

## Foreign Investment

### Update on Cross-Border RMB Investment – MOFCOM Further Opens Up RMB Inbound Investment

When the Chinese government started to step up the internationalization of RMB (the Chinese currency), the RMB-dominated cross-border investment had always been a significant channel to build up. China's authorities have made significant developments in 2011 and 2012 to expand the scope and variety of cross-border transactions utilizing the RMB.

For inbound investment, the government gave the green light to RMB-denominated investments by foreign investors in 2011, when the Ministry of Commerce (MOFCOM), the People's Bank of China (PBOC) and the State Administration of Foreign Exchange (SAFE) issued several circulars permitting the RMB-denominated foreign investments and also imposing certain supervision rules in this regard.

Earlier this month, MOFCOM released another circular to further relax its supervision power over the RMB-denominated inbound investment. Since January 1, 2014, the *Circular concerning Relevant Issues with regard to Cross-border RMB Direct Investment* ("**Circular No.87**") will become effective. On the same day, two currently effective regulations<sup>1</sup> issued by

MOFCOM governing this area will become invalid.

#### I. Highlights of Circular No.87

Circular No.87 is in a rather short form by having seven articles only, with the following highlights.

##### 1. Foreign Investor; Source of Offshore RMB and Investment Channel

- Foreign Investor has been defined to include investors from Hong Kong, Macau and Taiwan;
- Source of Offshore RMB: any legally gained offshore RMB;
- Investment Channel: establishment of new enterprises; capital increase to or subscription in existing enterprises; acquisition of domestic enterprises and other foreign direct investment activities.

##### 2. Approval Authority and Procedures

- The currently effective laws and regulations governing the area of foreign investment are applicable to transactions dominated by either foreign currency or RMB, and therefore, foreign investors

<sup>1</sup> *Circular of the MOFCOM regarding the Relevant Issues in relation to Cross-border RMB Direct Investment* (Shang Zi Han [2011] No.889) and *Circular of MOFCOM concerning Relevant Issues in relation to MOFCOM System regarding Administration*

*on Cross-border RMB Direct Investment* (Shang Ban Zi Han [2011] No.1171).

should go through the approval procedures accordingly.

3. Restriction

- The offshore RMB cannot be invested, either directly or indirectly, in negotiable securities or financial derivatives (except for the strategic investment in public companies);
- The offshore RMB cannot be used for offering entrusted loans.

4. Special Items marked on the MOFCOM Approval

- MOFCOM and its local agencies should specify the following in the MOFCOM approval letter, (i) “invested by offshore RMB”, (ii) the amount of the RMB investment, and (iii) investment restrictions.

5. Change of Currency used for Inbound Investment

- In case that the foreign investor intends to change the dominated currency in its investment from foreign currency to RMB, MOFCOM approval on the change of joint venture contract and the articles of association will be no longer required. Instead, the foreign investor may directly go through the procedures of registration, opening of a bank account and others with the relevant authorities and banks.

6. Re-investment by using RMB derived from Onshore

- Where the foreign investor uses its onshore RMB which may be derived from the dividend distribution, sale of equity interest/shares, reduction of capital contribution, liquidation or early exit from investment, the relevant existing regulations should still be followed.

## II. **Further Opening-Up by Circular No.87**

Circular No. 87 further opens up the RMB inbound investment from the following aspects.

1. Removal of Restrictions on Investment Scale and Sectors

Under the current regulatory regime, if the inbound RMB investment falls within the following circumstances, the investment should be finally approved by MOFCOM at the central level:

- (1) The amount of RMB used for an investment reaches RMB 300 million;
- (2) Investment in sectors such as finance security, finance leasing, micro financing and auctioning;
- (3) Investment in foreign invested holding companies, foreign invested venture capital companies or foreign invested equity investment enterprises; or
- (4) Investment in sectors that are subject to macro-economic control of the State such as cement, steel and iron, electrolytic aluminum and ship building.

Circular No.87 has removed the aforesaid restrictions on the scale and sectors, which is the most highlighted opening-up by this Circular.

2. Expansion of Offshore RMB Sources

The currently effective regulations have listed three legitimate sources of the offshore RMB, i.e., (i) RMB proceeds derived from cross-border trading activities; (ii) RMB proceeds derived onshore from the dividend distribution, sale of equity interest/shares, reduction of capital contribution, liquidation or early exit from investment, and legitimately remitted out of China; and (iii) RMB funds obtained offshore through legitimate

channels including issuance of RMB share or RMB bond.

Circular No.87 does not exemplify or restrict the sources of the "legally gained offshore RMB". Upon Circular No. 87, any legally gained offshore RMB may be used for inbound investment, regardless of whether obtained through cross-border trade, China investment proceeds, currency exchange, issuance of RMB share or bond, or any other means.

3. Cancellation of Approval on Change of Currency used for Inbound Investment

Under the current regulatory system, in case that the foreign investor intends to change the currency used for its inbound investment from foreign currency to RMB, the foreign investor should obtain the approval from MOFCOM or its local agency.

The said approval has been removed by the Circular No.87. In this sense, the foreign

investor is able to directly go through the procedures of registration, opening of a bank account and others with the relevant authorities and banks, with no need to obtain a prior MOFCOM approval.

