外商投资要闻简讯

JUNHE

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中国人民银行公布《银行卡清算机构管理办法》，对设立银行卡清算机构的行政许可条件、程序作出详细规定。

国家外汇管理局发文在全国范围内推广企业外债资金结汇管理方式改革，统一境内机构资本项目外汇收入意愿结汇政策。

中国证券监督管理委员会允许外资企业向中国证券投资基金业协会申请登记为私募证券投资基金管理人。

一、 中国人民银行公布《银行卡清算机构管理办法》

2016 年 6 月 7 日，中国人民银行公布《银行卡清算机构管理办法》，对设立银行卡清算机构的行政许可条件、程序作出详细规定。

（一） 背景

国务院于 2015 年 4 月 9 日公布，并于 2015 年 6 月 1 日起施行的《国务院关于实施银行卡清算机构准入管理的决定》（以下简称“**《准入决定》**”），对于申请设立银行卡清算机构应符合的条件及程序、银行卡清算机构的业务管理要求、外资银行卡清算机构的管理等作出了规定。国务院要求中国人民银行会同中国银行业监督管理委员会制定行政许可条件、程序的实施细则，以及相关审慎性监督管理措施，依法向符合条件的申请人颁发银行卡清算业务许可证，并按照分工实施监督管理。

根据《准入决定》，中国人民银行于 2016 年 6 月 7 日公布了《银行卡清算机构管理办法》，对于设立银行卡清算机构的许可条件、程序作出了具体规定。

（二） 法律点评

在《准入决定》的基础上，《银行卡清算机构管理办法》对于设立外资银行卡清算机构作出了进一步规定，要求“对境内银行卡清算体系稳健运行或公众支付信心具有重要影响”的境外机构应当在境内设立法人，依法取得银行卡清算业务许可证。考虑到中国人民银行将根据有利于银行卡清算市场公平竞争和健康发展的审慎性原则，以及中国银行业监督管理委员会的意见作出是否批准筹备的决定，因此，中国人民银行在作决定时很可能会考量境外机构在境内设立法人是否 “对境内银行卡清算体系稳健运行或公众支付信心具有重要影响”。由于《银行卡清算机构管理办法》并未规定如何判断是否符合该等前提条件，这将取决于中国人民银行的自由裁量权。

在《准入决定》的基础上，《银行卡清算机构管理办法》还对银行卡清算机构的注册资本、董事及高级管理人员的任职资格提出了更高要求。就注册资本而言，除了不低于 10 亿元人民币外，出资人应当以自有资金出资，不得以委托资金、债务资金等非自有资金出资。就任职资格而言，银行卡清算机构 50%以上的董事（含董事长、副董事长）和全部高级管理人员应当具备相应的任职专业知识，5 年以上银行、支付或者清算的从业经验和良好的品行、声誉，以及担任职务所需的独立性，而且不得具有《公司法》及《准入决定》规定的其他不得

担任银行卡清算机构的董事及高级管理人员的情形。

（三） 关注要点

境外机构为跨境交易提供外币的银行卡清算服务是指：（1）授权境内收单机构或与境内银行卡清算机构合作，实现境外发行的银行卡在境内的使用。（2）授权境内发卡机构发行仅限于境外使用的外币银行卡。对于《准入决定》施行前仅为跨境交易提供外币的银行卡清算服务的境外机构，应当参照《银行卡清算机构管理办法》规定向中国人民银行和中国银行业监督管理委员会进行报告。尽管《银行卡清算机构管理办法》并未规定补交报告的期限，但是未按规定报告将面临行政处罚的风险，因此建议《准入决定》施行前仅为跨境交易提供外币的银行卡清算服务的境外机构尽快向中国人民银行和中国银行业监督管理委员会补交报告。

二、全面实施企业外债资金结汇管理，统一境内机构资本项目外汇收入意愿结汇政策

2016 年 6 月 15 日，国家外汇管理局（以下简称“**外汇局**”）发布并实施《国家外汇管理局关于改革和规范资本项目结汇管理政策的通知》（汇发[2016]16 号，以下简称“**16 号文**”）。16 号文规定，境内企业（不含金融机构）的外债资金均可按照意愿结汇方式办理结汇手续。同时，根据实际经营需要，境内机构可以将其外汇资本金、外债资金、境外上市调回资金等资本项目外汇收入在银行办理结汇，资本项目外汇收入及其结汇资金可在更广泛的范围内使用。

