

## 中国企业境外投资所可能面临的新的限制 China's Recent Restrictions on Outbound Investments by Chinese Companies

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近期，国内一些已发布或者将要发布的政策法规，明显加强了对中国企业跨境投资某些产业领域的管控和督导。虽然此类政府管控措施一旦到位，是否会对过去几年来中国企业的跨境并购投资（特别是在某些热点行业的投资）画上一个中止符仍未可知；但是，政府加紧对中国企业跨境并购投资的宏观管控已初现端倪。拟进行、正在进行，或者即将交割的境外投资交易的中国境内企业确实需要及时掌握动向，并适时调整战略规划。而与此同时，在收紧境内资金外流并加大对某些领域境外投资监管的同时，中国相关政府部门也在大力推进新政策和营造新的投资法律环境，以吸引更多的优质境外资本在中国境内的直接投资。无论是中国或外国投资者，可以审时度势，以审慎灵活的策略应对政策变化，并抓住变化带来的其它机遇。

*Recently, several published rules and public comments by government officials have sent a signal that the Chinese government will take certain measures to tighten its control and supervision over outbound investment by Chinese companies, especially in certain industries. Yet to be seen is whether these new rules and policies, once fully implemented, will present significant legal obstacles to outbound investment by Chinese companies. Chinese firms engaged in overseas investments need to be aware of these new trends and to prepare to adjust their strategic plans and overseas activities. At the same time, we have also seen that Chinese government is taking concrete measures to*

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*further improve the legal framework for foreign direct investment into China. Both Chinese and foreign investors may take advantage of the policy changes to adapt their respective investment strategies in response to the challenges of change.*

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## I. 近期的相关政策和信息 Recent Rules And Policies

2016年11月29日，中国人民银行印发《关于进一步明确境内企业人民币境外放款业务有关事项的通知》（银发【2016】306号）（“306号文”）。306号文旨在限制企业通过人民币出境并在境外购汇的方式进行套利，以减少离岸人民币市场做空的机会，并进一步加强对人民币汇率稳定的预期管理。306号文新增了包括人民币境外放款业务外汇管理部门的事前备案登记要求、放款人与借款人之间股权关联关系、跨境人民币净流出数额限制、蓄意违约的风险管控等要求。值得一提的是，306号文的部分内容与下述加强境外投资某些热点领域的管控中的导向不谋而合。

On November 29, 2016, the People's Bank of China promulgated the *Notification on Further Clarifications on Overseas RMB Loans by Domestic Enterprises (YinFa [2016] No. 306)* (Circular 306). Circular 306 aims at restricting the arbitrage activities of companies that convert offshore RMB into hard currencies and engage in short-selling of offshore RMB, while stabilizing the RMB exchange rate. Circular 306 sets forth some new requirements, including requiring pre-approval of overseas RMB loans, requiring equity ownership between debtors and creditors, restrictions on the net outflow amount of RMB, and requirements to tighten the control over intentional breach of loan agreements. Some requirements under Circular 306 are also consistent with proposed measures that would tighten control over outbound investment by Chinese companies in certain industries, as discussed below.

与306号文同时，路透、中国财经等一些媒体也纷纷转载消息，称中国国家外汇管理局为严控资本外流，将中国境内设立的企业（包括内资和外商投资企业）从中国汇出的资金上限从5000万美元下调至500万美元；要求境内设立的企业资本项下500万美元或以上资金的汇出均需报外汇管理局的审批。据报道，上述措施不仅对中国境内企业的境外投资设置了新的限制性要求，同时也涉及到在华的跨国公司与其在境外的关联机构及交易方之间的资金调拨。在我们就上述措施向国家外汇管理局和某些地方外汇管理局做电话求证核实时，相关工作人员未对上述措施进行确认和解释。

Simultaneously with the publication of Circular 306, Reuters and some other news media in China also reported that the State Administration of Foreign Exchange (SAFE) has adopted certain internal rules cutting the maximum amount of overseas repatriation by companies established in China (including both domestic companies and foreign invested enterprises) down from USD 50 million to USD 5 million, requiring pre-approval with the SAFE for all overseas transfers by companies established in China of USD 5 million or more under capital accounts. These internal rules not only set forth new restrictions over offshore investment by Chinese companies, but also apply to funds transferred between Chinese subsidiaries and their offshore parents and affiliated companies. We have made informal telephone consultation with the SAFE and some of its local branches regarding these new internal policies, and we cannot get any confirming or denying comments from any of the government officials we have talked to.

