目录（2017 年修订）》发布

2017 年 6 月 28 日，国家发展和改革委员会、商务部发布《外商投资产业指导目录（2017 年修订）》，这是《外商投资产业指导目录》自 1995 年首次颁布以来的第 7 次修订版。

(一)背景

如上文所述，全国人民代表大会常务委员会于 2016 年 9 月修改了《外资企业法》《中外合资经营企业法》《中外合作经营企业法》及《台湾同胞投资保护法》等四部法律，规定将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，由审批改为备案管理。但是，与外商投资备案制相配套的外商投资准入特别管理措施制订相对滞后，外商投资准入特别管理措施范围仅能参照《外商投资产业指导目录（2015 年修订）》中限制类和禁止类，以及鼓励类中有股权要求、高管要求的有关规定执行。

2017 年 1 月，国务院发布《关于扩大对外开放积极利用外资若干措施的通知》，提出修订《外商投资产业指导目录》及相关政策法规，放宽服务业、制造业、采矿业等领域外资准入限制，支持外资参与创新驱动发展战略实施、制造业转型升级和海外人才在华创业发展，以进一步扩大对外开放。

基于以上背景，国家发展和改革委员会、商务部于 2017 年 6 月 28 日发布《外商投资产业指导目录（2017 年修订）》，并于 2017 年 7 月 28 日起施行。

(二)法律点评

相较前几个版本的《外商投资产业指导目录》，《外商投资产业指导目录（2017 年修订）》在结构上有较大改动，分为“鼓励外商投资产业目录”和“外商投资准入特别管理措施（外商投资准入负面

清单）”两部分，将此前版本中外商投资限制类和鼓励类项目中有股权、合资合营等要求的条目以及禁止类项目整合在外商投资准入负面清单中，统一列明限制性措施。此举为首次在全国范围内对外商投资领域推出负面清单制度。

在内容上，《外商投资产业指导目录（2017 年修订）》进一步减少了外资限制性措施，保留 63 条（包括限制类条目 35 条、禁止类条目 28 条），比上一版减少了 30 条，着重提高对服务业、制造业、采矿业的开放水平。服务业主要取消了公路旅客运输、会计审计、农产品批发市场等领域的准入限制；制造业主要取消了轨道交通设备、汽车电子、新能源汽车电池、摩托车、食用油脂、生物液体燃料等领域的准入限制，放宽了纯电动汽车领域准入限制；采矿业主要取消了非常规油气、稀有金属等领域的准入限制。

需要注意的是，境外投资者从事“鼓励外商投资产业目录”和“外商投资准入特别管理措施（外商投资准入负面清单）”重合的条目，享受鼓励类政策，同时须遵循相关准入规定。

(三) 关注要点

与上一版《外商投资产业指导目录》相比，《外商投资产业指导目录（2017 年修订）》共有 11 个条目取消了“中方控股”或“中方股比不低于 50%”的要求，共有 4 个项目取消了“限于合资或合作”的要求，总体而言开放力度较大。但同时，我们也注意到，《外商投资产业指导目录（2017 年修订）》加强了对外商投资文化领域的限制，比如将图书、报纸、期刊、音像制品和电子出版物的编辑业务、广播电视视频点播业务和卫星电视广播地面接收设施安装服务、互联网公众发布信息服务以及人文社会科学研究机构这四项增列为禁止外商投资产业目录。

四、 央行推出债券“北向通”，进一步对外开放银行间债券市场

2017 年 6 月 21 日，中国人民银行发布《内地与香港债券市场互联互通合作管理暂行办法》（中国人民银行令[2017]第 1 号）（简称“《暂行办法》”），自发布之日起施行。

(一) 背景

自中国人民银行于 2010 年 8 月发文明确了境外机构投资者投资中国内地银行间债券市场适用准入及投资额度核准制度起，中国内地银行间债券市场对境外投资者呈逐步开放趋势。

根据中国人民银行在《暂行办法》出台之前的相关规定，境外投资者准入内地银行间债券市场已由事前审批制变更为事后备案制，对投资主体的审查义务交由受托为境外机构投资者提供交易和结算服务的结算代理人承担。

准入内地银行间债券市场的境外投资人包括境外央行、国际金融组织、主权财富基金，以及满足条件的以下几类主体：（1）在中国境外依法注册成立的商业银行、保险公司、证券公司、基金管理公司及其他资产管理机构等各类金融机构；（2）上述金融机构依法合规面向客户发行的投资产品；（3）养老基金、慈善基金、捐赠基金等中国人民银行认可的其他中长期机构投资者；（4）合格境外机构投资者（QFII）、人民币合格境外机构投资者（RQFII）。

此外，准入内地银行间债券市场的境外投资人投资额度并无限制。境外投资人可投资债券现券等经中国人民银行许可的交易品种。

(二) 法律点评

《暂行办法》的出台旨在规范开展内地与香港债券市场互联互通合作相关业务，保护境内外投资者合法权益，维护债券市场秩序。但现阶段出台的《暂行办法》仅明确适用于境外投资者经由香港与内地债券市场基础设施机构之间在交易、托管、结算等方面互联互通的机制安排，投资于内地银行间债券市场，即“北向通”。“南向通”有关办法将另行制定。

在可投资券种方面，《暂行办法》规定符合中国人民银行要求的境外投资者可通过“北向通”投资内地银行间债券市场，标的债券为可在内地银行间债券市场交易流通的所有券种。据了解，投资标的债券的方式包括通过参与银行间债券市场发行认购方式，也可以通过二级市场买卖方式。

《暂行办法》延续了对于境外投资者的备案要求，并规定中国人民银行认可的电子交易平台和其他机构可代境外投资者向中国人民银行上海总部备案。据悉，境外投资者目前可选择委托中国外汇交易中心、境内托管机构、银行间债券市场结算代理人等作为代理备案机构办理备案。