（一） 背景

自《外债登记管理办法》于 2013 年 5 月实施以来，仅外商投资企业（不含金融机构）可将外债资金结汇使用，并且结汇申请须遵循实需原则。2015 年底，外债资金意愿结汇制先后在沪、津、粤、闽四地自由贸易区试点，贸易区内设立的企业无论是否为外商投资企业，外债资金均可由企业自由选择时机办理结汇。2016 年 4 月，外汇局发布《关于进一步促进贸易投资便利化完善真实性审核的通知》（汇发[2016]7 号）（以下简称“**7 号文**”），率先提出统一中、外资企业外债结汇管理政策，内资企业（不含金融机构）借用的外债资金可以按外商投资企业外债管理规定结汇使用，但 7 号文并未就此做出更为详细、具可操作性的规定。

16 号文的出台，进一步落实了 7 号文所提出的统一中、外资企业外债结汇管理政策。考虑到同为资本项目外汇收入的资本金和境外上市募集资金的意愿结汇已在全国范围内实施，16 号文进一步统一和规范了资本项目外汇收入的意愿结汇管理制度。

（二） 法律点评

16 号文更好地满足和便利了境内企业在跨境融资新规颁布后的经营与资金运作需求。2016 年 4 月，中国人民银行发布《关于在全国范围内实施全口径跨境融资宏观审慎管理的通知》（银发[2016]132 号），对境内企业跨境融资做出统一规定，极大地简化了内资企业和外商投资企业借用外债程序，有鉴于此，境内企业自境外融入资金的规模有望进一步扩大。而自 16 号文实施之日起，全国范围内的境内企业（不含金融机构）的外债资金均可按照意愿结汇方式办理结汇手续，此举赋予企业自由选择结汇时机的权利，将提高企业资金安排的灵活度。

16 号文通过负面清单管理模式对境内机构资本项目外汇收入及其结汇资金的使用实施统一管理，资本项目外汇收入及其结汇资金的使用范围更为广泛。16 号文规定，境内机构的资本项目外汇收

入及其结汇所得人民币资金不得：（1）直接或间接用于企业经营范围之外或国家法律法规禁止的支出；（2）直接或间接用于证券投资或除银行保本型产品之外的其他投资理财；（3）用于向非关联企业发放贷款（经营范围明确许可的情形除外）；（4）用于建设、购买非自用房地产（房地产企业除外）；（5）超出境内机构与其他当事人之间合同约定的使用范围。除负面清单所列的以及外汇局另行颁布的禁止用途外，境内企业可在经营范围内，在遵循真实、自用原则的基础上使用资本项目外汇收入及其结汇资金，该等资金的使用范围相较此前得到扩展。16 号文的亮点包括但不限于明确在经营范围明确许可的情形下资本项目外汇收入及其结汇资金可用于非关联企业的贷款，以及用于银行保本型投资理财产品。

16 号文规定，以备用金名义使用资本项目收入的，境内机构可不向银行提供真实性证明材料，并且单一机构每月备用金（含意愿结汇和支付结汇）支付累计金额不超过等值 20 万美元，相较于此前规定的 10 万美元有了大幅提升。

（三） 关注要点

外汇局要求银行应履行展业三原则，在为境内机构办理资本项目收入结汇和支付时承担真实性审核责任，在办理每一笔资金支付时，均应审核前一笔支付证明材料的真实性与合规性。因此，16 号文对于企业的资本项目外汇收入的结汇和支付的具体操作还须看各银行对于展业三原则的掌握和具体要求。

三、外资企业允许申请登记为私募证券投资基金管理人

2016 年 6 月 30 日，中国证券监督管理委员会在答记者问时提到同意中国证券投资基金业协会（以下简称“**基金业协会**”）公布问题解答，明确外商独资和合资私募证券基金管理机构有关资质和登记备案事宜。于同日，基金业协会公布《私募基金登记备案相关问题解答（十）》（以下简称“**《问题解答》**”）。从此，外资企业在境内开展私募证券基金管理业务可向基金业协会申请登记为私募投资基金管理人。

