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December 15, 2011

China's NDRC Strengthens Regulation of Equity Investment Enterprises

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On December 8, 2011, the General Office of China's National Development and Reform Commission (the "NDRC") issued **the Circular on Promoting the Standardized Development of Equity Investment Enterprises** (关于促进股权投资企业规范发展的通知)(the "New Circular"). The New Circular represents the first effort by a national agency in the PRC to regulate in a comprehensive way Equity Investment Enterprises ("EIEs"). The term "EIE" refers to enterprises engaged in the business of investing in equities of non-publicly traded enterprises. The term excludes enterprises engaged in investments in listed securities, since they are separately regulated by the China Securities Regulatory Commission. We understand it does not include purely offshore funds but would include funds of funds established in China investing into an EIE. The NDRC's website states that the purpose of the Circular is to address illegal fundraising activities and irregular operations of equity investment funds in the PRC.

The New Circular is a further development in the regulation of EIEs, following the **Circular on Further Regulating the Development and Record Filing Administration of EIEs in Pilot Areas**

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(关于进一步规范试点地区股权投资企业发展和备案管理工作的通知) (the "Pilot Circular"), issued by the NDRC on January 31, 2011. The New Circular covers the same regulated scope as the Pilot Circular: (1) the establishment, fundraising and investment of EIEs; (2) risk-control mechanisms of EIEs; (3) responsibilities of Equity Investment Management Entities (the "EIMEs", as entrusted management entities of EIEs); (4) information disclosure systems of EIEs; and (5) the record filings and industry self-discipline of EIEs.

The New Circular further confirms that EIEs may be formed as a limited liability company, a joint stock company, or a partnership in China. This conforms to the current common practice of PRC domestic private equity funds, all of which are either formed as limited liability companies or domestic partnerships (most of which are limited partnerships). However, it should be noted that under **the Regulation on the Administration of Foreign-Invested Venture Capital Enterprises** (外商投资创业投资企业管理规定) (the "FIVCE Regulation"), a FIVCE, (which as discussed below may be deemed to be an EIE under the New Circular), can be formed as a wholly-foreign-owned enterprise, an equity joint venture, a contractual joint venture as legal person, a contractual joint venture as a non-legal person, or as a foreign-invested partnership. It is not very clear whether a non-legal person joint venture may still be available to a FIVCE under the New Circular.

Notably, the New Circular distinguishes the Pilot Circular in the following aspects:

- The New Circular expands the geographic application of the post-formation record filing requirement under the Pilot Circular. Under the Pilot Circular, the pilot areas include Beijing, Tianjin, Shanghai, Jiangsu Province, Zhejiang Province and Hubei Province. Experimental record filing of the EIEs formed in these pilot areas began as early as June 2008. Filings are now required nationwide rather than being limited to the pilot areas. Similar to the Pilot Circular, to apply for the filing, an EIE must submit: (1) a filing application; (2) a photocopy of its business

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license; (3) its prospectus; (4) its articles of association or partnership agreement; (5) a letter of commitment to subscription signed by all investors; (6) a capital verification report issued by a capital verification institution on the paid-in contributions from all investors; (7) a written explanation by the promoters on the compliance of the fund raising process with laws and regulations; (8) the resumes of all of its senior managers and the corresponding verification documents; (9) a custody agreement or the letter of consent signed by all of the investors if they consent that assets of the EIEs may be free from custody; and (10) a legal opinion issued by a law firm on the documents and materials involved in the filing. If the EIE has adopted entrusted management, it must also submit a trust agreement signed with its entrusted EIME.