**III. Comments**

Circular No.87 expands the sources of offshore RMB and simplifies the investment procedures by abolishing the special approval requirements on large-scale investment or investment in special sectors. With more opening-up measures taken by the government, it is expected that the RMB-dominated inbound investment process will become more predictable and convenient for the investor.

Lastly, it is worth noting that Circular No.87 still restricts RMB inbound investments in negotiable securities and financial derivatives, in order to channel RMB investment into substantive economic activities.

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## 外商投资法律热点

### 跨境人民币直接投资 一

#### 商务部新规进一步放开人民币境内回流监管

近年来，拓展资本项目下人民币跨境流动的渠道显然已成为推进人民币国际化步伐的一项重要举措。人民币跨境直接投资，是资本项目下人民币向境内回流的主要渠道之一。

回顾 2011 年，在商务部、中国人民银行和国家外汇管理局的全面推动下，人民币跨境直接投资在半年内即实现自个案审批体系到程式审批体系的全面过渡，步伐迅捷。日前，商务部再推新规，进一步“解绑”现有体制下的某些束缚，为跨境人民币直接投资提供更多通道便利。

商务部于 2013 年 12 月 3 日发布《关于跨境人民币直接投资有关问题的公告》（商务部公告 2013 年第 87 号，以下简称“**87 号文**”），自 2014 年 1 月 1 日起正式实施。届时，监管现行体系的两个主要文件：《商务部关于跨境人民币直接投资有关问题的通知》（商资函[2011]889 号）和《商务部办公厅关于商务系统实施跨境人民币直接投资管理相关问题的通知》（商办资函[2011]1171 号），将停止执行。

#### 一、87 号文要点

87 号文内容仅有七条，除实施时间条款之外，实体内容仅六条：

##### 1、境外投资者、境外人民币来源及投资方式

- 境外投资者：包含港澳台投资者；
- 境外人民币来源：合法获得的境外人民币；

- 投资方式：新设企业、增资、参股或并购境内企业等外商直接投资活动。

##### 2、审批权限和程序

- 境外投资者按照现行外商投资法律、行政法规、规章和政策办理相关审批手续。

##### 3、用途限制

- 不得在中国境内直接或间接投资于有价证券和金融衍生品（战略投资上市公司除外）；
- 不得用于委托贷款。

##### 4、批复加注

- 商务主管部门在跨境人民币直接投资批复中应写明“境外人民币出资”字样、人民币出资金额及用途限制要求。

##### 5、出资币种变更

- 境外投资者申请将原出资币种由外币变更为人民币的，无需办理合同或章程变更审批，直接到有关部门和银行办理登记、开立账户、资金汇兑等手续。

##### 6、未汇出境外的境内投资所得人民币再投资

- 境外投资者以从中国境内所投资的外商投资企业获得但未汇出境外的人民币利润以及转股、减资、清算、先行回收投资所得人

民币开展直接投资的，仍按照有关规定执行。

## 二、87号文的监管放开

87号文对跨境人民币直接投资的监管进一步放开体现在：

### 1、取消规模和行业限制

按照现行体系，几种特殊情形须由省级商务主管部门转报商务部审核：

- (1) 人民币出资金额达3亿或3亿元人民币以上；
- (2) 融资担保、融资租赁、小额信贷、拍卖等行业；
- (3) 外商投资性公司、外商投资创业投资或股权投资企业；
- (4) 水泥、钢铁、电解铝、造船等国家宏观调控行业。

87号文最重要的放开是取消了前述以提高审批层级从而对资金规模和行业予以限制的规定。87号文规定，境外投资者按照现行外商投资法律、行政法规、规章和政策办理跨境人民币直接投资的有关手续。也就是说，87号文没有设定对规模和行业的任何特别限制。

### 2、境外人民币来源扩大

现行体系下列举了三项外国投资者境外合法的人民币来源，包括：(1) 通过跨境贸易人民币结

算取得的人民币；(2) 从中国境内依法取得并汇出境外的人民币利润和转股、减资、清算、先行回收投资所得人民币；以及(3) 在境外通过合法渠道取得的跨境人民币，包括但不限于通过境外发行人民币债券和发行人民币股票等方式取得的人民币。

87号文未对“合法获得的境外人民币”来源作任何列举或限制。因此，87号文实施后，只要通过合法方式获得的境外人民币，不论是通过跨境贸易、境内投资获得，还是境外汇兑、发债或发股等方式获得，均可用于直接投资。

### 3、出资币种变更不再审批

现行体系规定外商投资企业原出资币种由外币变更为人民币的，需报请商务主管部门批准。

87号文取消此项审批要求，境外投资者无需办理合同或章程变更审批，可直接到有关部门和银行办理登记、开立账户、资金汇兑等手续。

## 三、评述

87号文扩大了境外人民币的来源范围，简化了投资流程，取消了对大规模和特定行业的特殊审批要求以及对出资币种转换的审批要求，为资本项目下人民币向境内回流提供了更多便利。

但需注意，在引导境外人民币投资实体经济的政策环境下，87号文对于跨境人民币投资有价证券和金融衍生品等领域仍然进行限制。

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