《暂行办法》规定境外托管机构应在境内托管机构开立名义持有人账户，用于记载名义持有的全部债券余额。境外投资者通过“北向通”买入的债券应当登记在境外托管机构（注：如香港金管局的债务工具中央结算系统）名下，并依法享有证券权益。需要注意的是，境外投资者作为债券实际权益拥有人行使债权人权利的方式，应当根据香港特区关于名义持有人的相关法律规定作出安排。

《暂行办法》允许境外投资者自由选择使用自有人民币或外汇进行投资。境外投资者如只使用自有人民币投资不涉及外汇兑换的，无须通过香港结算行办理“北向通”下的资金汇兑和结算业务；如使用外汇投资的，应通过香港结算行办理外汇资金结算，投资的债券到期或卖出后不再投资的，原则上应兑换回外汇汇出，并通过香港结算行办理。

《暂行办法》要求“北向通”下的资金兑换纳入人民币购售业务管理，这也意味着目前人民币购售业务的范围从货物贸易、服务贸易和直接投资扩展至包括债券投资。香港结算行应遵守反洗钱和反恐怖融资、人民币购售业务等相关规定，在境内银行间外汇市场平盘头寸时，应确保与其相关的境外投资者在本机构的资金兑换和外汇风险对冲是基于“北向通”下的真实合理需求。中国人民银行将会同国家外汇管理部门对“北向通”下人民币购售业务、资金汇出入、外汇风险对冲等实施监督管理，并与香港金融管理局及其他有关国家或地区的相关监督管理机构加强跨境监管合作，防范利用“北向通”进行违法违规套利套汇等活动。

(三) 关注要点

“北向通”和“南向通”共同组成的“债券通”，是中国内地债券市场有序开放中的一次制度创新。先期推出“北向通”有助于为未来“债券通”的双向开放积累经验，有利于保持金融市场的稳定，减少金融市场的风险。目前，“北向通”境外投资者仅可以进行债券现券交易，未来将逐步扩展到债券回购、债券借贷、债券远期，以及利率互换、远期利率协议等交易。

配合《暂行办法》的发布，2017 年 6 月 22 日，中国人民银行上海总部发布《中国人民银行上海总部“债券通”北向通境外投资者准入备案业务指引》（中国人民银行上海总部公告[2017]第 1 号），为境外投资者备案提供了指南。此外，中国人民银行与

香港金融管理局已就“债券通”所涉及的跨境监管合作原则等相关事项达成共识，并签署了《“债券通”项目下中国人民银行与香港金融管理局加强监管合作谅解备忘录》。双方约定，根据两地的法律和各自法定权限，双方建立有效的信息交换与协助执行机制，加强监管合作，共同打击跨境违法违规行为，确保项目有效运作。

五、 内地与香港签署《<内地与香港关于建立更紧密经贸关系的安排>投资协议》和《<内地与香港关于建立更紧密经贸关系的安排>经济技术合作协议》

2017 年 6 月 28 日，在《内地与香港关于建立更紧密经贸关系的安排》（简称“CEPA”）框架下，商务部副部长与香港特别行政区政府财政司司长于香港签署了《<内地与香港关于建立更紧密经贸关系的安排>投资协议》（简称“《CEPA 投资协议》”）和《<内地与香港关于建立更紧密经贸关系的安排>经济技术合作协议》（简称“《CEPA 经济技术合作协议》”）。两个协议自签署之日起生效，《CEPA 投资协议》自 2018 年 1 月 1 日起正式实施。

(一) 背景

为了加强内地与香港之间的贸易和投资合作，商务部副部长与香港特别行政区政府财政司司长于 2003 年 6 月 29 日签署 CEPA。随后双方签署了 10 个补充协议，以及《<内地与香港关于建立更紧密经贸关系的安排>关于内地在广东与香港基本实现服务贸易自由化的协议》和《<内地与香港关于建立更紧密经贸关系的安排> 服务贸易协议》（简称“《CEPA 服务贸易协议》”）。

(二) 法律点评

1. 《CEPA 投资协议》

《CEPA 投资协议》共有四章二十九条及三个附件，包括投资准入、投资保护、投资便利化及争端解决等内容。

首先，《CEPA 投资协议》对于“投资”的定义、特征、形式作出明确的规定。“投资”是指所有由投资者直接或间接拥有或控制的、具有投资特征的各种资产，投资特征包括：资本或其他资源的投入、收益或利润的预期和风险的承担。投资形式包括，但不限于：（一）一家企业；（二）企业的股份、股票和其他形式的参股；（三）债券、信用债券、贷款和其他债务工具，包括由企业或一方发行的债务工具[1]；（四）期货、期权及其他衍生工具；（五）交钥匙、建筑、管理、生产、特许、收入分配及其他类似合同；（六）知识产权；（七）根据一方法律授予的执照、授权、许可及类似权益[2][3]；以及（八）其他有形或无形资产、动产、不动产以及相关财产权利，如租赁、抵押、留置权及质押权。我们注意到《CEPA 投资协议》项下的投资形式较《外国投资法（征求意见稿）》规定的更加丰富，增加了期货、期权及其他衍生工具、知识产权等内容。

其次，《CEPA 投资协议》对于“投资者”的定义及条件作出明确的规定。对于以商业存在形式在内地进行投资的香港企业需要满足在香港注册或登记设立，并取得有效商业登记证，以及在香港从事实质性商业经营的要求。对于在香港从事实质性商业经营的判断标准沿用了 CEPA 对于“服务提供者”

[1]若干债务形式，如债券、信用债券及长期票据较可能具有投资特征；而其他债务形式，如由于货物或服务销售所得而即将到期的付款索偿，则具有投资特征的可能性较小

[2]个别种类的执照、授权、许可及类似工具（包括特许权，如具有此工具的性质）是否具有投资特征的资产，亦取决于例如持有人在一方法律下所享有权利的性质及范围等因素。在不构成具有投资特征资产的工具当中，包括并不产生受一方法律保障的任何权利的工具。为进一步明确，以上不影响与此类工具有关联的任何资产是否具有投资特征。