- The New Circular requires EIEs to complete a provincial-level record filing procedure where the capital size of the EIEs (including paid-in and committed capital contributions) is less than RMB500 million (or equivalent foreign currency). Previously, the Pilot Circular only required EIEs with a capital size of RMB500 million or more to complete record filings with the NDRC. National-level record filing requirements remain the same as specified in the Pilot Circular: only EIEs with capital size of RMB500 million or more must file with the NDRC.
- The New Circular allows EIEs to raise funds only from “accredited investors.” Furthermore, the number of investors of an EIE must be in compliance with the PRC Company Law and the PRC Partnership Law. Specifically, (a) if an EIE is structured as a limited partnership (“LP”), such EIE must have at least 2 and at most 50 investors or partners, one of whom must serve as the general partner (“GP”); (b) if an EIE is structured as a limited liability company, the number of investors or shareholders of such EIE must not exceed 50; (c) if an EIE is structured as a joint stock company, such EIE must have at least 2 and at most 200 investors or promoters. In the event an investor to an EIE is a non-legal-person entity, e.g., a partnership, unless such investor is the parent fund to a fund of funds, the New Circular requires the promoters to “look through” or “penetrate” such non-legal-person entity to examine whether or not the ultimate natural persons and legal-person entities are “accredited investors” and to calculate whether or not the total number of investors is within the statutory limitation. It should be noted that this “look-through” requirement is a relatively new concept in the PRC legal regime and its implementation in practice remains untested.
- The New Circular also specifies the qualification requirements for serving as a senior manager of the EIEs and its entrusted management entities. More specifically, no senior manager may have any violation on record in the last 5 years or have been involved in any substantial economic disputes. Further, at least three senior managers in an EIE must have two or more years’ experience in the equity investment business or other relevant experience.
- The New Circular further provides that the assets of the EIEs must be entrusted with independent assets custodial institutions, unless all of the investors consent that the assets may be free from such custody. Consistent with the Pilot Circular, the New Circular continues to require that where the entrusted EIMEs are wholly foreign-owned or Chinese-foreign joint ventures, assets of the EIEs must be entrusted with independent custodial institutions incorporated as legal persons within China.

The New Circular does not distinguish private equity investments from venture capital investments. As such, venture capital firms or funds would presumably fall under the coverage of the New Circular as well. However, the New Circular does provide an exemption that venture capital firms or funds that have previously filed as venture capital investment enterprises pursuant to the **Interim Measures for the Administration of Venture Capital Enterprises** (创业投资企业管理暂行办法) (the “Interim Measures for VCEs”) with the NDRC and its provincial-level counterparts are not required to file under the New Circular. Pursuant to the Interim Measures for VCEs, the record filings of VCEs are

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encouraged but not mandatory. Though it seems to be a logical reasoning, the New Circular does not explicitly specify VCEs that have not previously filed in accordance with the Interim Measures for VCEs must file under the New Circular unless the VCE falls into a category exempting it from record filings. Exemptions exist for a VCE that is fully-funded and established by a single entity or a single natural person; a VCE that is jointly funded and established by the same entity with its wholly-owned subsidiary (ies); or, a VCE that was jointly funded and established by several wholly-owned subsidiaries of the same entity.

For foreign private equity (“PE”) or venture capital (“VC”) investors who wish to establish and operate a PE or VC firm or fund in China, in addition to required compliance under the New Circular, such foreign PE or VC investors will also be required to observe other existing regulations previously promulgated by the Ministry of Commerce (“MOFCOM”) and other governmental authorities at the central and local levels such as the FIVCE Regulation and the provincial-level implementation rules of the FIVCE Regulation. According to the FIVCE Regulation, approval by MOFCOM and its provincial counterparts for the establishment of an FIVCE is a pre-formation requirement, whereas the record filing procedure mandated by the NDRC is a post-formation administrative procedure. While there appears to be no overlap between the jurisdiction of the MOFCOM and the NDRC with respect to the regulation of FIVCEs, the promulgation by the NDRC of the New Circular enhances the NDRC’s authority over EIEs. Moreover, the industry (for both domestic-funded and foreign-invested firms) may view the filing with the NDRC (and its provincial counterparts) as a blessing given by the NDRC to a newly established EIE. Therefore, a successful filing is perceived to provide an EIE enhanced credibility to source investment opportunities. Given this benefit, investors of an EIE may require that such EIE complete the record filing with the NDRC as a condition for the investors to fulfill their capital commitments.

Penalties for circumventing the filing requirements and for non-compliant operations are the same under the New Circular, i.e., such non-compliance of the EIEs and the entrusted EIMEs will be published on the website of the relevant record filing authorities. One obvious consequence of being blacklisted by the NDRC (or its provincial counterpart) on its official website is that the reputation of the affected EIE and the entrusted EIME would be adversely affected. Such EIEs and EIMEs would lose credibility in the market when competing against peers for deals.

