



## Foreign Direct Investment

### 1. MOC Publishes Draft of the Foreign Investment Law of the People's Republic of China

商务部发布《中华人民共和国外国投资法（草案征求意见稿）》(01/19/2015)

On Jan. 19, 2015, China's Ministry of Commerce (the **MOC**) published the *Foreign Investment Law of the People's Republic of China* (the **Proposed Law**) draft for public comment. The Proposed Law is expected to revamp China's current legal and regulatory regime on foreign investment by reducing the regulatory red tape and creating a more flexible playground for both Chinese and foreign investors. The public comment period ended Feb. 17, 2015.

The Proposed Law features the following evolutions from the existing legal and regulatory regime:

- *Revocation of the FIE Laws*

The Proposed Law will, once being enacted, repeal and replace the *Sino-foreign Equity Joint Venture Enterprise Law*, the *Sino-foreign Cooperative Joint Venture Enterprise Law* and the *Wholly Foreign-invested Enterprise Law* (collectively, the **FIE Laws**). The FIE Laws were enacted two decades ago and have long proved to be maladapted to China's economic reality. Abandoning the FIE Laws, the Proposed Law is intended not to regulate the governance structure and operational activities of an enterprise with foreign investment, leaving such issues to the existing business organization laws of China, including the *Company Law* and the *Partnership Enterprise Law*. This will bring changes to the governance structure of existing foreign-invested enterprises. For example, pursuant to the *Sino-foreign Equity Joint Venture Enterprise Law*, for a Sino-foreign equity joint venture enterprise (the **EJV**), the board of directors is the "highest governing authority" to decide "all significant matters" of the enterprise; however, under the Proposed Law, the investors of an EJV should have established the same governance structure

within the enterprise as other domestic companies, including submitting significant matters to the shareholders' meetings for determination.

- *Adoption of a Catalogue of Special Administrative Measures*

The Proposed Law expressly grants foreign investors "national treatment," meaning foreign investors may receive the same treatment as domestic investors except for the prohibitions or restrictions provided for in the *Catalogue of Special Administrative Measures (SAM Catalogue)* published by the State Council. The SAM Catalogue is designed as a "negative list" for investors accessing the Chinese market and, unless the investment involves the industry sectors specified in the SAM Catalogue, foreign investors will not be required to apply for any market access approvals in advance, as they are required now under the FIE Laws.

The SAM Catalogue will include both a list of "prohibited sectors" in which neither director nor indirect foreign investment is permitted, and a list of "restricted sectors" with detailed restrictive conditions. The draft SAM Catalogue has not been published yet. However, MOC has anticipated in its explanation of the Proposed Law (the **MOC Explanation**) that with the new SAM Catalogue in place, a majority of the foreign investment projects will not be subject to any government approvals regarding market access.

- *Broadening the Definition of "Foreign Investment"*

Unlike the FIE Laws regulating "greenfield" investment, the Proposed Law expands the definition of "foreign investment" to include, in addition to establishment of new enterprises, (a) acquisition of interest of existing enterprises; (b) provision of financing to domestic enterprises in which such foreign investors hold interests for a term of no less than one year; (c) gaining concessions to explore and develop natural resources or to build/operate infrastructure; (d) acquisition of real estate; and (e) gaining "control" of domestic enterprises through various ways, including contract or trust.

The term "control" is broadly defined further in the Proposed Law to include (a) directly or indirectly holding no less than 50 percent of the equity or voting right; (b) gaining the ability to directly or indirectly appoint the majority members of the board (or ensuring its nominees being elected as board members) or otherwise materially influence the decision of the board or shareholders' meeting; and (c) gaining ability to decisively influence the business, finance, human resources or technology of the enterprise by way of contracts or trust.

Following the comprehensive definition, the Proposed Law clarifies that (i) any domestic enterprises under control of a foreign investor will be considered a "foreign investor;" and (ii) the transactions occurring outside of China and resulting in a change of control of domestic enterprises will be considered "foreign investment" also.

- *Implementation of the Reporting System*

The Proposed Law requires every foreign investor and foreign-invested enterprise to report its investment and the ongoing business operation to MOC, regardless of whether the investment falls within the SAM Catalogue. The scope of reporting includes information of the actual controller, the key financial status, and the significant litigations. The Proposed Law authorizes the State Council to promulgate implementing rules and establishes a database of the foreign

investors and their investments. Pursuant to the Proposed Law, the database may be available to the public except for the information containing commercial secrets and personal privacy.