2016年12月6日，国家发展和改革委员会、商务部、中国人民银行和中国国家外汇管理局四部门负责人在答记者问（“答记者问”）中，虽表明“支持国内有能力、有条件的企业开展真实合规的对外投资活动，参与‘一带一路’共同建设和国际产能合作，促进国内经济转型升级”，但亦提出，将“密切关注近期在房地产、酒店、影城、娱乐业、体育俱乐部等领域出现的一些非理性对外投资的倾向，以及大额非主业投资、有限合伙企业

对外投资、‘母子大’、‘快设快出’等类型对外投资中存在的风险隐患”，并建议“有关企业审慎决策”。业内人士相信，相关的行政法规或措施将会陆续出台，以对境内企业投资上述密切关注领域加以实际审查和管控。而这一管控不仅会收紧境内公司对上述领域产业的投资，也可能会连带影响中国公司对境外其他领域的投资进程。我们预计，国内审批备案部门在审查一个境外投资项目时，会更加严格把关和审查境内投资资金来源、境内投资实体、境外收购的目标公司或目标资产，以及要求投资方提供更多文件以证明投资的目的、预期的投资回报和投资的合理性。

On December 6, 2016, officials from the National Development and Reform Commission (**NDRC**), the Ministry of Commerce, the People's Bank of China and the SAFE, in a press conference (**Press Release**), stated that the government “will support domestic companies that have the ability and opportunity to make real and legal outbound investment and to participate in projects relating to China’s ‘One Belt and One Road’ strategy,” but that it “has also noticed some irrational investment activities in real estate, hotels, film studios, the entertainment industry and sports clubs” and “has been alerted to potential risks in association with overseas investment projects involving (a) large investment in business that is not related to the core business of the Chinese investor, (b) outbound investment made by limited partnerships, (c) investment in offshore targets that have assets value larger than the Chinese acquirers, and (d) projects that have very short investment period.” The Press Release “suggests the companies to be cautious when making outbound investment.”

Some insiders and professionals believe that Chinese government will soon publish a set of rules and regulations with concrete measures to tighten the inspection and supervision of outbound investment activities of Chinese companies, and that those rules and regulations will be broadly applied to outbound investment in all industries. It is expected that domestic examination and approving authorities of outbound investment projects will scrutinize the approval process from the perspectives of the source of the investment funds, the qualification of the domestic investment entities and the quality of the overseas target companies and/or assets, and that they will require the Chinese investors/acquirers to provide more documents supporting their investment objectives, the estimated investment returns and the rationale of the investment.

值得注意的是，中国有关政府部门在加紧对外投资和资金外流管控的同时，对外国投资者到中国的境内直接投资的政策却在逐步放宽并简化程序。2016年9月，全国人大常委会作出决定，将《中华人民共和国外资企业法》、《中华人民共和国合资经营企业法》、《中华人民共和国合作经营企业法》以及《中华人民共和国台湾同胞投资保护法》以及相关行政审批条款进行修改，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和台胞投资企业的设立和变更，由原先的审批制改为备案管理。商务部和国家工商行政总局随后发文正式实施外商投资企业备案制。国家发展与改革委员会及商务部也进一步发文明确须经投资准入特别管理措施的行业（即外商投资准入“负面清单”）。今年12月7日，国家发展和改革委员会以及商务部发布了《外商投资产业指导目录》第七次修订征求意见稿，将2015年版项下的93条限制性措施减少到了60多条。