PLEASE SEE THE FOLLOWING PAGE FOR A FULL ENGLISH TRANSLATION OF THE NEW CIRCULAR.

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English Translation of the General Office of National Development and Reform Commission's New Circular

Circular of the General Office of the National Development and Reform Commission Regarding Facilitating Compliant Development of Equity Investment Enterprises

To: The offices of People's Governments of all provinces, autonomous regions, municipalities directly under the Central Government, the office of Xinjiang Production, and Construction Corps:

In order to regulate the operations and the management of record filing by the equity investment enterprises established in the People's Republic of China (the "PRC") and engaged in equity investment in non-publicly traded enterprises (including the equity investment parent funds that target equity investment enterprises for investments) and to encourage the compliant development of equity investment enterprises, please take note of the following in relation to relevant matters:

I. REGULATING THE ESTABLISHMENT, CAPITAL FUND RAISING, AND INVESTMENT SCOPE OF EQUITY INVESTMENT ENTERPRISES

(1) Establishment and Mode of Management

Equity investment enterprises shall be established in accordance with the relevant provisions of the *Company Law of the People's Republic of China* and the *Partnership Law of the People's Republic of China*. Equity investment enterprises established in the form of a limited company or joint stock limited company may implement self-management through establishing internal management teams, or entrust other equity investment enterprises or equity investment management enterprises to manage the assets by way of entrustment management.

(2) Capital Raising

The capital of an equity investment enterprise may only be raised through private placement from accredited investors who have the capability to identify risks and tolerant risks, and no solicitation in connection with capital raising of any equity investment enterprise shall be made directly or indirectly to non-specific or unqualified investors through announcements published in the media (including various kinds of websites), gazettes posted in communities, leaflets distributed to the public, short messages disseminated to the mobile phones of the public, or seminars or speeches, or other public or disguised public activities (including putting placement prospectuses at the counters of institutions such as commercial banks, securities companies, and trust investment companies). The party responsible for raising the capital fund for an equity investment enterprise shall fully disclose to investors the information pertaining to the investment risks and the potential investment loss, and shall not promise investors that a return to the principal or a fixed return is guaranteed.

(3) Subscription to Capital

All of the investors of equity investment enterprises may only pay for their subscribed capital contributions with funds that they legally own. Subscribed capital contributions may be paid according to a commitment system, meaning the investors shall sign a commitment letter regarding the payment for subscribed capital contributions at the capital raising stage of an equity investment enterprise, and pay for their subscribed capital contributions by installments according to the articles of association of the equity investment enterprise or as agreed in the partnership agreement at the investment operation stage of an equity investment enterprise.

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(4) Limit on Number of Investors

The number of investors in an equity investment enterprise shall comply with the *Company Law of the People's Republic of China* and the *Partnership Law of the People's Republic of China*. Where the investor is a non-legal person institution such as a mutual fund trust or partnership enterprise, a "look through" method shall be adopted to examine whether the ultimate natural person or legal person institution is an accredited investor or not and to calculate the number of investors, except with respect to an investor that is the equity investment parent fund.

(5) Scope of Investment

The investment scope of an equity investment enterprise is limited to the equity interests not publicly traded, and any idle fund may only be deposited in banks or used for the purchase of fixed income investment products such as State bonds. The investment direction shall comply with the State's industrial policies, investment policies and macro-economic control policies. Projects invested in by an equity investment enterprise shall be subject to the compliance management procedures for fixed assets investment projects. When making any investment, a foreign-invested equity investment enterprise shall go through the formalities for verification and approval of the investment project in accordance with the relevant provisions of the State.

II. IMPROVING THE RISK CONTROL MECHANISMS OF EQUITY INVESTMENT ENTERPRISES

(6) Control of Investment Risks

An equity investment enterprise shall utilize its funds in accordance with its articles of association or the terms of the partnership agreement, and appropriately diversify its investments to reduce investment risks. An equity investment enterprise shall not provide guarantee for enterprises other than its investee enterprises. Where an equity investment enterprise intends to invest in its related parties, it shall implement a system for the related parties to abstain from its decision-making process and shall set forth the relevant provisions in its articles of association or the partnership agreement as well as in the entrusted management agreement and custodial agreement. The standard for identifying related parties shall be agreed to by investors in the equity investment enterprise in its articles of association or the partnership agreement as well as in the entrusted management agreement and custodial agreement of the equity investment enterprise in accordance with provisions of the relevant laws and regulations.