- *Expanded Scope of National Security Review Regime*

The Proposed Law fleshes out the current national security review regime put forward by the State Council in relation to the foreign investor's acquisition of domestic companies or assets. Notably, the Proposed Law proposes that the national security review may apply to any form of foreign investment, including greenfield investment.

- *Impact on Future and Existing VIE Structures*

By adopting a comprehensive definition of "control," the Proposed Law is deemed to have a direct impact on the "VIE structures," i.e., Chinese citizens creating an offshore holding company which will in turn control the Chinese operating companies through contractual arrangements. The VIE structures are widely used by China-based companies to achieve initial public offerings in overseas stock exchanges, particularly in sectors currently with access restriction to foreign investors such as the Internet and e-commerce services. The legality of VIE structures used in such sectors was debated.

Pursuant to Article 45 of the Proposed Law, foreign-incorporated enterprises that are ultimately controlled by Chinese citizens or government may apply to MOC for certification as a domestic investor upon making its investment in China. This means such foreign-incorporated enterprises will be immune from the jurisdiction of the Proposed Law, and thus not required to obtain the market access approval if it is re-investing in the prohibited or restricted sectors of China as provided in the SAM Catalogue. Arguably, after taking effect, the Proposed Law will significantly reduce the reliance on VIE structures by Chinese entrepreneurs seeking overseas IPOs.

However, the Proposed Law does not directly comment on the legality of existing VIE structures adopted in industries that will fall within the restricted or prohibited sectors. Instead, the MOC Explanation suggests three possible approaches to treat such VIE structures: (a) the foreign-incorporated company at issue may retain the structure by reporting it to MOC; (b) the foreign-incorporated company will have to apply to MOC to certify that it is ultimately controlled by Chinese citizens or government and may retain the structure after getting the certification; or (c) the foreign-incorporated company will have to apply to MOC for market access approval and may only be allowed to retain the structure after the approval is acquired. The MOC Explanation also makes clear that the issue is pending further research and discussion.

Pursuant to the Legislation Law of China, when the Proposed Law is finalized, the State Council will submit the draft to the National People's Congress (the **CPC**) for review and adoption. It is still difficult to anticipate when the Proposed Law will finalize and take effect.

- *Draft Foreign Investment Law of the People's Republic of China (For Public Comment)*

- *中华人民共和国外国投资法（草案征求意见稿）*

- *Issuing Authority: Ministry of Commerce*

- *Date of Issuance: January 19, 2015 / Public Comment Deadline: February 17, 2015*

## 2. NDRC Releases Notice Eliminating Enterprise Operation Autonomy Matters As the Pre-Conditions for Enterprise Investment Project Approvals

国家发展改革委发布通知消除企业经营自主权事项作为企业投资项目核准前置条件 (12/31/2014)

On Dec. 31, 2014, the National Development and Reform Commission (the **NDRC**) released the *Notice Concerning the Prohibition on the Enterprise Operation Autonomy Matters as the Pre-Conditions for Enterprise Investment Project Approval* (the **Notice**), which became effective the same day.

### Background

In 2004, the State Council released the *Decision of the State Council on Reforming the Investment System* (the **Decision**), which established an approval and filing system for investments by enterprises in fixed asset projects. Under the Decision, projects that fall into the *Government Approval Investment Project Catalogue* (the **Catalogue**)—which are usually significant projects or projects the government scrutinizes for the purpose of protecting public interest—require approval from the government; all other fixed-asset projects are subject to filing requirements only.

When an enterprise applies for investment project approval with the local government, the government usually requires the enterprise to submit a series of documents as the pre-conditions of granting its approval, including the application report, pre-approvals from other governmental authorities, and internal documents of the applicant. The process for the enterprise applicant to collect all such approvals and documents is usually very complex and can be time consuming.

### Canceled Pre-Conditions of Enterprise Investment Project Approval

The Notice canceled 18 of the pre-conditions for investment project approval. According to the Notice, in determining whether to grant its approvals for investment projects, the government will only take into account “external” considerations, such as the protection of economic safety, the reasonable development and utilization of resources, environmental protection, the strategic optimization of significant industries, the protection of public interests, and the prevention of monopolies. For foreign invested projects, the government would also examine other aspects such as market entry restrictions and capital project management. The Notice provides that regarding the “internal” considerations of a project, such as market prospect, economic benefit, funding source, and product technology plan, the enterprise should use its own discretion and bear relevant risks; the government should not include such matters as the pre-conditions for project approval.