[3]“投资”此词并不包括司法或行政程序中的命令或判决。

的判断标准，仍然需要香港投资者应已在香港注册或登记设立并从事实质性商业经营 3 年以上（含 3 年）、缴纳利得税、拥有或租用业务场所从事实质性商业经营、雇用符合比例的员工。

最后，《CEPA 投资协议》对于投资准入管理沿用了《CEPA 服务贸易协议》的负面清单模式。《CEPA 投资协议》要求除了负面清单列明的措施外，一方应当给予对方投资者国民待遇、最惠待遇，并规定了双方均应承担在业绩要求、高级管理人员、董事会成员与人员入境等方面的实体业务。

2. 《CEPA 经济技术合作协议》

内地与香港在 CEPA 及其所有补充协议的基础上签署《CEPA 经济技术合作协议》，该协议既包括对 CEPA 及其补充协议中有关经济技术合作的内容的全面梳理、更新、分类和汇总，也包括根据两地经贸合作实际需要提出的新的合作内容[4]。《CEPA 经济技术合作协议》共有七章二十六条，包括合作目标及机制、深化“一带一路”建设经贸领域的合作、重点领域合作、次区域经贸合作、贸易投资便利化等内容。

内地鼓励香港参与“一带一路”建设，支持两地加强次区域经贸合作，为此《CEPA 经济技术合作协议》在 CEPA 的基础上新增 “一带一路”建设、次区域经贸合作内容并设置专章。次区域经贸合作包括深化泛珠三角区域经贸合作、支持香港参与自贸区建设和深化香港与前海、南沙、横琴合作三个部分。

《CEPA 经济技术合作协议》将金融合作、旅游合作、法律和争议解决合作、会计合作、会展业合作、文化合作、环保合作、创新科技合作、教育合作、电子商务合作、中小企业合作、知识产权合作、商标品牌合作、中医药产业合作作为重点领域合作。《CEPA 经济技术合作协议》在 CEPA 原有的合作领域增加“法律及争议解决合作”和“会计合作”，为香港的专业服务机构提供新的机遇[5]。

(三) 关注要点

为了落实《CEPA 投资协议》、《CEPA 经济技术合作协议》，国务院及各部委需要就此制定相关规定，后续的立法进展值得关注。

国家发展改革委员会、广东省人民政府、香港特别行政区政府、澳门特别行政区政府于 2017 年 7 月 1 日签署《深化粤港澳合作 推进大湾区建设框架协议》，共同推进粤港澳大湾区建设。该框架协议约定，将落实 CEPA 及其系列协议，推动内地与港澳企业相互投资。CEPA 及《CEPA 投资协议》、《CEPA 经济技术合作协议》对于推动粤港澳大湾区建设的成效值得关注。

六、 外资并购境内企业与外资战略投资上市公司正式纳入商务部备案管理

2017 年 7 月 30 日，商务部正式公布《关于修改<外商投资企业设立及变更备案管理暂行办法>的决定》（商务部 2017 年第 2 号令）（简称“《决定》”），并于同日发布《关于外商投资企业设立及变更备案管理有关事项的公告》（2017 年第 37 号）（简称“《37 号令》”），明确对于外国投资者并购境内非外商投资企业以及对上市公司实施战略投资，不涉及特别管理措施和关联并购的，适用备案管理。

(一) 背景

[4] http://tga.mofcom.gov.cn/article/zwyw/zwxx/201706/20170602600690.shtml

[5] http://tga.mofcom.gov.cn/article/zwyw/zwxx/201706/20170602600690.shtml

根据《关于外国投资者并购境内企业的规定》，外国投资者并购境内企业应经审批机关批准。此外，外国投资者对已完成股权分置改革的上市公司和股权分置改革后新上市公司通过具有一定规模的中长期战略性并购投资，取得该公司 A 股股份的，也应依据《外国投资者对上市公司战略投资管理办法》，事先取得商务部批准。

2016 年 10 月 1 日起，在全国范围内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，依据《外商投资企业设立及变更备案管理暂行办法》（简称“《备案办法》”），已由审批改为备案管理。但是外资并购设立企业、外资战略投资上市公司，并未明确载明在《备案办法》中适用备案管理的范围，仍应按照《关于外国投资者并购境内企业的规定》《外国投资者对上市公司战略投资管理办法》经审批机关批准后实施。

(二) 法律点评

根据《决定》修改后的《备案办法》，在不涉及特别管理措施和关联并购的情况下，由于并购、吸收合并等方式，非外商投资企业转变为外商投资企业的，应办理设立备案手续，填报设立申报表；外国投资者战略投资上市公司的，则应于证券登记结算机构证券登记前或登记后 30 日内办理备案手续，并视该上市公司是否为外商投资企业，填报设立或变更申报表。

所谓涉及特别管理措施的范围，在自由贸易试验区内，是依照新版《自贸区负面清单》的规定执行；自由贸易试验区外，则是依照《外商投资产业指导目录（2017 年修订）》中《外商投资准入特别管理措施（外商投资准入负面清单）》的规定执行。此外，“关联并购”的定义明确为是指境内公司、企业或自然人以其在境外合法设立或控制的公司名义并购与其有关联关系的境内的公司的情况。涉及以上特别管理措施和关联并购的外资并购及战略投资，不属于备案范围，仍应按照既有规定经审批后实施。

值得注意的是，修改后的《备案办法》，在进行备案手续时需通过综合管理系统上传提交的清单要求中，增加了“外商投资企业最终实际控制人股权架构图”的要求；而涉及外国投资者以境外公司股权作为支付手段的，另需提供境内企业的《企业境外投资证书》。

(三) 关注要点

修改后的《备案办法》，在完成构建开放型经济新体制、实施高水平对外开放、统一内外资法律法规和创新外国投资法律制度的政策目标道路上，又前进了一大步。

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Foreign Investment Bulletin

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The State Administration of Foreign Exchange ("**SAFE**") Shenzhen Branch is permitted to examine the pilot cross-border transfer of non-performing assets in domestic banks on a case-by-case basis.

