

## 直接投资外汇政策

国家外汇管理局（以下简称“外汇局”）于2012年11月19日发布了《国家外汇管理局关于进一步改进和调整直接投资外汇管理政策的通知》（以下简称“59号通知”）。此项通知的发布，共取消了35项行政审批，简化合并了14项行政审批，取消、缩减了大部分常规性业务的事前核准，并将于2012年12月17日起开始实施。

需要注意的是：

- 一、企业仍需就所登记项目提供相关资料，直接投资项下外汇管理的限制并未有实质性突破。
- 二、执行初期，各银行受理业务的过程及要求可能差异较大。在风险控制能力相对较弱、风险意识相对保守的银行办理相关业务时，企业可能需花费更长的时间办理相关业务。

此次政策调整主要包括以下三方面内容：

- (1) 取消外商直接投资相关账户开立、入账、结汇以及购付汇核准；取消外商直接投资常规业务的境内外汇划转核准；取消外国投资者境内合法所得再投资核准；取消减资验资询证；取消外商投资性公司境内再投资的外汇登记及验资询证。
- (2) 简化外商直接投资项下外汇账户类型；简化资本金结汇管理程序；简化外商投资企业验资询证及转股收汇外资外汇登记程序。
- (3) 放宽直接投资项下外汇账户开立个数及异地开户限制；放宽直接投资项下异地购付汇限制；放宽境外放款资金来源及放款主体资格限制，允许境内主体以国内外汇贷款对外放款，允许外商投资企业向其境外母公司放款。

对企业的影响

### (1) 核准制改为登记制

59号通知改进了直接投资项下外汇管理方式，将大部分业务从核准制改为登记制，从以往：

- 企业向所在地外汇局提出申请；
- 外汇局出具相关核准件；
- 银行凭核准件办理具体业务，

改为：

- 企业向所在地外汇局提交相关资料；
- 外汇局利用“直接投资外汇业务信息系统”（以下简称“直投系统”）设定跨境资金流动及汇兑额度；

- 银行依据直投系统的登记信息为企业办理具体业务并在直投系统进行业务数据备案；
- 外汇局利用直投系统的登记信息进行“非现场监管”。

### (2) 简化外商投资性公司境内再投资程序

政策调整后，外商投资性公司境内再投资，拟投资企业在外汇局办理再投资外汇信息登记后，即可由银行凭直投系统登记信息为其开立境内再投资专用账户，并办理所涉资金的划转手续。

### (3) 境外放款放宽

根据原汇发[2009]24号，境内企业仅可为其在境外合法设立的全资附属企业或参股企业提供资金融通。政策调整后，允许外商投资企业向其境外母公司放款。同时，扩大境外放款资金来源，允许境内主体以国内外汇贷款对外放款。在此情况下，境内子公司以放款的形式将其“未分配利润”提供给境外母公司使用，境内子公司仅需就其获取的利息收入缴纳5%营业税及25%企业所得税，从一定程度上达到了推迟纳税的效果。

但59号通知仍然规定，外商投资企业对外放款额度不得超过该境外母公司享有的境内子公司应付股利与未分配利润之和。因此，对于尚处于亏损阶段或微利阶段而现金富裕的外商投资企业来说，依然缺乏有效的渠道将境内闲余的现金融通予境外关联方使用。

## 外商投资企业股权出资规定出台

2012年9月21日，商务部批准并公布了《关于涉及外商投资企业股权出资的暂行规定》（商务部令[2012]8号，以下简称为“8号令”），并自2012年10月22日起实施。

### 8号令的要点

- (1) 8号令同时适用于境内投资者（以下统称为“股权出资人”），以其持有的中国境内企业（以下统称为“股权企业”）的股权作为出资，设立及变更外商投资企业（以下统称为“被投资企业”）的行为。
- (2) 用于出资的股权应当依法进行评估，并进行验资。
- (3) 被投资企业的全体股东的股权出资金额和以其他非货币财产作价出资金额之和不得高于其注册资本的百分之七十。
- (4) 在计算被投资企业的外债额度和进口免税额度时，应从被投资企业的注册资本和投资总额中相应扣除股权出资部分后，再进行核定。