（一） 背景

在历次修订的《外商投资产业指导目录》，证券投资基金管理公司均被列入限制类外商投资项目。而且，2007 年、2011 年、2015 年修订的《外商投资产业指导目录》均规定证券投资基金管理公司的外资比例不超过 49%。

2015 年第七轮中美战略与经济对话、中英第七次经济财金对话明确欢迎符合条件的外商独资和合资企业申请登记成为私募证券基金管理机构并开展包括二级市场证券交易在内的私募证券基金管理业务。

由于私募基金登记备案工作由基金业协会具体开展，根据第八轮中美战略与经济对话成果，中国证券监督管理委员会同意由基金业协会发布《问题解答》对外资企业申请登记为私募证券投资基金管理人作出规定。

《问题解答》规定，符合以下条件的外资企业可以登记为私募证券投资基金管理人：

1. 外资企业系在中国境内设立的公司；

2. 外资企业的境外股东为所在国家或者地区金融监管当局批准或者许可的金融机构，且境外股东所在国家或者地区的证券监管机构已与中国证监会或者中国证监会认可的其他机构签订证券监管合作谅解备忘录；

3. 外资企业及其境外股东最近三年没有受到监管机构和司法机构的重大处罚。

有境外实际控制人的外资企业，该境外实际控制人也应当符合上述第 2、3 项条件。

外资企业遵循与内资企业相同的登记程序，也需要向基金业协会提交中国律师事务所及其经办律师出具的《私募基金管理人登记法律意见书》。

（二） 法律点评

外资企业申请登记为私募投资基金管理人应注意如下内容：

首先，外资企业只能采取公司形式，而不能采取合伙企业形式。

其次，外资企业的名称和经营范围中应当包含“基金管理”、“投资管理”、“资产管理”、“股权投资”、“创业投资”等相关字样。

再次，我国对于私募证券投资基金管理人采取登记主义。外资企业在境内完成设立登记后，应当向基金业协会履行登记手续，基金业协会对外资企业的基本情况进行形式审查。基金业协会将自收齐材料之日起 20 个工作日内，以通过协会官方网站（http://www.amac.org.cn）公示私募基金管理人基本情况的方式，为其办结登记手续。

最后，外资企业只能在基金业协会登记为私募证券投资基金管理人后方可从事私募证券投资管理业务。

（三） 关注要点

商务部、国家发展和改革委员会负责核准外商准入，在《外商投资产业指导目录》证券投资基金管理公司的外资比例不超过 49%的要求未被修改前，外国投资者能否获批在境内设立外商独资企业开展包括二级市场证券交易在内的私募证券基金管理业务存在不确定性。国务院、商务部、国家发展和改革委员会修改现有外资准入规定的进展值得关注。

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The People's Bank of China announced the *Measures for Administration of Bank Card Clearing Institutions* (the "**Measures**"), providing in detail the administrative licensing conditions and procedures for establishing a bank card clearing institution.

The State Administration of Foreign Exchange issued a circular to promote the reform on measures for control over the foreign exchange settlement of foreign debts by enterprises and to unify the policy for discretionary foreign exchange settlements of foreign exchange receipts by domestic entities under the capital accounts.

The China Securities Regulatory Commission permits foreign invested enterprises to apply to the Asset Management Association of China for registration as private securities investment fund managers.

1. The PBOC announced the Measures for Administration of Bank Card Clearing Institutions

On June 7, 2016, the People's Bank of China ("**PBOC**") announced the Measures, providing in detail the administrative licensing conditions and procedures for establishing a bank card clearing institution.

1.1 Background

On April 9, 2015, the State Council announced the *Decision of the State Council on Implementing Access Administration of Bank Card Clearing Institutions* (the **"Decision"**), among the provisions are conditions and procedures applicable to applicants that apply for establishing bank card clearing institutions, business management requirements on bank card clearing institutions and administration of foreign-funded bank card clearing institutions. The State Council requires the PBOC, in conjunction with the China Banking Regulatory Commission ("**CBRC**"), to formulate detailed rules on administrative licensing conditions and procedures, develop related measures for prudential supervision and administration, issue licences for bank card clearing business to qualified applicants, and implement supervision and administration according to the division of duties.