The State Council issued the New Edition of Negative List for Pilot Free Trade Zones, which further expands the access scope for foreign investments in the current 11 Pilot Free Trade Zones.

The National Development and Reform Commission ("**NDRC**") issued the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)*. The negative list regime for foreign investment officially applies to the whole country.

The People's Bank of China ("**PBOC**") approves *Interim Measures for the Collaboration in the Mutual Bond Market Access between Mainland China and Hong Kong*, signifying the official launch of the Northbound Trading in the Bond Connect.

The Vice Minister of Commerce and Financial Secretary of Hong Kong Special Administrative Region ("**HKSAR**") signed the "*'Mainland and Hong Kong Closer Economic Partnership Arrangement' Investment Agreement*" and the "*'Mainland and Hong Kong Closer Economic Partnership Arrangement' Agreement on Economic and Technical Cooperation*" on June 28, 2017, which will expand the liberalization of and further facilitate the investment, and foster economic and technical cooperation between the Mainland and Hong Kong.

The Ministry of Commerce ("**MOC**") amended the *Interim Measures for Record-filing Administration over the Establishment and Change of Foreign-invested Enterprises*, encompassing mergers and acquisitions of domestic enterprises by foreign investors as well as strategic investment in listed companies by foreign investors into the record-filing administration.

1. Pilot Cross-border Transfer of Non-performing Assets in Domestic Banks Launched in Shenzhen

On June 1, 2017, SAFE issued the *Approving Reply to Shenzhen Branch on Developing Pilot Cross-border Transfer of Non-performing Assets Business in its Administered Banks* (Huifu [2017] No. 24) (the "**Approving Reply No. 24**"), which authorized SAFE Shenzhen Branch to examine the requests made by the banks under its administration to carry out pilot cross-border transfer of non-performing assets business (the "**Pilot Business**") on a case-by-case basis.

1.1 Background

The *Tentative Regulations on the Attraction of Foreign Capital by Financial Asset Management Companies to the Restructuring and Disposal of Assets* promulgated by the Ministry of Finance, PBOC, and the former Ministry of Foreign Trade and Economic Cooperation on October 26, 2001 was the first policy basis for foreign investors to participate in the disposal of non-performing assets. As the transfer of a domestic debtor's non-performing assets by the domestic bank to foreign investors creates foreign debts for the domestic debtor, such transfer has long been dual-regulated by SAFE and the NDRC, both of which are foreign debt regulators.

In recent years, although relevant laws, regulations, and government administrative measures have been progressively relaxed, no rules have been released regarding the transfer of non-performing assets directly overseas. Therefore, under current regime, investing in the non-performing assets in the domestic banks by way of AMC is the solely legitimate path available to foreign investors. Foreign investors often need to attend the AMCs' public disposal procedures of non-performing assets and, in view of the principles of transparency, competition and selection of the best, and value maximization set forth in the *Administrative Measures for Batch Transfer of Non-performing Assets of Financial Enterprises* issued by the Ministry of Finance and the China Banking Regulatory Commission ("**CBRC**"), foreign investors do not have much bargain power when investing in non-performing assets. In the meantime, foreign investors also encounter high intrinsic uncertainty of public disposal procedures. Under relevant regulations, AMC shall conduct record-filing with NDRC on the outbound transfer of creditor's rights after a transaction is concluded via public transfer procedures. The certification of record-filing issued by NDRC is mandatory for foreign investors to purchase and remit foreign currency abroad.

1.2 Legal Review

The Approving Reply No. 24 stipulates that outbound transferred assets that SAFE Shenzhen Branch is authorized to examine are limited to the non-performing assets sold by domestic banks. Foreign debts resulting from the Pilot Business shall not be included in the weighted balance of cross-border financing risk (or the short-term external debt balance indicators). SAFE Shenzhen Branch is responsible for the supervision of the Pilot Business, and shall report quarterly to SAFE on the examinations and status of progress. Approving Reply No. 24 will be valid through one year from the date of the reply.

Approving Reply No. 24 further provides that the applicants within the jurisdiction of SAFE Shenzhen Branch shall, on behalf of domestic debtors, conduct relevant procedures such as foreign debt registration and foreign exchange in accordance with the *Administrative Measures for Registration of Foreign Debts*, but Approving Reply No. 24 did not clarify the identity conditions and requirements for "applicants within the jurisdiction". To our understanding, the applicants

who are entitled to file application with SAFE Shenzhen Branch on the Pilot Business shall be the banking financial institutions in Shenzhen. Meanwhile, we noticed that the Approving Reply No. 24 is an answer to the *Shenzhen Qianhai Financial Assets Exchange Request for Instructions concerning the Authorization of examining power for Pilot Bank Assets Cross-border Transfer Business* ("**QFAE**") submitted by SAFE Shenzhen Branch. It is said that QFAE, via the Kua Jing Tong Platform, may distribute to onshore and offshore financial institutions the information related to the transfer of non-performing assets. In the case of outbound transfer, QFAE can serve as an agent for foreign debt registration and foreign exchange at the SAFE Shenzhen Branch. The services provided by QFAE include information distribution, transaction matchmaking, asset registration, fund monitoring, supervision compliance, and so on.

1.3 Next Step

According to this Approving Reply, which authorized SAFE Shenzhen Branch to carry out pilot cross-border transfer of the non-performing assets business, domestic banks are permitted to transfer non-performing assets upon SAFE Shenzhen Branch's examination. Nevertheless, as bound by the *Administrative Measures for Batch Transfer of Non-performing Assets of Financial Enterprises* and other relevant regulations issued by the CBRC, for the transfer of non-performing assets of 3 packs and more, domestic banks shall proceed via AMC as set forth in the original rules.

2. New Edition of Negative List for Pilot Free Trade Zones Comes into Force

On June 5, 2017, the General Office of the State Council issued the *Special Administrative Measures (Negative List) for Foreign Investment Access to Pilot Free Trade Zones (2017 Edition)* (the "**New Edition of FTZ Negative List**"), which entered into effect on July 10, 2017.

