

## 外管新规全面放开外商投资企业意愿结汇制

2015年4月8日，国家外汇管理局发布了《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）（“《通知》”）。《通知》将《国家外汇管理局关于在部分地区开展外商投资企业外汇资本金结汇管理方式改革试点有关问题的通知》（汇发[2014]36号）（“36号文”）中试点地区的资本金结汇制度扩展至了全国范围。《通知》将于2015年6月1日生效。

### 1. 外商投资企业外汇资本金实行意愿结汇制度

《通知》延续了36号文允许外商投资企业资本金意愿结汇的做法，将其扩展至了全国范围。外商投资企业可以在完成出资登记后根据其实际经营需要对其资本金账户中的外汇资金在银行办理意愿结汇，意愿结汇比例为100%。从此，非试点地区外商投资企业不再实行《关于完善外商投资企业外汇资本金支付结汇管理有关业务操作问题的通知》（汇综发[2008]142号）（“142号文”）下的支付结汇制，全国的外商投资企业都将享有外汇资本金结汇的自主权。

同时，鉴于外管局于2015年2月发布了《关于进一步简化和改进直接投资外汇管理政策的通知》（汇发[2015]13号），取消了以非货币形式的出资确认登记，并将以货币形式出资确认登记修改为银行直接办理出资入账登记，这意味着作为企业意愿结汇前提条件的出资登记程序也被大大地简化了。

### 2. 便利外商投资企业以结汇资金开展境内股权投资

《通知》复制了36号文关于便利外商投资企业以结汇资金开展境内股权投资的做法。

《通知》规定，除原币划转股权投资款外，以投资为主要业务的外商投资企业（“**投资性外资企业**”），在所投资项目真实、合规的前提下，可直接结汇并将结汇所得的人民币资金直接汇入被投资企业的基本账户。而《通知》生效前，非试点地区的投资性外资企业进行境内股权投资，被投资企业需要开立境内再投资专用账户，接收原币划转的外汇，并且所接收的股权投资款需要按照支付结汇制原则向银行申请结汇才可换汇为人民币使用。所以，《通知》主要是将结汇程序提前至了投资性外资企业这一层级。

《通知》规定，对于上述投资性外资企业之外的一般性外商投资企业（“**一般性外资企业**”），除原币划转境内股权投资款外，可以用结汇所得的人民币资金在中国境内进行股权投资；被投资企业需要事先办理境内再投资登记并开立相应结汇待支付账户，外汇资本金在外商投资企业层面办理完结汇后，由外商投资企业划转到被投资企业的结汇待支付账户，纳入专户进行监管。这一操作模式与36号文一

## SAFE New Regulation Promotes Discretionary Settlement of FIEs' Capital Nationwide

On April 8<sup>th</sup>, 2015, the State Administration of Foreign Exchange (“SAFE”) released 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**”). Compared with the *Circular of the State Administration of Foreign Exchange on Issues Concerning the Pilot Reform of the Administrative Approach to the Settlement of Foreign Exchange Capital of Foreign-invested Enterprises in Certain Areas* (Huifa [2014] No.36) (the “**Circular 36**”) issued in 2014, the Circular further promotes discretionary settlement of foreign investment enterprises' foreign exchange capital nationwide. The Circular will be effective on June 1<sup>st</sup>, 2015.

### I. Discretionary Settlement of Foreign Exchange Capital of FIEs in Place of Payment-based Settlement

The Circular adopts the approach in the Circular 36 that allows foreign-invested enterprises (“**FIEs**”) to settle foreign exchange capital at their discretion and promotes such approach nationwide. FIEs may, according to actual business need, settle with a bank the portion of foreign exchange capital in its capital account after completing capital contribution registration. The proportion of discretionary settlement of foreign exchange capital is temporarily set at 100%. Thus, FIEs in the non-pilot zone can also enjoy discretionary settlement of foreign exchange capital instead of the payment-based settlement specified in the *Circular on Operational Issues relating to Administration of payment-based settlement of Foreign Exchange Capital of Foreign-invested Enterprises* (huizongfa [2008] No. 142) (the “**Circular 142**”).

Meanwhile, as SAFE also cancels the non-monetary capital contribution registration and authorizes the banks to directly handle the monetary capital contribution registration as specified in the *Circular on Further Simplifying and Improving Foreign Exchange Administration for Direct Investment* (Huifa [2015] No. 13), it means that the capital contribution registration, as the previous step of discretionary settlement of foreign exchange capital, has also been materially simplified.

### II. Facilitate Domestic Equity Investment of FIEs with Settled Foreign Exchange Capital

The Circular carries forward the practice in the Circular No. 36 that allows FIEs to carry out domestic equity investment with their settled foreign exchange capital.