The pre-conditions eliminated by the Notice including the following:

- > Bank loan commitment
- > Bank reference letter
- > Other evidentiary materials for source of funds
- > Planning and design scheme examination opinion
- > Feasibility report examination opinion
- > Power grid access opinion
- > Railway exclusive line assess opinion
- > Fuel transportation agreement
- > Letter of intent on by-product resource integrated utilization

- > Access system design review opinion
- > Raw material transportation agreement
- > Water supply agreement
- > Raw material supply agreement
- > Letter of intent for financing
- > Shareholder's contribution commitment
- > Letter of intent, agreement, framework agreement with partner (except Sino-foreign joint venture and Sino-foreign cooperative projects)
- > Other matters that are subject to enterprise operation autonomy

### Conclusion

The changes provided by the Notice will facilitate enterprise investment projects by reducing pre-condition approval requirements in most circumstances and improve the efficiency of the approval procedures.

- *Notice Concerning the Prohibition on the Enterprise Operation Autonomy Matters As the Pre-Conditions for Enterprise Investment Project Approval*

- 《关于一律不得将企业经营自主权事项作为企业投资项目核准前置条件的通知》

- *Issuing authority: the National Development and Reform Commission*

- *Date of issuance: December 31, 2014 / Effective date: December 31, 2014*

### 3. NDRC and MOC Promulgates Revised Foreign Investment Industry Guidance Catalogue

发改委及商务部发布《外商投资产业指导目录》修订版（03/10/2015）

On March 10, 2015, upon approval from the State Council, the National Development and Reform Commission (the **NDRC**) and Ministry of Commerce (the **MOC**) released the revised *Foreign Investment Industrial Guidance Catalogue (Revised in 2015)* (the **2015 Catalogue**), which took effect April 10, 2015.

#### Background

In 1995, China published the first *Foreign Investment Industry Guidance Catalogue* (the **Catalogue**) to provide guidelines on market access and industry policies for foreign investments. Since 1995, the Catalogue has been revised five times to conform with China's commitments under its Protocol of Accession to the World Trade Organization (**WTO**), and to reflect China's continued economic and social development. The last Catalogue was promulgated by the NDRC and the MOC in 2011 (the **2011 Catalogue**).

According to the Catalogue, specific industries are categorized as "encouraged," "restricted," or "prohibited" for foreign investment. Any industry not listed in the Catalogue, in the absence of other PRC regulations and rules to the contrary, is considered to be "permitted" for foreign investments. Foreign investors may invest in the industrial areas under the "encouraged," "permitted," and "restricted" categories; however, as a general rule, foreign-invested projects under the "restricted" category may be subject to a higher level of scrutiny and stricter administrative formalities and restrictions. Foreign investors are banned from investing in "prohibited" industries.

**Changes Proposed by the 2015 Catalogue**

Compared to the 2011 Catalogue, the 2015 Catalogue involves changes to a variety of industries including, among others, farming, forestry, animal husbandry, fishery, mining, manufacturing, power, heat, gas and water production, and supply industries. The 2015 Catalogue reduces the items under the “restricted” category from 79 to 38. The requirement in the 2011 Catalogue regarding the structuring of foreign investment as joint ventures with Chinese partners (i.e., Sino-foreign equity joint venture and Sino-foreign cooperative joint venture; collectively, the **Sino-Foreign Joint Ventures**) is also eliminated for certain industries. On the other hand, the 2015 Catalogue also imposes stricter control over several industries such as manufacturing of automobiles and motorcycles.

The below table sets forth certain significant changes introduced by the 2015 Catalogue:

<b>Industries</b>	<b>2011 Catalogue</b>	<b>2015 Catalogue</b>
<b>Commercial Service</b>		
Legal consultancy	“Restricted.”	With respect to “legal consultancy on Chinese laws” - “Prohibited” (except for provision of information in relation to China legal environment). With respect to other legal consultancy - “Permitted.”
Accounting and auditing	“Encouraged” – limited to Sino-Foreign Joint Ventures or Sino-foreign cooperative joint ventures.	“Encouraged.” The nationality of the chief partner should be Chinese.
<b>Cultural, Sports and Leisure</b>		
Operation of performance venues	“Encouraged.” Chinese party should hold a controlling interest.	“Encouraged.” Requirement on controlling interest being held by Chinese party is eliminated.
Operation of amusement venues	“Restricted” – limited to Sino-Foreign Joint Ventures.	“Permitted.”
Operation of golf courses and villas	“Prohibited.”	“Permitted.”