### 适用范围

8号令包括以下三种股权出资类型：

- (1) 设立外商投资企业；
- (2) 增资使非外商投资企业变更为外商投资企业；
- (3) 增资使外商投资企业股权发生变更

值得注意的是股权企业和被投资企业均应是在中国境内依法设立的有限责任公司或股份有限公司。

8号令强调如果股权企业是外商投资企业的，该企业应依法批准设立，符合外商投资产业政策。



## Update on Administration of Foreign Exchange for Direct Investment

19 November, 2012, the State Administration of Foreign Exchange (SAFE) announced the circular 'Further Adjustments to Measures for the Administration of Foreign Exchange for Direct Investment' ("Circular 59"). In the circular, 35 administrative approvals are removed, 14 administrative approvals are simplified, and most pre-approvals for routine operations are downscaled. This circular becomes effective on 17 December 2012.

It needs pay attention on:

- (1) Enterprises must still provide relevant documents for registration purposes. In other words, there is no substantive change in terms of foreign exchange ('Forex') control on direct investment.
- (2) Owing to differing risk appetites and internal control requirements, banks may have varying procedures during the initial implementation phase. Therefore, enterprises may spend more time dealing with banks whose risk control is relatively weak or who are conservative in this regard.

Summary the three major changes below:

- (1) Removes approval for bank account opening, cash remittance, and forex conversion, as well as purchase and remittance in direct investment by foreign investors. Removes approval for domestic transfer of forex in routine operations. Removes approval on reinvestment by foreign investors with income obtained by legal means in China. Removes capital verification confirmation (CVC) procedures for capital reduction. Removes CVC and registration requirements when a Chinese holding company (CHC) reinvests in China.
- (2) Reduces the types of forex accounts relating to direct investment. Simplifies management procedures for forex capital conversion. Simplifies CVC procedures and SAFE registration requirements for share transfer by foreign investment enterprises (FIEs) and the corresponding forex collection.
- (3) Enables more accounts to be opened, and allow accounts to be opened in locations other than business registration under direct investment. Relaxes the restrictions on forex purchases and remittances for direct investment from different locations. Expands capital sources for overseas lendings, which allows overseas holding company lending sourced from a domestic forex loan.

Impacts on enterprises

(1) Administration measures changing from approval to registration

Circular 59 shifts forex control from an approval system to a registration system. Previously:

- (i) Enterprises applied to their local SAFE
- (ii) The local SAFE issued an approval certificate
- (iii) Banks executed the remaining procedures.

Changed to:

- (i) Enterprises submit required documents to their local SAFE
- (ii) SAFE sets the quota on cross-border cash transfer and forex convention via its Direct Investment Forex Information System ("DIFIS")
- (iii) Banks execute their handling procedures and update related information using DIFIS
- (iv) SAFE conducts "off-site supervision" using DIFIS information.

## (2) Reinvestment through CHC

After the policy adjustment, the proposed investee should register its reinvestment by CHC with its local SAFE. Following registration, its bank can open a reinvestment account and transfer funds using DIFIS registration information.

## (3) Relaxed controls on lending overseas

According to a previous circular Hui Fa [2009] No. 24, a PRC enterprise could only provide loans to its overseas subsidiaries. After the policy adjustment, an FIE is allowed to provide a loan to its overseas parent company. Meanwhile, capital sources for overseas lending have been expanded, and overseas lending sourced from a domestic forex loan by PRC banks is allowed. In such instances, an FIE may remit the 'undistributed profit' to its overseas parent company in the form of a loan. In this way, the FIE will only be subject to 5 percent business tax and 25 percent corporate income tax on the interest income, which to some extent defers the PRC tax liabilities to be imposed on 'dividend' repatriation.

Nevertheless, Circular 59 still requires that the approved overseas lending be limited to the overseas parent company's share of profit in the Chinese subsidiary, which is the sum of the subsidiary's dividends payable and undistributed profits. Hence, FIEs making losses or breaking even, including those with excess cash, still lack the practical means to finance foreign related parties with excess domestic cash.