(7) Incentive and Control Mechanisms

Legal documents such as the articles of association or the partnership agreement of an equity investment enterprise and its entrusted management entity shall explicitly set forth the performance incentive mechanism and the risk control mechanism, as well as the decision-making procedures concerning relevant investment operations. An equity investment enterprise may have a prescribed term of duration.

(8) Examination and Evaluation of Entrusted Management Entities

An equity investment enterprise may periodically or at non-fixed times examine and evaluate the conditions of investment operations of its management entity in connection with its utilization of the capital of the equity investment enterprise according to the relevant agreements in the legal documents such as the entrusted management agreement.

(9) Asset Entrustment

The assets of an equity investment enterprise shall be entrusted with an independent custodial institution, unless waived by unanimous consent of the investors. If the management entity entrusted is a wholly foreign-owned enterprise or a Sino-foreign equity joint venture, the assets of such equity investment enterprise shall be placed in the custody of an independent custodial institution qualified as a legal person in the PRC.

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III. BASIC RESPONSIBILITIES AND DUTIES OF EQUITY INVESTMENT MANAGEMENT ENTITIES

(10) Duties of Entrusted Management Entities

If an equity investment enterprise adopts the entrusted management, the entrusted management entity shall perform the following responsibilities and duties in accordance with the entrusted management agreement: (1) formulating and implementing investment plans, and implementing post-investment management of the investee enterprises; (2) actively participating in the formulation of the development strategy of the invested enterprise and providing value-added services; (3) periodically or at non-fixed times disclosing information pertaining to the investment operation of the equity investment enterprise to the equity investment enterprise, and periodically preparing accounting statements, which shall be reported to the equity investment enterprise after being audited by an external audit institution; and (4) performing other responsibilities and duties provided in the entrusted management agreement.

(11) Restrictions on Conflicts of Interest

An entity entrusted with the management of equity investment enterprises' property shall handle property of different equity investment enterprises impartially, and shall not use the property of equity investment enterprises to seek benefits for any third party other than the equity investment enterprise. An entrusted management entity shall set up different accounts for different equity investment enterprises to carry out separate account management.

(12) Resignation of Entrusted Management Entities

An entrusted management entity shall resign from management of the equity investment enterprise in any of the following situations: (1) the entrusted management entity dissolves, goes bankrupt, or has its assets taken over by a receiver; (2) the entrusted management entity loses its management capacity or brings serious damage to the interests of investors of relevant equity investment enterprise; (3) investors holding more than a certain portion of equity interests in the equity investment enterprise request the resignation of the entrusted management entity according to provisions in the entrusted management agreement; or (4) other situations specified in the entrusted management agreement concerning the resignation of the entrusted management entity.

IV. ESTABLISHING INFORMATION DISCLOSURE SYSTEMS IN EQUITY INVESTMENT ENTERPRISES

(13) Submission of Annual Report

Apart from investment operation information disclosed to investors in accordance with articles of association and partnership agreements, an equity investment enterprise shall, within four months after the end of each fiscal year, submit to the relevant record filing administration departments its annual business report and annual financial report audited by an accounting firm. The entrusted management entity and custodial institution of an equity investment enterprise shall, within four months after the end of each fiscal year, submit to the relevant record filing administration departments its annual asset management report and annual asset custodial report.

(14) Immediate Report of Major Events

Occurrence of the following major events during the investment operation shall be reported to the relevant record filing administration departments within ten business days:

(1) amendments are made to documents such as the articles of association, the partnership agreement and the entrusted management agreement of the equity investment enterprise or its entrusted management entity; (2) the equity investment enterprise or its entrusted management entity carries out capital increases or decreases, or makes external debt financings; (3) the equity investment enterprise or its entrusted management entity is involved in division or merger; (4) the entrusted management entity or the custodial institution of the equity investment enterprise involves any changes,

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including a change in the senior management personnel of the entrusted management entity and other major changes; and (5) the equity investment enterprise is dissolved or goes bankrupt, or its assets are taken over by a receiver.