2.1 Background

General Office of the State Council once issued the *Special Administrative Measures (Negative List) for Foreign Investment Access to Pilot Free Trade Zones* (the "**Original Edition of FTZ Negative List**") on April 8, 2015, which applied to four Pilot Free Trade Zones (the "**FTZs**") in Shanghai, Guangdong, Tianjin, and Fujian.

On September 3, 2016, the Standing Committee of the National People's Congress issued the *Decision of the Standing Committee of the National People's Congress on Revising Four Laws including the Law of the People's Republic of China on Wholly Foreign-owned Enterprises* adding a new article to each of the four laws, which provides that the establishment or alteration of foreign-invested enterprises that does not involve the implementation of special access administrative measures prescribed by the State shall be subject to record-filing instead of prior approval. Soon afterwards, on October 8, 2016, the NDRC and the MOC jointly issued the 2016 Announcement No. 22, which stipulates that

the scope of the special administrative measures for foreign investment shall follow the Restricted Catalog, the Prohibited Catalog, and the shareholding/executive requirements in the Encouraged Catalog of the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2015)*.

In practice, FTZ Negative List applies only to the FTZs whereas the currently effective *Catalog for the Guidance of Foreign Investment Industries* sets forth the scope of special administrative measures for foreign investment in the area outside of FTZs.

2.2 Legal Review

The New Edition of FTZ Negative List contains 95 items in 40 sectors, which are 27 items and 10 sectors less than the Original Edition, among which 6 sectors were removed (i.e. manufacturing of railway transportation equipment, pharmaceutical manufacturing, road transport, insurance business, accounting and audit, other commercial services) while 4 sectors were abolished due to restructuring. The features of the New Edition of FTZ Negative List are summarized as follows:

Firstly, the access for foreign investment to the transportation business is further opened up. For example, the section of railway transportation equipment manufacturing is removed, which means the manufacturing of railway transportation equipment no longer requires joint venture or joint operation with Chinese partners and that the localization ratio requirement of urban railway transportation equipment is lifted. Another example is road passenger transportation which is removed from the restricted category, meaning foreign investments in the road passenger transportation may enjoy national treatment.

Secondly, the limited access to internet-related services for foreign investment is progressively lifted. For example, foreign investors are permitted to operate premises for internet access services.

Thirdly, the access restriction for foreign investment to enter the cultural, sports, and entertainment business is slightly relaxed. For example, foreign investors are now permitted to operate the importation of artworks and digital bibliographic database and its publications as well as other cultural products. Another example is the construction and operation of large theme parks which is removed from the restricted category.

2.3 Next Step

The State Council once issued the *Opinions on Implementing Negative List System for Market Access* on October 2, 2015, which suggests implementing the negative list system in some regions from December 1, 2015 to December 31, 2017 in order to gather experience, make improvements, explore a uniform negative list and its corresponding institutions, and officially implement a nationwide uniform negative list system in 2018. Therefore, to understand precisely the upcoming negative list applicable to the whole country, we advise close monitoring

towards this amendment of FTZ Negative List.

3 *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)* Issued

On June 28, 2017, the NDRC and the MOC jointly issued the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)*, the seventh amendment since the first issuance of *Catalog for the Guidance of Foreign Investment Industries* in 1995.

3.1 Background

As stated above, in September 2016, the Standing Committee of the National People's Congress revised four laws including the *Law of the People's Republic of China on Wholly Foreign-owned Enterprises* adding a new article to each of the four laws stipulating that the establishment or alteration of foreign-invested enterprises that does not involve the implementation of special access administrative measures prescribed by the state shall be subject to record-filing instead of prior approval. However, the lagging enactment of the scope of special access administrative measures causes the determination of scope of the special administrative measures for foreign investment to refer to the Restricted Catalog, the Prohibited Catalog, and the shareholding/executive requirements in the Encouraged Catalog of the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2015)*.

In January 2017, the State Council issued the *Circular on Several Measures concerning the Expansion of Opening-up and the Active Use of Foreign Capital*, promoting a new round of high-level opening-up by revising the *Catalog for the Guidance of Foreign Investment Industries* and the relevant policies and regulations, easing access restrictions on foreign capital in fields such as services, manufacturing, and mining sectors, supporting foreign capital to participate in the implementation of the innovation-driven development strategy and the transformation and upgrading of manufacturing, and encouraging overseas talents to start entrepreneurship in China.

Given the above background, the NDRC and MOC issued the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)* on June 28, 2017, which came into force on July 28, 2017.

3.2 Legal Review

Compared to the previous versions of the *Catalog for the Guidance of Foreign Investment Industries*, the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)* experienced significant alteration in respect of structure. The *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)* is divided into the Catalog of Encouraged Foreign Investment Industries and the Special Administrative Measures for Access of Foreign Investments (Negative List for Access of Foreign Investments) wherein those items in the Restricted Catalog and the Prohibited Catalog

and the shareholding/joint venture/joint operation requirements in the Encouraged Catalog of previous versions are now integrated into the Negative List for Access of Foreign Investments, in which section all access restrictions are specified. This is the first time when the negative list regime for foreign investments has been implemented in the whole country.

With respect to the contents, the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)* continues to reduce restrictive measures, retaining 35 items in the Restricted Catalog and 28 items in the Prohibited Catalog, which amount to 63 items in total and are 30 items less than the previous version. The opening-up in services, manufacturing, and mining sectors are the highlights. For the services sector, access restrictions in road passenger transportation, accounting audit, and agricultural products wholesale markets, among others, are removed. For the manufacturing sector, access restrictions in railway transportation equipment, automotive electronics, new energy automobile battery, motorcycles, edible fats, biology liquid fuel, among others, are removed, and the access restriction in electric vehicles is eased. For the mining sector, access restrictions in unconventional oil and gas and rare metals, among others, are removed.