On June 7, 2016, according to the Decision, PBOC announced the Measures, providing in detail the administrative licensing conditions and procedures for establishing a bank card clearing institution.

1.2 Legal Review

On the basis of the Decision, the Measures impose further requirements for establishing foreign-funded bank card clearing institutions,

by requiring foreign institutions that "have significant impact on the stability of the domestic bank card clearing system or the public's confidence in payment" to establish a domestic legal person so as to lawfully obtain the license for the bank card clearing business. Given that the PBOC will decide whether to approve or deny the application for the establishment of legal person in accordance with the prudential supervisory principles benefiting the fair competition and healthy development of the bank card clearing market, as well as the opinion of China Securities Regulatory Commission ("**CSRC"**), there is ample opportunity for the PBOC to consider whether the domestic legal persons established by foreign institutions "have significant impact on the stability of the domestic bank card clearing system or the public's confidence in payment" when they make decisions. However, since the Measures do not mention how to judge whether an institution complies with this precondition, the judgment may be at the PBOC's discretion.

On the basis of the Decision, the Measures also set higher requirements for the registered capital of bank card clearing institutions and the service qualifications of directors and other senior executives. As for the registered capital, apart from the requirement on the minimum of RMB 1 billion, it is also required that shareholders shall make capital contributions with their own funds instead of non-self-owned funds, such as funds held on trust or borrowed funds. As for personnel qualifications, it is required that more than 50% of the directors, including the chairman and vice-chairman of the board of directors, and all senior executives of a bank card clearing institution shall have relevant expertise, more than 5 years of professional experience in banking, payment or clearing business, and a record of good conduct and a high reputation, as well as the independence required by the position, and shall not fall under any other situation as stipulated in the Company Law and the Decision that a person shall not serve as the director or senior executive of a bank card clearing institution.

1.3 Next Steps

The bank card clearing services provided by foreign institutions, which offer foreign currency for cross-border transactions, refers to:

(1) authorizing domestic acquirers to co-operate with domestic bank card clearing institutions so that bank cards issued overseas can be used domestically; and

(2) authorizing domestic card-issuing institutions to issue foreign currency card which can only be used abroad.

Foreign institutions which only provided foreign-currency bank card clearing services for cross-border transactions before the implementation of the Decision shall report to the PBOC and CBRC in accordance with rules of the Measures. Though the Measures do not set a deadline for submitting such a report, the failure to submit the report as required will lead to the risk of administrative penalties. Therefore, it is suggested that foreign institutions which

only provided foreign-currency bank card clearing services for cross-border transactions before the implementation of the Decision supplement the report to the PBOC and CBRC as soon as possible.

2. China thoroughly implements control over the foreign exchange settlement of foreign debts by enterprises and unifies the policy of discretionary foreign exchange settlement of foreign exchange receipts of domestic entities under capital accounts

On June 15, 2016, the State Administration of Foreign Exchange ("**SAFE**") announced and implemented the *Circular of the State Administration of Foreign Exchange on Reforming and Regulating Policies on the Administration over Foreign Exchange Settlement under Capital Accounts* (Hui Fa No.16 [2016], the "**Circular No.16**"). In accordance with the Circular No.16, the foreign debts of domestic enterprises (excluding financial institutions) can make foreign exchange settlements at their discretion. Meanwhile, as required by their business operation, domestic institutions are allowed to make foreign exchange settlements with a bank for foreign exchange receipts under capital accounts, such as foreign exchange registered capital, foreign debts, and repatriated foreign exchange funds raised through overseas listing, etc., and the foreign exchange receipts under capital accounts and the settled funds can be used in a wider scope.

2.1 Background

After the implementation of the *Measures for Administration of Foreign Debts Registration* in May of 2013, only foreign invested enterprises (excluding financial institutions) can use funds from foreign debts after foreign exchange settlement, and the application for foreign exchange settlement must be based on actual needs. By the end of 2015, the policy of "discretionary foreign exchange settlement" was successively implemented for pilots in Shanghai, Tianjin, Guangdong and Fujian pilot free trade zones, in which enterprises, regardless of being foreign invested or not, are allowed to choose the timing of making foreign exchange settlements of foreign debts.