The Circular provides that other than by means of transferring the same foreign currency to the reinvested enterprise, FIEs with investment as their main business (“**Investment FIEs**”) are also allowed to directly settle their foreign exchange capitals and transfer that amount into the basic account of an enterprise being invested, provided that the relevant domestic investment project is real and compliant. Before the Circular takes into effect, the enterprises invested by Investment FIEs in non-pilot zone shall first open a special account to receive domestic reinvestment fund in the same foreign currency, and then settle the same foreign currency into RMB for usage under the payment-based settlement rules. Therefore, instead of settlement by the enterprises being invested, the Circular advances the foreign exchange capital settlement to the Investment FIEs' level.

The Circular further provides that FIEs other than Investment FIEs (“**Ordinary FIEs**”) can also use the RMB funds derived

致，是在全国层面废除了 142 文关于外商投资企业结汇所得人民币资金不得进行境内股权投资的限制。

### 3. 结汇所得人民币资本金用途的负面清单

《通知》包含了外商投资企业结汇所得人民币使用范围负面清单，规定外商投资资本金结汇所得人民币资金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。这与 36 号文的规定一致，而 36 号文发布后，就此类条款人们已经展开了广泛的讨论。争议的焦点在于，一般性外资企业进行股权投资，其经营范围内是否必需包含“投资”字样？如果答案是肯定的，并且鉴于实践中一般性外资企业的经营范围很难包含“投资”二字，那么一般性外资企业开展境内股权投资仍然受到很大的限制。但也有学者认为，国家早在 2000 年就颁布了《关于外商投资企业境内投资的暂行规定》（“《暂行规定》”），旨在鼓励和管理外商投资企业的境内投资行为，《暂行规定》区分了一般性外资企业和投资性外资企业，对于一般性外资企业，偶尔的境内投资行为并不需要在经营范围中列出，投资资金自然也不属于企业经营范围之外的支出。

需要注意的是，《通知》相较于 36 号文，在结汇待支付账户的支出范围中增加了“支付境内股权投资资金”的字样，并且该事项与“经营范围内的支出”呈并列关系，似乎又预示着一般性外资企业可以在经营范围之外以结汇待支付账户中的资金支付境内股权投资款。但是，鉴于《通知》仍然保留了与 36 号文一致的负面清单，外商投资企业资本金结汇所得资金遵循自用原则的前提不变，《通知》能否真正做到放开外商投资企业以结汇资金进行境内股权投资限制，仍然需要外管局进一步的确定。

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from capital settlement to carry out domestic equity investment in addition to transferring the same foreign currency to the reinvested enterprise. An enterprise to be invested shall first go through domestic reinvestment registration and open a corresponding account for pending foreign exchange settlement payment (the “**Pending Account**”) subject to relevant supervision, after which the Ordinary FIEs settle their foreign exchange capitals and transfer the RMB funds obtained to that corresponding Pending Account. Such operation is in line with the Circular 36, which removes the administrative burden of the Circular 142 that forbids RMB funds settled by FIEs to be used in domestic equity investment.

### III. Negative List for RMB Funds Derived from Capital Settlement

The Circular formulates a negative list for RMB funds derived from capital settlement and specifies that FIEs shall not use the RMB funds derived from capital settlement for expenditures beyond their business scopes or for expenditures prohibited by the laws and regulations of the State, which is in line with the relevant provisions of the Circular 36. The Circular 36 had caused a debate in respect to these provisions on whether Ordinary FIEs shall add the word “investment” into their business scopes. If the answer is positive and in consideration of the practice that it’s difficult for Ordinary FIEs to add the word “investment” into their business scopes, it is still nearly impossible for Ordinary FIEs to use the RMB funds derived from capital settlement for domestic investment. However, some scholars consider that China issued the *Interim Provisions on the Domestic Investment of Foreign Invested Enterprises* (the “**Interim Provisions**”) in 2000 with the purpose of encouraging and administrating domestic investment activity by FIE, and the Interim Provisions distinguishes Ordinary FIEs and Investment FIEs. Therefore, for Ordinary FIEs, occasional domestic investment activity does not require expansion of the business scope, and naturally, investment funds shall not be deemed as expenditures beyond business scope.

We also note that, in comparison with the Circular 36, the Circular adds “pay domestic equity investment funds”, a parallel phrase with “expenditures within business scope”, in the expenditure scope of the Pending Account. It seems that Ordinary FIEs are entitled to pay domestic equity investment funds with the money in the Pending Account beyond their business scopes. However, in consideration that the Circular formulates the negative list, which is the same as that of the Circular 36, FIEs are still required to use the RMB funds derived from capital settlement truthfully for their own operational purposes. Hence, it is still unclear whether the Circular has completely allowed Ordinary FIEs to carry out domestic equity investment with settled RMB funds.

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