It shall be noted that for an investment item which falls simultaneously within the Catalog of Encouraged Foreign Investment Industries as well as the Special Administrative Measures for Access of Foreign Investments (Negative List for Access of Foreign Investments), that foreign investors will be entitled to the encouragement policies while in the meantime subject to access regulations.

3.3 Next Step

The issuance of the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)* signifies a relatively high level of opening up as 11 items in the previous version that require control or 50% minimum shareholding of Chinese party are removed from the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)*, so as 4 items that require joint venture or joint operation. Notwithstanding the above, we noticed strengthened control over foreign investments in the cultural field in that four items, being (1) editing of books, newspapers, periodicals audio-visual products, and electronic publications, (2) radio and television video-on-demand services, and installation services for ground receiving facilities for television broadcasting by satellite, (3) services for internet information release by the public, and (4) humanities and social sciences research institutes, are added as Prohibited items.

4 PBOC Continues to Open Up the Inter-bank Bond Market to Foreign Investors by Launching the "Northbound Trading" of Bond Connect

On June 21, 2017, the PBOC issued the *Interim Measures for the Collaboration in the Mutual Bond Market Access between Mainland China*

and Hong Kong (Order of the People's Bank of China [2017] No.1) (the "**Interim Measures**"), effective since the date of issuance.

4.1 Background

The Inter-bank Bond Market has started to progressively open up to foreign investors since the PBOC clarified in August 2010 that the access and investment quota approval regime applies to foreign investors.

According to relevant regulations issued by the PBOC prior to the Interim Measures, foreign investors investing in the Mainland Inter-bank Bond Market are subject to record-filing instead of prior approval. The settlement agent entrusted to provide trading and settlement services is responsible for the examination of investor qualification.

Foreign investors permitted with access to Mainland Inter-bank Bond Market include foreign Central Banks, international financial institutions, sovereign wealth funds, and other entities that satisfy the following conditions: (1) financial institutions such as commercial banks, insurance companies, securities companies, fund management companies and other asset management institutions lawfully registered and incorporated outside the People's Republic of China, (2) investment products lawfully launched by such financial institutions, (3) other long-and medium-term institutional investors recognized by the PBOC such as pension funds, charity funds and endowment funds, and (4) qualified foreign institutional investors ("**QFII**") and RMB qualified foreign institutional investors ("**RQFII**").

In addition, PBOC puts no limit on the investment quota of foreign investors investing in the Mainland Inter-bank Bond Market. Foreign investors are allowed to invest in those trading types permitted by the PBOC such as outstanding bonds.

4.2 Legal Review

The purposes of the Interim Measures are to conduct relevant business concerning the collaboration in establishing mutual Bond Market access between Mainland China and Hong Kong in a standardized manner, protect the legitimate rights and interests of domestic and foreign investors, and uphold the order of the Bond Market. Notwithstanding the above, it is specified that the Interim Measures at this stage apply only to foreign investors investing in the Mainland Inter-bank Bond Market through mutual access between the Hong Kong and Mainland Bond Market infrastructure institutions in respect of trading, custody, settlement, and so on, which is the Northbound Trading. Relevant measures for Southbound Trading will be formulated separately.

In terms of object bonds, the Interim Measures provide that any foreign investor that satisfies the requirements of the PBOC may invest in the Mainland Inter-bank Bond Market through Northbound Trading wherein the object bonds shall include all types of bonds that can be traded and circulated in the Mainland Inter-bank Bond Market. It is understood that foreign investors can

invest in the object bonds by subscription to initial bond issuance as well as trading in the secondary market.

The Interim Measures follow the conventional record-filing requirement for foreign investors and provides that the electronic trading platform or other institutions that are recognized by the PBOC may file the record on behalf of foreign investors with the Shanghai Head Office of the PBOC. The available filing agencies include China Foreign Exchange Trade System ("**CFETS**"), domestic Custody Institutions, and Inter-bank Bond Market Settlement Agent.

The Interim Measures stipulate that overseas Custody Institutions shall open a nominee account at a domestic Custody Institution, which is used to record the balance of all bonds held nominally. Bonds purchased by the foreign investor through the Northbound Trading shall be registered under the name of the overseas Custodian Institution (such as the Central Moneymarkets Unit of Hong Kong Monetary Authority) and entitled to the rights and interests of the bonds according to the law. It should be noted that the foreign investor, as the actual owner of the rights and interests of the bonds, shall exercise creditor's rights in accordance with relevant laws and regulations of Hong Kong.

Foreign investors are permitted under the Interim Measures to invest with self-owned RMB or foreign currencies. Where an investment is made in self-owned RMB and does not involve foreign exchange, the funds are not required to undergo foreign exchange and settlement under the Northbound Trading at Hong Kong-based Settlement Banks. Where an investment is made in a foreign currency, the funds shall be settled at Hong Kong-based Settlement Banks and in principle, when bonds mature or are sold, the funds shall be exchanged into the foreign currency if such funds are not to be used for further investment, and proceed via Hong Kong-based Settlement Banks.

The Interim Measures require the exchange of funds with respect to Northbound Trading be subject to the administration of the purchase and sales of RMB, which implies that the scope of the purchase and sales of RMB has been extended from trade in goods, trade in services, direct investment to bond investment. Hong Kong-based settlement banks shall abide by the relevant anti-money laundering and counter-terrorism financing regulations and the provisions in respect of the purchase and sales of RMB. A Hong Kong-based settlement bank, when selling out the flat position in the domestic Inter-bank Foreign Exchange Market, shall ensure that related foreign investors exchange funds and hedge foreign exchange risks at such bank based on their real and reasonable needs for the purpose of Northbound Trading. The PBOC, in concert with the SAFE, shall supervise the RMB purchase and sales business, entry and exit of funds, hedging of foreign exchange funds, and so on in respect of Northbound Trading, and work with the Hong Kong Monetary Authority ("**HKMA**") and relevant regulators of other

countries or regions to step up the cross-border supervisory cooperation so as to prevent unlawful leverage of Northbound Trading such as illegal arbitrage and exchange of foreign currency.