In April of 2016, the SAFE announced the *Circular of the State Administration of Foreign Exchange on Further Promoting Trade and Investment Facilitation and Improving Authenticity Review* (Hui Fa No.7 [2016], the "**Circular No.7**"), first declaring that the policies on the administration of foreign exchange settlements of foreign debts applicable to Chinese-funded and foreign-funded enterprises shall be unified, and providing that foreign debts of Chinese-funded enterprises (excluding financial institutions) may be settled in accordance with the provisions on the administration of foreign debts of foreign-funded enterprises. However, the Circular No.7 contains no more detailed and practical provisions in this regard.

The release of the Circular No.16 further unifies the policies on the administration of foreign exchange settlements of foreign debts applicable to Chinese-funded and

foreign-funded enterprises as initiated in the Circular No.7. Given that the policy of discretionary foreign exchange settlements of the foreign exchange registered capital and repatriated foreign exchange funds raised through overseas listings, both being foreign exchange receipts under capital accounts, has been implemented nationwide, the Circular No.16 further unifies and regulates the administration over the discretionary foreign exchange settlements of foreign exchange receipts under capital accounts.

2.2 Legal Review

The Circular No. 16 accommodates and facilitates the operation and capital demands of domestic enterprises after the implementation of the new cross-border financing regulations. In April of 2016, the PBOC announced the *Notice on Implementing Nationwide Full-coverage Macro Prudential Administration of Cross-Border Financing* (Yin Fa [2016] No.132), setting unified regulations on cross-border financing by domestic enterprises, significantly simplifying the procedures of borrowing foreign debts for both domestic funded enterprises and foreign funded enterprises. On this basis, the scale of overseas financing of Chinese enterprises is expected to further expand. Since the implementation of the Circular No.16, the foreign debts of domestic enterprises nationwide (excluding financial institutions) may be settled at their discretion, which entitles the enterprises the right to choose the timing of foreign exchange settlements and increases their flexibility of capital arrangements.

The Circular No.16 adopts a “negative list” approach to implement the unified administration of the usage of domestic institutions’ foreign exchange receipts under capital accounts and the funds settled therefrom, and expands the scope of usage of foreign exchange receipts under capital accounts and the funds settled therefrom. In accordance with the Circular No.16, the domestic institutions’ foreign exchange receipts under capital accounts and the funds settled therefrom shall not:

(1) be directly or indirectly used for the payment beyond the business scope of the enterprises or any payment prohibited by national laws and regulations;

(2) be directly or indirectly used for securities investment or other investment and financing except for the principal-safeguarded bank wealth management products;

(3) be used for granting loans to non-affiliated enterprises, unless expressly permitted by the business scope of the enterprises;

(4) be used for constructing and purchasing real estate not for their own use, except in case of real estate enterprises; or

(5) be used beyond the scope as agreed in the contract between the domestic institution and other parties.

Except for the purposes on the negative list or which are otherwise prohibited by the SAFE, domestic enterprises are allowed to use foreign

exchange receipts under capital accounts and the funds settled therefrom within their business scope based on actual needs and for their own use. The range of usage of such funds is therefore broadened. The highlights of the Circular No.16 include but are not limited to clearly pointing out that foreign exchange receipts under capital accounts and the funds settled therefrom may be used for granting loans to non-affiliated enterprises and investment in principal-safeguarded bank wealth management products to the extent permitted by their business scope.

According to the Circular No.16, if domestic institutions use the receipts under capital accounts as petty cash, they may not be required to provide authentic certifications to the bank, and the maximum amount of the accumulated monthly payment of petty cash for a single institution (including funds settled under the approach of "discretionary foreign exchange settlement" and "settle-to-pay") shall be an amount equal to US$ 200,000, far higher than the previous maximum amount of US$ 100,000.