Industries	2011 Catalogue	2015 Catalogue
<b>Education</b>		
Institutions of higher learning	“Encouraged” – limited to Sino-Foreign Joint Ventures.	“Restricted” – limited to Sino-foreign cooperative joint venture which should be led by Chinese party; “being led by Chinese party” means (i) the nationality of the dean or main administrative person-in-charge should be Chinese, and (ii) half or more members of the board of governors, board of directors, or the joint management committee should be assigned by the Chinese party.
<b>Utilities</b>		
Construction and operation of ultra-supercritical power stations with single unit power of 600,000 kw	“Permitted.”	“Encouraged.”
Construction and operation of power grids	“Restricted.” Chinese party should hold a controlling interest.	“Encouraged.” Chinese party should hold a controlling interest.
<b>Financial Industry</b>		
Banks	“Restricted.”	“Restricted.” In addition, (i) a single foreign financial institution’s shareholding interest in a Chinese commercial bank should be capped at 20 percent (or for multiple foreign institutions, 25 percent); and (ii) the foreign financial institution that invests in the medium or small size rural financial institution must be a banking-related foreign financial institution.
Finance companies, trust companies and money brokers	“Restricted.”	“Permitted.”

Industries	2011 Catalogue	2015 Catalogue
<b>Manufacturing</b>		
<u>Beverage Manufacturing:</u> production of yellow wine, and selected high-quality white wine	"Restricted." Chinese party should hold a controlling interest.	"Permitted."
<u>Beverage Manufacturing:</u> processing of green teas and specialty teas using traditional Chinese processes (famous tea, fermented dark tea, among others.)	"Prohibited."	"Permitted."
<u>Chemical Raw Material and Chemical Product Manufacturing:</u> production of certain selected products such as soda ash and caustic soda, photosensitive materials, benzidine, etc.	"Restricted."	"Permitted."
<u>Chemical Fiber Manufacturing:</u> (a) production of chemical fibers from conventional chipspinning; and (b) production of viscose fibers	"Restricted."	"Permitted."
<u>Medicine Manufacturing:</u> production of certain selected medicine products such as (i) vaccines included in the state immunization programme; (ii) chloramphenicol, penicillin G, jiemycin, gentamycin, etc; and (iii) blood products	"Restricted."	"Permitted."
<u>Electric Machinery and Apparatus Manufacturing :</u> manufacture of vented (direct emission of acid mist) lead acid batteries, mercury containing silver oxide button batteries, mercury-containing alkaline zinc manganese button batteries, pasted zinc manganese batteries, and nickel cadmium batteries	"Prohibited."	"Permitted."

Industries	2011 Catalogue	2015 Catalogue
<u>Whole Automobiles, Special Automobiles and Motorcycles Manufacturing</u>	“Permitted.”	“Restricted,” and (a) Chinese shareholding ≥ 50 percent; and (b) for a single foreign investor, no more than two joint ventures for manufacturing of the same type of whole automobiles (not applicable if the foreign investor and its Chinese partner jointly merge or acquire other domestic manufacturing enterprises).
<b>Real Property Industry</b>		
Development of large tracts of land	“Restricted” – limited to Sino-Foreign Joint Ventures.	“Permitted.”
Construction and operation of high-end hotels, high-end office buildings and international conference centers	“Restricted.”	“Permitted.”
Real property secondary market trading and real property intermediaries or brokerages		
<b>Wholesale and Retail</b>		
Direct sale, mail order, and online sale	“Restricted.”	“Permitted.”
Distribution of audio and video products (excluding motion pictures)	“Restricted” – limited to Sino-foreign cooperative joint ventures.	“Permitted.”