4.3 Next Step

The Bond Connect, comprising of Northbound Trading and Southbound Trading, is an institutional innovation in the orderly open-up of Mainland China Bond Market. The early introduction of Northbound Trading helps to gather experience for the upcoming two-way access in the Bond Connect, maintain the stabilization of finance market, and reduce risks in the finance market. For now, the Northbound Trading investors can only trade in outstanding bonds, but it is anticipated that bond repurchase, bond lending, interest rate swap, forward rate agreement, and so on will be available to investors in the future.

In support of the Interim Measures, on June 22, 2017, the PBOC issued the *Guide on Registration of Foreign Investors for Northbound Trading in the Bond Connect* (PBOC Shanghai Head Office Announcement [2017] No. 1), which provides guidance for the record-filing of foreign investors. In addition, The PBOC and the HKMA have agreed on the principles of cross-border supervisory cooperation under Bond Connect and have signed the *Memorandum of Understanding between the People's Bank of China and Hong Kong Monetary Authority on Strengthening Supervisory Cooperation under Bond Connect*. The two parties agreed, in accordance with the laws and legal authorization of Mainland China and Hong Kong respectively, the two parties will establish effective mechanisms for information exchange and execution assistance, strengthen supervisory cooperation and jointly combat cross-border illegal activities so as to ensure effective operation of the scheme.

5 Mainland and Hong Kong have signed the "'Mainland and Hong Kong Closer Economic Partnership Arrangement' Investment Agreement" and the "'Mainland and Hong Kong Closer Economic Partnership Arrangement' Agreement on Economic and Technical Cooperation"

On June 28, 2017, under the framework of *Mainland and Hong Kong Closer Economic Partnership Arrangement* ("**CEPA**"), the Vice Minister of Commerce and Financial Secretary of HKSAR signed the "*'Mainland and Hong Kong Closer Economic Partnership Arrangement' Investment Agreement*" ("**CEPA Investment Agreement**") and the "*'Mainland and Hong Kong Closer Economic Partnership Arrangement' Agreement on Economic and Technical Cooperation*" ("**CEPA ETC Agreement**"). These two agreements took effect on the date of execution and the CEPA Investment Agreement will be implemented from January 1, 2018 onwards.

5.1 Background

To promote trade and investment cooperation between the Mainland and Hong Kong, the Vice

Minister of Commerce and Financial Secretary of HKSAR has signed CEPA on June 29, 2003. Since then, the two parties have signed 10 supplementary agreements, the "*'Mainland and Hong Kong Closer Economic Partnership Arrangement' Agreement between the Mainland and Hong Kong on Achieving Basic Liberalization of Trade in Services in Guangdong*" and the "*'Mainland and Hong Kong Closer Economic Partnership Arrangement' Agreement on Trade in Services*" ("**CEPA TIS Agreement**").

5.2 Legal Review

5.2.1. CEPA Investment Agreement

The CEPA Investment Agreement consists of 4 chapters, 29 articles and 3 annexes, including market excess, investment protection, Investment Facilitation and Settlement of Investment Disputes.

First of all, the CEPA Investment Agreement clearly set out the definition, characteristics and forms of "Investment". The Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risks. Forms that an investment may take include, though not exclusively: (i) an enterprise; (ii) shares, stocks and other forms of equity participation in an enterprise; (iii) bonds, debentures, loans and other debt instruments including debt instruments issued by an enterprise or one side;[1] (iv) futures, options and other derivatives; (v) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts; (vi) intellectual property rights; (vii) license, authorizations, permits and similar rights conferred pursuant to the laws of one side;[2][3] and (vii) other tangible or intangible assets, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges. We noticed that compared to the Law of Foreign Investment (Draft for Comment), forms of investment set out in the CEPA Investment Agreement are more diverse and has included the forms of futures, options and other derivatives, intellectual property and so on.

Secondly, the CEPA Investment Agreement also gives a clear definition of "Investors" and sets out the relevant conditions. To be classified as an "Investor", a Hong Kong enterprise investing in the Mainland in the form of commerce presence shall satisfy the requirements of incorporation or establishment in Hong Kong, obtaining a valid business registration certificate and engagement in substantive business operations in Hong Kong.

[1] Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

[2] Whether a particular type of license, authorization, permit or similar instrument (including a concession to the extent that it has the nature of such an instrument) is an asset that has the characteristics of an investment also depends on such factors as the nature and extent of the rights that the holder has under the laws of one side. Among such instruments that do not constitute an asset that has the characteristics of an investment are those that do not create any rights protected under the laws of one side. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

[3] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

The criteria for determining the engagement in substantive business operations in Hong Kong follows those of “Service Provider” under the CEPA, and includes that the Hong Kong investor should be incorporated or established in Hong Kong, and have engaged in substantive business operations for 3 years or more (including 3 years), should have paid profit tax, should own or rent premises in Hong Kong to engage in substantive business operations and should employ the required percentage of employees.

Lastly, the CEPA Investment Agreement continues to adopt the negative listing approach adopted in the CEPA TIS Agreement for market access. The CEPA Investment Agreement states that unless it is explicitly listed out in the negative list, one side should give the other side national treatment, most favored treatment and imposes on both sides the substantive obligations regarding performance requirements and senior management, board of creditors and entry of personnel. The CEPA Investment Agreement only contains the negative list of the Mainland for Hong Kong investors, i.e. Schedule of concessions of the Mainland.

5.2.2 CEPA ETC Agreement

The Mainland and Hong Kong signed the CEPA ETC Agreement based on the CEPA and all its supplementary agreements. The CEPA ETC Agreement not only sorts out, updates, classifies and summarizes the economic and technical cooperation under the CEPA and its supplementary agreements comprehensively, but also added new cooperation areas based on the actual need for economic and trade cooperation between two sides[4]. The CEPA ETC Agreement consists of 7 chapters and 26 articles, including the Cooperation Objective and Mechanism, the Cooperation in Economic and Trade Areas of the "Belt and Road", the Cooperation in Key Areas, and the Sub-regional Economic and Trade and Investment Facilitation.