It is also worth mentioning that while tightening the control over outbound investment by Chinese companies, the Chinese government is also taking measures to lift restrictions over foreign investment into China and simplifying the examination and approving process for foreign direct investment. In September 2016, the Standing Committee of the People's Congress made decisions to make revisions to the relevant provisions in the *Wholly Foreign Owned Enterprises Law*, *Sino-Foreign Equity Joint Ventures Law*, *Sino-Foreign Cooperative Joint Venture Law*, the *Law on Protection of Investment from Taiwan Enterprises and Individuals*, and some related administrative rules. Under those revisions, foreign invested enterprises (including companies invested by Taiwan enterprises or individuals) in non-restricted industries no longer have to be examined and approved by government authorities, and all such companies only need to file with the government for the record upon formation and changes. The filing for record system for foreign invested enterprises was later formalized by the Ministry of Commerce and the State Administration of

Industry and Commerce under the *Tentative Rules on Filing System for the Establishment and Information Change of Foreign Invested Enterprises*, published on October 8, 2016. NDRC and the Ministry of Commerce also published a circular to clarify the industries in which foreign investments are still subject to special administration (the so-called “Negative List”). On December 7, 2016, the NDRC and the Ministry of Commerce issued the draft Seventh Edition of the *Catalogue of Industries for Foreign Investment* for public comments, which draft further cuts down the restricted industries for foreign investment from 93 categories in 2015 to approximately 60 categories.

## II. 加强境外投资管控形势下中国可能面对的问题和不确定性

### Uncertainties Relating To Outbound Investment Under Recent Trends

在上述四部委的答记者问中，对外投资管理机关强调了四种类型境外投资项目的关注，即大额非主业投资、有限合伙企业对外投资、“母小子大”和“快设快出”项目；并且明确点名了包括房地产、酒店、影城、娱乐业和体育俱乐部五大类别的境外投资项目。我们有理由相信，中国政府可能会继续出台具体文件，或者内部颁行具体措施，对上述四种投资类型和五类目标项目进行较为严格的审查和控制。我们不相信中国政府会“一刀切”，在没有仔细甄别和适度考量的情况下叫停所有在上述五类目标项目的投资。但是，政府如何审查和管控，或又如何将相应的管控法规或政策要求细节化，仍然是留给我们的疑问。

In the Press Release, the overseas investment administrative authorities have emphasized their focus on four types of offshore investment projects, namely, (a) large investment in business that is not related to the core business of the Chinese investor, (b) outbound investment made by limited partnerships, (c) investment in offshore targets that have assets value larger than the Chinese acquirers, and (d) projects that have very short investment period. They have also specifically mentioned five industries: real estate, hotels, movie theaters, the entertainment industry and sports clubs (collectively, the **Targeted Industries**). We expect that some concrete measures will be published or internally adopted by Chinese government to set forth stricter restrictions and approving requirements over those projects. We doubt that the government will take a sweeping approach towards any investment projects falling into the Targeted Industries and allow no flexibility whatsoever to grant conditioned approvals. We remain interested to see how the Chinese government will set forth detailed restrictions and adopt reasonable and enforceable rules.

函待解决的问题概括如下：

The questions yet to be resolved are as follows:

首先，对于“大额非主业投资”的“大额”金额及“非主业”标准将如何界定？境内投资主体公司可不可以通过在中国境内设立与境外目标公司的主营业务相同或类似的子公司的方式进行境外投资？对于该等子公司在进行或完成收购之前的存续和相关业务经营时间会不会有最少经营期的要求（如经营该业务不少于一或两年或更长时间？）另外，中国政府一直号召中国企业“做大做强”。在该等号召的影响下，很多中国公司都已纷纷扩大其主营业务，重组扩展为跨领域集团，且分别成立专门用于投资各类项目的投资性公司。跨业经营的中国投资者用该等投资性公司进行境外投资，是否会被认定为“大额非主业投资”？