V. STRENGTHENING RECORD FILING MANAGEMENT AND INDUSTRY SELF-DISCIPLINE OF EQUITY INVESTMENT ENTERPRISES

(15) Record Filing Administration Scope

Equity investment enterprises shall register with the corresponding administration departments for record filing within one month from the completion of registration with the relevant State Administration of Industry and Commerce according to requirements of this Circular, except any equity investment enterprise that:

(1) has completed the record filing process for venture capital with respect to enterprises in accordance with the *Interim Administrative Measures for Venture Capital Enterprises*; (2) is established with the capital contributions fully contributed by one single institution or a single natural person, or is established with the capital contributed by an institution and the wholly owned subsidiary of the same institution, or established with the capital contributed by certain subsidiaries of the same institution.

(16) Supplementary Record Filing by Entrusted Management Entities

If an equity investment enterprise adopts entrusted management, and entrusts other equity investment enterprises or equity investment management enterprises with asset management, the entrusted management entity shall apply for supplementary record filing and accept relevant record filing administration.

(17) Record Filing Administration Department

If the capitalization of an equity investment enterprise (including paid-in contributions and committed contributions but not yet paid-in from investors) reaches RMB500,000,000 or an equivalent amount in a foreign currency, record-filing of the said enterprise shall be made with the National Development and Reform Commission ("NDRC") (hereinafter referred to as the "national record filing administration department"); if the capitalization of an equity investment enterprise is less than RMB500,000,000 or an equivalent amount in a foreign currency, record filing of the said enterprises shall be made with the record filing administration department determined by the People's Government at the provincial level (hereinafter referred to as the "record filing administration departments at the provincial level").

(18) Application Subject of Record Filing

If an equity investment enterprise adopts a self-management approach, the enterprise shall be responsible for applying for record filing on its own. If an equity investment enterprise adopts an entrusted management approach, its entrusted management entity shall be responsible for applying for record filing.

(19) Application Procedures for Record Filing with the National Record Filing Administration Department

When an equity investment enterprise applies for record filing with the national record filing administration department, the applicant enterprise shall firstly submit record-filing materials to record filing administration departments at the provincial level at the place where the equity investment enterprise is located for preliminary examination.

Within 20 business days after receiving the record-filing application, the record filing administration departments at the provincial level shall issue preliminary examination opinions and submit the same to the national record filing administration department if it has confirmed that the application materials submitted by the equity investment enterprise are complete. After receiving an equity investment enterprise's record filing application to record-filing administration departments at the provincial level, together with the preliminary examination opinions issued therein, the national record

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filing administration department shall complete relevant the record filing within 20 business days if the application is reviewed without objection by publishing the applicant's name and basic information on the official website of the national record filing administration department.

(20) Application Procedures for Record Filing with Record Filing Administration Departments at the Provincial Level

When an equity investment enterprise applies for record filing with record filing administration departments at the provincial level, the said department shall, within 20 business days after receiving the record filing application submitted by an equity investment enterprise, complete the relevant record filing if the application is reviewed without objection, by publishing the applicant's name and basic information on the official website of relevant record filing administration departments at the provincial level.

(21) Documents and Materials to be Submitted if an Equity Investment Enterprise Applies for Record Filing

When an equity investment enterprise applies for record filing, the said enterprise shall submit the following documents and materials:

- (1) Application documents for the record filing;
- (2) Photocopies of the business licenses;
- (3) A prospectus;
- (4) Articles of association or a partnership agreement;
- (5) Letter(s) of commitment regarding capital contributions signed by all investors;
- (6) A capital verification report issued by the relevant capital verification institution in connection with the actual contributions made by all investors;
- (7) A statement issued by the promoter regarding whether fund-raising activities of relevant equity investment enterprises are in compliance with relevant laws and regulations;
- (8) Materials supporting the curriculum vitae of senior management;
- (9) An entrusted management agreement. If all investors agree unanimously that the requirement of entrusted management may be waived, a written resolution on the waiver of entrusted management jointly signed by all investors shall be provided; and
- (10) Legal opinions issued by the relevant law firm regarding the documents and materials involved in relevant record filing. If the equity investment enterprise adopts entrusted management, the entrusted management agreement signed by and between the equity investment enterprise and the entrusted management entity shall also be submitted.