2.3 Next Steps

The SAFE, under the guidance of the three principles of "Know Your Customers" (KYC), "Know Your Business" (KYB) and "Customer Due Diligence" (CDD), requires banks to be responsible for reviewing the authenticity of foreign exchange settlements and payments of foreign exchange receipts under capital accounts of domestic enterprises, and when dealing with each payment first review the authenticity and compliance of the certifications of the previous payment. Therefore, the specific application of the Circular No.16 in the foreign exchange settlements and payments of foreign exchange receipts under capital accounts shall be subject to the banks' understanding and specific requirements of the three principles.

3. Foreign invested enterprises are permitted to apply for registration as private securities investment fund managers

On June 30, 2016, in a press conference, the CSRC stated that it had agreed the Asset Management Association of China ("**AMAC**") to publish a Q&A to clarify the qualification requirements and matters concerning registration and recording of wholly foreign owned and joint venture private securities fund management institutions. On the same day, the AMAC announced the *Answers to Relevant Questions Concerning Private Fund Registration and Recording (10th)* (the "**Q&A**"). From this point on, foreign invested enterprises can apply to the AMAC for registration as private investment fund managers when they carry out private securities fund management business in China.

3.1 Background

In all of the versions of the *Catalogue of Industries for Guiding Foreign Investment*, the securities investment fund management companies are categorized as restricted projects for foreign investment. Moreover, the Catalogue revised in 2007, 2011 and 2015 restricted the maximum shareholding

percentage of the foreign investor to 49%.

In the 7th round of the China-US Strategic and Economic Dialogue ("**SED**") and the 7th China-Britain Economic and Financial Dialogue ("**EFD**") in 2015, it was made clear that eligible wholly foreign owned enterprises and joint ventures would be allowed to apply for registration as private securities investment fund management institutions and conduct private securities investment fund management business including trading securities in the secondary market.

Since the registration and recording of private funds were implemented by the AMAC, as a result of the 8th round of China-US SED, the CSRC authorized the AMAC to announce the Q&A to set rules for foreign invested enterprises applying for registration as private securities investment fund managers.

According to the Q&A, a foreign invested enterprise meeting the following conditions is eligible to be registered as a private securities investment fund manager:

(1) It is a company incorporated in China;

(2) its foreign shareholder is a financial institution approved or licensed by the financial regulator(s) in its home country/region, and the securities regulatory body in its home country/region has entered into securities supervision cooperation memorandum with the CSRC or other organizations recognized by the CSRC; and

(3) neither it nor its foreign shareholder has been subject to any material penalty by their respective supervisory or judicial authorities in the past three years.

If the foreign funded enterprise has a foreign actual controller, the actual controller shall also meet the conditions under paragraphs (2) and (3) above.

Foreign invested enterprises should observe the same registration procedures as domestic enterprises and should also submit the *Legal Opinion on Private Fund Manager Registration* issued by a Chinese law firm and its lawyers to the AMAC.

3.2 Legal Review

Foreign invested enterprises should pay careful attention to the following points when applying for registration as private investment fund managers:

Firstly, foreign invested enterprises can only be established in the form of a corporation, instead of partnership.

Secondly, the name and the business scope of the foreign invested enterprises shall contain such words as "Fund Management", "Investment Management", "Assets Management", "Equity Investment" and "Venture Capital", etc.

Thirdly, private securities investment fund managers conducting business in China should be registered. After completing the registration and establishment in China, foreign invested enterprises should apply to the AMAC for registration for the AMAC to conduct formal examination on the basic information of the

foreign invested enterprises. The AMAC will confirm the registration by publishing the basic information of the applicants on its website (http://www.amac.org.cn) within 20 working days.

Finally, foreign invested enterprises can only conduct private securities investment management business after being registered as private securities investment fund managers with the AMAC.

3.3 Next Steps

The market access of foreign invested enterprises is in the charge of the Ministry of Commerce of China and the National Development and Reform Commission. Until there is a change to the 49% cap for foreign shareholding in a securities investment fund management company as stipulated under the *Catalogue of Industries for Guiding Foreign Investment*, there are still uncertainties for foreign investors conducting private securities investment fund management business in China – including trading securities in the secondary market – by establishing wholly foreign owned enterprises. It is worth keeping an eye on the progress of the State Council, the Ministry of Commerce and the National Development and Reform Commission in changing the existing regulations on market access of foreign investors.

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