1. How will the authorities define “large” and “core business” when deciding what is a “large investment in business that is not related to the core business of the Chinese investor”? To structure around this legal obstacle, is it possible for the Chinese investor to set up an acquiring subsidiary in China with the same or similar business scope as the target company? Will the Chinese government will set forth requirements on operating history (for example, two or three years of operation) of such an acquiring subsidiary before it can make outbound investment? Also, since the Chinese government has long required Chinese companies to “get bigger and get

stronger,” many Chinese firms have already expanded their “core” business to cover many different industrial areas or have already been organized as multinational or cross-industry company groups, it will be very difficult, if not impossible, to clearly define the “core” business of a company.

其次，关于有限合伙企业对外投资的限制，会不会延伸到对有限合伙企业所设置的投资性子公司境外投资的限制？在自贸区设立的有限合伙或有限合伙控股的全资子公司的对外投资是否也被限制？据我们的了解，上海自由贸易区早在 2016 年年中的时候，就已经开始对通过在上海自由贸易区设立的全资投资性公司进行的境外投资项目设定了不成文的限制。例如，限制或禁止设立以投资或投资管理为名目的公司实体。

2. Will restrictions over outbound investment by limited partnerships be expanded to investment/holding corporations set up by such limited partnerships? Will the wholly owned corporate entities set up by such limited partnerships in free trade zones also be covered by such restrictions? To our knowledge, Shanghai Free Trade Zone has taken measures since the middle of 2016 to restrict (or prohibit) establishment of investment entities within its geographic area for outbound investment, and such restriction has been broadly applied to all companies' entities that have the word “investment” or “investment management” in their company names.

第三，对于“母小子大”投资实体相关部门如何界定？国际上被广泛采纳的投资实体对目标项目的递进式分阶段或分割式收购是否也被界定为“母小子大”？

3. How will the authorities define “investment in offshore targets that have assets value larger than the Chinese acquirers”? Does it cover acquisition projects that allow acquisition by the Chinese acquirer of target company's assets in two or more different phases?

第四，对于不属于上述投资类别和关注领域的境外投资，是否将仍然沿用以往的审批和监管标准？就我们向包括上海和深圳等地的监管部门所征询的结果表明，目前对于投资目标在不属于上述被关注的热点领域的境外投资，该地的审批监管部门仍然按照原有的对外投资备案审批程序和要求进行，尚没有增加任何新的文件材料要求；但同时我们和浙江等地的监管部门咨询结果则表明目前在各该等地区，相关对外投资审批流程已经基本暂缓或暂停，等待上级主管部门进一步的明确指示。

4. Will outbound investment projects that fall outside of the Targeted Industries be subject to the previous examination and approving standards and requirements? Our informal consultation with approving authorities in Shanghai and Shenzhen indicates that authorities in those two cities will still use the previous examination and approving standards, while our consultation with government authorities in Zhejiang Province indicates that all examination and approval of outbound investment projects has been suspended or ceased, pending further notification from the central government.

第五，对于中国境内公司对外投资的上述管控是局限在境内内资公司还是会扩展适用到中外合资/合作企业甚至外商独资企业的对外再投资或持股？据我们所知，某些国际跨国公司正致力于区域性业务重组。而在该重组过程中，一些在中国境内设立的外商投资企业或外商投资的投资性公司可能会成为该企业集团在中国的地区总部或以其它公司治理或股权重组方式成为其中国境外关联公司或境外新设公司的股东。而这类外商投资企业或投资性公司的在中国境外的再投资和持股，是否也会受到中国政府与对中国内资公司境外投资管控同样的审查和监管，也是各国投资者关注的问题。

5. Last but not least, will the restrictions be applicable only to Chinese companies, or will they also be applicable to investment activities outside of China by Sino-foreign equity or cooperative joint ventures and wholly foreign owned enterprises? We have been helping some multinational

corporations to restructure their regional business in Asia, and during the restructuring process, many foreign invested enterprises or foreign invested investment enterprises in China will be reorganized as the regional centers or headquarters, and will no doubt involve investment in and shareholding of their overseas affiliates. What measures the Chinese government is to take to tighten its control over outbound investment by Chinese companies and foreign invested companies in China will have great effect over the decision-making process of these multinational companies and offshore investors.