## **New regulatory breakthrough for foreign investment using equity of Chinese company**

21 September 2012, the Provisional Regulations for Capital Contribution to FIEs in Form of Equity Interests (MOFCOM Decree [2012] No.8, hereinafter referred to as "Decree 8") and made effective from 22 October 2012.

### Highlights of Decree 8

(1) Decree 8 is applicable to both domestic and foreign investors (hereinafter referred to as "Equity Contributor") who make equity contribution by using the equity interests that they own in existing Chinese enterprises (hereinafter referred to as "Equity Enterprise") to establish or modify the FIEs in China (hereinafter referred to as "Investee Enterprise").

(2) Valuation has to be conducted on the equity interests to be contributed as capital and capital verification has to be done.

(3) 70% cap is imposed on non-cash capital contribution including equity contribution out of the total registered capital of the Investee Enterprise.

(4) Equity contribution should be excluded from the registered capital and total investment when the Investee Enterprise applies for foreign loan registration and duty-free import of equipment.

## Scope of application

Decree 8 covers equity contribution in the following three scenarios:

- (1) Setting up a new FIE
- (2) Increasing the registered capital of an existing non-FIE and thereby converting it into an FIE;
- (3) Increasing the registered capital of an existing FIE and thereby changing the shareholding structure of the FIE

Please note that both Equity Enterprises and Investee Enterprises are required to be either limited liability companies or joint companies properly established in China.

Decree 8 emphasizes that if the Equity Enterprise is FIE, it should be legally set up strictly in accordance with the relevant foreign investment policies in China. In addition, the equity interests of a real estate enterprise, apart from that of a China holding company and a foreign-invested venture capital enterprise, cannot be used for equity contribution. In other words, foreign investors are not allowed to make equity contribution by using equity interests in real estate companies. This is consistent with China's policy of restricting foreign investments in the real estate industry in a bid to combat the overheating property market.

Decree 8 sets out the detailed application procedures for equity contribution transactions. The application should be initially reviewed and approval by the approval authority in charge of the Investee Enterprise.

The following table provides an illustration of the roadmap for obtaining approval, for your reference.

	Application procedures
Step 1	The Investee Enterprise or the Equity Contributor shall apply for the approval of equity contribution with the approval authority in charge of the Investee Enterprise.
Step 2	The approval authority in charge of the Investee Enterprise shall seek opinion from the approval authority in charge of the Equity Enterprise where the Equity Enterprise is an FIE registered in a different location. The opinion should be deemed to be "in agreement", if it were not reverted within the requisite 20-day timeframe. Upon approval, the Investee Enterprise shall be issued an "FIE Approval Certificate" marked with "Equity Contribution not yet Paid Up".
Step 3	Upon equity contribution, the Equity Enterprise shall apply to the relevant approval authority for amending its shareholding structure accordingly. In case the shareholding structure of the Equity Enterprise no longer comprises any foreign investors, its FIE approval certificate should be de-registered.
Step 4	The Equity Enterprise shall proceed with the post-amendment registrations with various local-level authorities accordingly, including the State Administration for Industry and Commerce, State and Local Tax Bureaus, Customs, State Administration of Foreign Exchange, etc.
Step 5	The Investee Enterprises shall then apply with the relevant approval authority for changing its "FIE Approval Certificate" to be marked with "Equity Contribution Paid Up" and proceed with the various post-amendment registrations accordingly.

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<b>张有礼</b>	联系电话(Tel): 53832277*5168	<b>王伟文</b>	联系电话(Tel): 53832277*5111
<b>Youli Zhang</b>	电子信箱(Email): ylzhang@dean CPA.com.cn	<b>Jude Wang</b>	电子信箱(Email): weiwen@dean CPA.com.cn
<b>周剑英</b>	联系电话(Tel): 53832277		
<b>Jenny Zhou</b>	电 子 信 箱 (Email): jenny.zhou@dean CPA.com.cn		