(22) Documents and Materials to be Submitted if the Entrusted Management Entities of an Equity Investment Enterprise Apply for Supplementary Record Filing

When the entrusted management entity of an equity investment enterprise applies for supplementary record filing, the

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said entity shall submit the following documents:

- (1) Photocopies of the business license;
- (2) Articles of association or a partnership agreement;
- (3) A list of names and profiles of shareholders (partners);
- (4) Materials supporting to the curriculum vitae of senior management; and
- (5) An equity investment business and track record.

(23) Definition and Requirements for Senior Management

For the purposes of this Circular, “senior management” refers to directors, supervisors, managers, deputy managers, chief financial officer, secretary of the board of directors of a company, and such other persons stipulated in the articles of association, or the general partners of a partnership enterprise and other persons stipulated in the partnership agreement. If the general partners of a partnership enterprise are legal persons or unincorporated bodies, the senior management of such partners shall be collectively deemed to be the senior management. All senior management of equity investment enterprises and relevant entrusted management entities shall have no record of violation of law in the past five years and if they are in the middle of material economic disputes, at least three senior management personnel shall have more than two years’ equity investment or relevant business experience.

(24) Application for Record Filing Deregistration

An equity investment enterprise may apply for deregistration of the record filing, in the event of the following:

- (1) it is dissolved;
- (2) its major business is no longer the equity investment business; or
- (3) it is otherwise filed as a venture capital enterprise in accordance with the *Interim Administrative Measures for Venture Capital Enterprises*.

(25) Regulation and Administration

To strengthen the regulation and administration over equity investment enterprises, record filing administration departments shall establish and improve an information system for the administration of the record filing of equity investment enterprises and the relevant procedures relating to public reporting, periodic and irregular inspection, and the public announcement system. As to equity investment enterprises and their entrusted management entities that have completed the record filing with relevant departments, the said departments shall, within five months after the end of each accounting year, conduct annual inspections regarding their compliance with the relevant provisions of this Circular.

When necessary, the said departments may inspect the operation and management of relevant companies and entities by, among others, correspondence, phone calls enquiries, on-site visitations, on-site inspections and off-site monitoring.

(26) Penalty for Evasion of Record Filing Regulation

When relevant record filing administration departments are aware of the fact that an equity investment enterprise and its entrusted management entity fail to file records with relevant departments, relevant departments shall require such companies and entities complete any relevant record filing with the corresponding departments within 20 business days. The said enterprises or entities that fail to make rectifications within the stipulated period shall be deemed “equity

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investment enterprises or entrusted management entities that evade record filing regulations". The same information shall be published on the official websites of the relevant record filing administration departments to inform the public.

(27) Penalty for Non-Compliant Operations

When an equity investment enterprise or its entrusted management entity fails to comply with the provisions of this Circular in terms of its business operations, the aforesaid company or institution shall be required to make rectifications within six months. Such enterprises or entities that fail to make rectifications within the stipulated period shall each be deemed an "equity investment enterprise or entrusted management entity with non-compliant operations management". The same shall be published on the official websites of the relevant record-filing administration departments to inform the public.

(28) Industry Self-Discipline

A national association for the equity investment industry shall be established to conduct self-disciplinary management over the equity investment enterprises and their entrusted management entities in accordance with the relevant laws, regulations, and this Circular as well.

(29) Implementation

This Circular shall be implemented from the date of its issuance.

The equity investment enterprises and their entrusted management entities established before the implementation of this Circular shall file record with relevant record filing administration departments according to relevant provisions of this Circular within three months upon the issuance of this Circular. If investment operations do not comply with relevant provisions of this Circular, the said operations shall be rectified according to relevant provisions of this Circular within six months upon the issuance of this Circular.

**General Office of National Development and Reform Commission
November 23, 2011**

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