

SAFE Further Reforms Foreign Exchange Settlement of Capital Accounts

On June 9, 2016, the State Administration of Foreign Exchange (“SAFE”) released the Circular on Reforming and Regulating Policies on the Administration of Foreign Exchange Settlement of Capital Accounts (Huifa [2016] No. 16) (the “Circular”), with effect as of the date of promulgation. Based on the Circular of the State Administration of Foreign Exchange on Reforming the Administration of the Settlement of Foreign Exchange Capital of Foreign-invested Enterprises ([Huifa [2015] No. 19]) (the “Circular 19”) issued in 2015, the Circular extends discretionary foreign exchange settlement to foreign debts sector and the sector of repatriated funds raised from overseas listings, which will better facilitate the need of capital operation of domestic enterprises and promote the facilitation of cross-border investment and financing.

I. Discretionary Foreign Exchange Settlement Permissible in Foreign Debts Sector

The Circular implements the discretionary foreign exchange settlement of foreign debts on a nationwide basis, as a result of which all onshore non-financial enterprises including both domestic enterprises and foreign-invested enterprises are permitted to choose at will the timing and amount for the settlement of foreign debts into RMB.

II. Discretionary Foreign Exchange Settlement of Capital Accounts Unified

Compared to the Circular 19, the Circular expands the scope of discretionary foreign exchange settlement, from the previous registered capital of foreign-invested enterprises

外管局发文改革规范资本项目结汇管理

2016年6月9日，国家外汇管理局发布《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）（《“通知”》），自发布之日起施行。《通知》在《国家外汇管理局关于改革外商投资企业外汇资本金结汇管理方式的通知》（汇发[2015]19号）（“19号文”）的基础上，统一了外汇资金结汇和外债资本金结汇的规定，企业可以自行选择外汇收入结汇以及结汇时机，资本项目外汇收入意愿结汇的规定趋于统一。

1. 全面实施外债资金意愿结汇制度

《通知》在上海、天津、广东和福建4大自贸区试点经验的基础上，将企业外债资金意愿结汇管理制度推广至全国，境内非金融机构的中资企业和外商投资企业（“境内企业”）可自由选择外债资金结汇时机。

2. 统一境内机构资本项目外汇收入意愿结汇政策

对比19号文，《通知》将意愿结汇的适用范围从外商投资企业的外汇资本金扩大至外商投资企业外汇资本金、境内企业外债资金以及境内企业境外上市调回资金。资本项目外汇收入可根据境内机构的实际经营需要在银行办理结汇（法律法规存在限制性规定的除外），且意愿结汇比例暂定为100%。相比于此前的强制结汇制度，境内机构可以自主选择结汇或保留外汇。

3. 缩减资金使用的“负面清单”

资本项目收入的使用原则，《通知》继续沿用19号文的负面清单管理模式，并缩减相关负面清单范围。

《通知》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：(i)可用于自身经营范围内的经常项下支出，以及法律法规允许的资本项下支出；(ii)不得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；(iii)除另有明确规定外，不得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

to registered capital of foreign-invested enterprises, repatriated funds raised from overseas listings and foreign debt funds. The proportion of discretionary settlement of foreign exchange income from capital accounts is temporarily set at 100%.

III. “Negative List” for Capital Use Shortened

The Circular specifies that foreign exchange income from capital accounts and the capital obtained from foreign exchange settlement thereof:

(a) can be used for current account spending within the business scope and capital account spending allowed under applicable laws and regulations;

(b) cannot be directly or indirectly used for any spending beyond the business scope or prohibited by applicable laws and regulations;

(c) cannot be directly or indirectly used for investment in securities or other investment and financing except for principal guaranteed products issued by banks, unless applicable laws or regulations provide otherwise;

(d) cannot be used for loans to non-affiliated enterprises unless the business scope sets forth otherwise expressly; and

(e) cannot be used for construction or purchase of real estate not for self-use except for real estate development enterprises.

The Circular lifts the previous restrictions on RMB entrusted loans to affiliate, repayment of inter-company loans (including third-party advances) and repayment of RMB bank loans that have been re-lent to third parties with RMB

; (iv)不得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；以及(v)不得用于建设、购买非自用房地产（房地产企业除外）。

在外汇资本金的使用范围方面，《通知》删除了19号文中规定的“不得直接或间接用于发放人民币委托贷款（经营范围许可的除外）、偿还企业间借贷（含第三方垫款）以及偿还已转贷予第三方的银行人民币贷款”，进一步放开对外汇资本金使用的限制，进一步满足企业经营和资金运转的需要。根据《通知》，外商投资性企业在经营范围内可以通过意愿结汇开展境内股权投资；而对于一般性外商投资企业运用资本金进行股权投资，其经营范围内是否必须包含“投资”字样，《通知》并未对其进行明确，仍然需要在实践中进一步验证。

在外债资金方面，此前《外债登记管理办法》及其操作指引（汇发[2013]19号）规定，外债结汇资金不能用于偿还境内金融机构发放的人民币贷款。《通知》的发布意味着外债资金也可以与外汇资本金一样，结汇后可用于偿还金融机构贷款。

4. 备用金上限从10万美元上调至20万美元

《通知》规定，单一机构每月备用金（含意愿结汇和支付结汇）支付累计金额不得超过等值20万美元。而此前19号文中对外汇资本金结汇备用金限定为不超过等值10万美元。

5. 明确了结算银行的审核责任

《通知》明确银行应按“了解客户”、“了解业务”及“尽职审查”的展业三原则承担真实性审核责任，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，银行均应审核前一笔支付证明材料的真实性与合规性。银行应留存境内机构资本项目外汇收入结汇及使用的相关证明材料5年备查。

converted from foreign exchange as provided under the negative list of the Circular 19.

The Circular 19 prohibits foreign invested-enterprises from, directly or indirectly, using RMB converted from registered capital for expenditure beyond business scope. The Circular still keeps the aforesaid limitation in its negative list as mentioned above. Although the Circular provides for the first time that “foreign exchange incomes and settled RMB funds under capital accounts can be used for current account spending within the business scope and capital account spending allowed under applicable laws and regulations”, it is still not clear whether the Circular has completely allowed ordinary foreign invested-enterprises to carry out domestic equity investment with settled RMB funds.

IV. Foreign Exchange Settlement Administration Emphasized

The Circular further regulates the administration of settlement and payment of the income from capital accounts, specifying that banks shall have the obligations to verify authenticity pursuant to the principles of "know your customer", "know your business", and "due diligence".