The Mainland encourages Hong Kong to participate in the "Belt and Road" Initiative and support to strengthen the sub-regional economic and trade cooperation between the two sides. For this purpose, the CEPA ETC Agreement adds chapters for new cooperation areas in relation to "Belt and Road" Initiative and Sub-regional Cooperation. The Sub-regional Economic and Trade Cooperation includes strengthening the economic and trade cooperation in the Pan-Pearl River Delta Region, supporting Hong Kong to participate in the Pilot Free Trade Zones, and deepening the operation between Hong Kong and Qianhai, Nansha and Hengqin.

The CEPA ETC Agreement listed the cooperation in key areas which include financial cooperation, tourism cooperation, cooperation in legal and dispute resolution services, accounting cooperation, cooperation in convention and exhibition industry, cultural cooperation, environmental cooperation, innovation and technology cooperation, education cooperation, electronic commerce cooperation, medium and

[4] http://tga.mofcom.gov.cn/article/zwyw/zwxx/201706/20170602600690.shtml

small enterprise cooperation, intellectual property cooperation, trademark and branding cooperation and cooperation in traditional Chinese medicine and Chinese medicinal products industry. On top of cooperation areas under the CEPA, the CEPA ETC Agreement adds the areas of cooperation in legal and dispute resolution services, and accounting cooperation, which provides new opportunities for professional services institutions in Hong Kong[5].

5.3 Next Step

For implementation of the CEPA Investment Agreement and the CEPA ETC Agreement, the State Council and relevant ministries shall promulgate relevant rules and regulations, which is worthy of our attention.

On July 1, 2017, the National Development and Reform Commission, the People's Government of Guangdong province, the HKSRA government and the government of the Special Administrative Region of Macau have signed the Framework Agreement on Deepening the Cooperation among Guangdong, Hong Kong and Macau and Promoting the Development of the Greater Bay Area, to jointly promote the development of the Guangdong-Hong-Kong-Macau Greater Bay Area and facilitate the cross-border investment between the Mainland enterprises and enterprises from Hong Kong and Macau. The impact of the CEPA, the CEPA Investment Agreement and the CEPA ETC Agreement on the development of the Guangdong-Hong-Kong-Macau Greater Bay Area is also worthy of our attention.

6 Mergers and Acquisitions of Domestic Enterprises as well as Strategic Investment into Listed Companies by Foreign Investors are subject to the MOC Record-filing Administration.

On July 30, 2017, the MOC released the *Decision on Amending the Interim Measures for Record-filing Administration over the Establishment and Change of Foreign-invested Enterprises* (MOC 2017 Order No. 2) (the "**Decision**") and the *Announcement on Matters Relating to the Record-filing Administration over Establishment and Change of Foreign-invested Enterprises* ([2017] No. 37) (the "**Announcement No. 37**"), clarifying that the mergers and acquisitions of domestic enterprises and strategic investment into listed companies by foreign investors shall fall within the scope of the record-filing administration provided that no special access administrative measures or acquisition of a related party is involved.

6.1 Background

Under the *Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, mergers and acquisitions of domestic enterprises by foreign investors are subject to approval by the authority. In addition, acquisitions of A-shares of the listed company which have finished reform of non-tradable shares and of the newly listed companies by means of

[5] http://tga.mofcom.gov.cn/article/zwyw/zwxx/201706/20170602600690.shtml

long-and-mid-term strategic investment of mergers and acquisitions with certain scale are subject to MOC's prior approval under the *Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies*.

From October 1, 2016, according to the *Interim Measures for Record-filing Administration over the Establishment and Change of Foreign-invested Enterprises* (the "**Record-filing Measures**"), except for those involving special access administrative measures, the establishment and alteration of foreign-invested enterprises are no longer subject to prior approval, but shall be governed by the record-filing administration. However, the Record-filing Measures did not explicitly include the mergers and acquisitions of established enterprises as well as strategic investment into listed companies into the record-filing system, and hence prior approval from relevant authorities were still required pursuant to the *Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* and the *Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies.*

6.2 Legal Review

Under the Record-filing Measures as amended by the Decision, a non-foreign-invested enterprise (the "**non-FIE**") changing into a foreign-invested enterprise (the "**FIE**") resulting from acquisition or consolidation by merger or otherwise, and not involving special access administrative measures or acquisition of a related party, shall undergo the record-filing formalities and fill in the Establishment Application Form; whereas a foreign investor investing in a listed company shall complete the record-filing formalities before or within 30 days after the security registration with the competent securities registration and settlement institution and, if the listed company is a FIE, fill in the Establishment Application Form or the Alteration Application Form.

The term "special access administration measures" refers, within the FTZs, to those set forth in *Special Administrative Measures (Negative List) for Foreign Investment Access to Pilot Free Trade Zones (2017 Edition)*, and outside of the FTZs, to the Special Administrative Measures for Access of Foreign Investments (Negative List for Access of Foreign Investments) in the *Catalog for the Guidance of Foreign Investment Industries (Revised in 2017)*. Additionally, the term "acquisition of a related party" is defined as domestic companies, enterprises or natural persons using the companies legally established or controlled by them in foreign countries to nominally merge or acquire the domestic companies that are related to them. The mergers and acquisitions and strategic investment by foreign investors that involve the aforesaid special access administration measures and acquisition of a related party do not fall within the record-filing administration and shall obtain relevant approval before conducting investments.

It shall be noted that under the amended

Record-filing Measures, the shareholding chart of the FIE's ultimate actual controlling party is added as requested document which shall be uploaded to the Comprehensive Administration System. Furthermore, if a foreign investor pays with the shares of an overseas company, the Certificate of Foreign Investment of the domestic enterprise shall be provided.

6.3 Next Step

The amended *Record-filing Measures* is another huge step on the way towards the construction of an open economic system, implementation of high-level opening-up, unifying of laws and regulations on domestic and foreign investments, and the innovation of foreign investment legal system.

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