### III. 预测和建议

#### Our Observations and Suggestions

中国监管部门对境外投资某些领域的管控以及对人民币外流的收紧，的确需要中国投资者在当前及今后的投资项目中更加谨慎。例如，在对外投资时，中国投资者要更加留意境内审批为交易交割带来的不确定性并对交割期予以合理的预计。同时，客观评估交易完成的风险。

Tightened control over outbound investment, at least in certain industries, and over outflow of RMB and foreign exchange by the Chinese authorities will no doubt require Chinese investors to be more cautious. For example, Chinese investors shall be fully aware of the uncertainties and stretched timelines involving the closing of offshore investment projects.

我们看到，在收紧境内资金外流并加大对某些领域境外投资监管的同时，中国相关政府部门也在大力推进新政策和营造新的投资法律环境，以吸引更多的优质境外资本在中国境内的直接投资。这些措施中影响最为巨大的是上文提到的从审批制到备案制的转变以及外商投资“《负面清单》”的出台和运用。中国对境外投资的这一管控措施或许是一种应对方法，以回应近期因国际政治风起云涌而对中国的跨境交易/投资可能带来的负面影响，缓解人民币贬值，并促进国内经济和鼓励多元资本在中国境内的投资。

We have also seen that Chinese government is taking concrete measures to further improve the legal framework for foreign direct investment into China. The adoption of a filing system for foreign investment and the publication of the “Negative List” are only part of the continuing efforts of the Chinese government to retain and to attract more foreign investment. These measures also intend to address negative effects on Chinese cross-border transactions and the overall Chinese domestic economy of recent international political disturbances, to alleviate the pressure brought by the depreciation of RMB, to boost the confidence of foreign investors and to encourage foreign investors to increase their investment in China.

政策更新与变化在风云变幻的市场经济运行中不会影响商业发展的趋势。近年来，在国际和国内市场的投资和交易中，中国的投资者们已磨练得愈加成熟和灵活；而境外的投资伙伴和国际合作者也愈来愈了解中国投资的需求和优势。而中国境内投资环境的改善，也会促进和引导更多优质的境外资本和灵活的境内投资方式。无论是中国或外国投资者，可以审时度势，以审慎灵活的策略应对政策变化，并抓住变化带来的其它机遇。我们也相信政府监管部门不会放慢鼓励中国企业“走出去”的步伐，而是会更加严谨地规范对外对内投资行为，设置更明确的要求。作为法律服务提供者，我们将与我们的客户们、中国及境外投资者紧密合作，共同探讨更加合理合规的方式，协助投资者和客户的境内境外投资和业务开拓。

Any changes to policies and rules have to be in tune with economic development. Chinese investors have become more mature and sophisticated in the international transaction and investment market, and on the other hand, foreign partners and entrepreneurs have also come to understand the uniqueness of Chinese commercial culture. We believe that continued improvement of the domestic infrastructure and legal framework will encourage foreign investors to increase their investment in China and hence bring more opportunities to Chinese companies. Both Chinese and foreign investors may take advantage of the policy changes to carefully adapt their respective investment strategies to respond to the challenges of changes.

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We also believe that Chinese government will adhere to its policies encouraging Chinese companies to “go global” but will set forth detailed and enforceable rules to regulate overseas investment activities. We will work closely with our customers to design feasible outbound investment structures and to assist with the overseas expansion and operation of our Chinese customers.

我们也将持续关注这一政策变化，继续与相关政府机关沟通，为我们的客户、中外投资者提供未来政策走向及投资策略等方面的提示和建议。

We will pay close attention to future developments and continue our communications with the relevant government contacts in order to offer updated suggestions and to assist our customers.

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If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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