- *The Foreign Investment Industrial Guidance Catalogue (Revised in 2015)*
- 《外商投资产业指导目录（2015年修订）》
- Issuing authority: National Development and Reform Commission, the Ministry of Commerce and other authorities
- Date of issuance: March 10, 2015 / Effective Date: April 10, 2015

**4. MIIT Removes Foreign Equity Ratio Restrictions for Online Data Processing and Transaction Processing Business**

工信部放开自贸区在线数据处理与交易处理业务外资股权比例限制 (01/13/2015)

On Jan. 13, 2015, the Ministry of Industry and Information Technology (the **MIIT**) released the *Circular on Removing the Restrictions on the Foreign Equity Ratios in Online Data Processing and Transaction Processing Business (E-Commerce Business) in the China (Shanghai) Pilot Free Trade Zone (the **SPFTZ**) (the **Circular**)*.

The Circular was promulgated following the *Decision Concerning the Interim Adjustment of Implementation of Relevant Administrative Regulations and Rules as Approved by State Council Regarding the Special Administrative Measure on Market Entry In China (Shanghai) Free Trade Pilot Zone (the*

**Decision**), which was released by the State Council Sept. 4, 2014. The Decision eases and even eliminates certain qualifications, shareholding, and market-entry related requirements on the foreign investments within the SPFTZ.

The Circular announces the decision to remove the restrictions on the foreign equity ratio in online data processing and online transaction processing business (E-Commerce business) in the SPFTZ. That means the foreign equity ratio in such businesses could reach 100 percent.

- *Circular on Removing the Restrictions on the Foreign Equity Ratios in Online Data Processing and Transaction Processing Business (Commercial Internet Information Service) in the China (Shanghai) Pilot Free Trade Zone*
- 《关于在中国（上海）自由贸易试验区放开在线数据处理与交易处理业务（经营类电子商务）外资股权比例限制的通告》
- *Issuing authority: the Ministry of Industry and Information Technology*
- *Date of issuance: January 13, 2015 / Effective date: January 13, 2015*

## Intellectual Property

### 5. Supreme People's Court Revises Several Provisions on Issues Concerning the Application of Law in the Adjudication of Patent Dispute Cases

最高人民法院修改《最高人民法院关于审理专利纠纷案件适用法律问题的若干规定》  
(01/29/2015)

On Jan. 29, 2015, the Supreme People's Court published the *Decision of the Supreme People's Court on Revising Several Provisions of the Supreme People's Court on Issues Concerning the Application of Law in the Adjudication of Patent Dispute Cases* (the **Decision**). The Decision modifies the *Several Provisions of the Supreme People's Court on Issues Concerning the Application of Law in the Adjudication of Patent Dispute Cases* (the **Provisions**), in order to make the Provisions consistent with the current Patent Law of the People's Republic of China (the **Patent Law**) and the judicial interpretation thereof. The key contents of the Decision are summarized below.

#### Key Points of the Decision

Below are key points of the Decision:

- > Adding the Place of Offering for Sale as a Place of Infringement for Design Patent. The Decision revised the Provisions to add the places of offering for sale as one of the places of infringement for design patents. This change was made to be consistent with the Patent Law.
- > Changing "Necessary Technical Features" into "All Technical Features." The *Interpretations of the Supreme People's Court Concerning Certain Issues on the Application of Law for the Adjudication of Cases on Disputes over Infringement of Patent Rights* (the **Interpretations**) released in 2009 provided when determining whether the allegedly infringing technical features fall within the protection scope of a patent, courts should take into account all technical features of the patent instead of only the "necessary technical features." Accordingly, the Decision revised the Provisions to clarify that the scope of protection for a patent right should be determined based on all technical features of the patent.
- > Changing the Amount of Compensation for Patent Infringement. In accordance with changes to the Patent Law, the Decision provides that in determining compensation for patent infringements, where no royalty exists as a reference or the royalty is clearly unreasonable, the people's courts may base the amount of compensation according to the type of the patent right concerned, the nature and circumstances of the infringing act and other factors, and fix an amount between RMB 10,000 and RMB 1,000,000.
- > Search Report vs. Assessment Report. In patent infringement disputes involving a utility model or design, the current Patent Law provides that courts or patent administrative departments may require the patent holders to provide the "assessment reports" issued by the relevant patent administrative departments to serve as evidence. This is in contrast to the previous version of the Patent Law, which only provides that in these cases courts or the patent administrative departments may ask the patent holder to furnish "search reports" issued by the relevant patent administration departments. Accordingly the Decision revised the Provision to provide that: (1) for lawsuits involving the alleged infringement of utility model patents filed before Oct. 1, 2009, the plaintiffs may provide the search

reports; and (2) for lawsuits involving the alleged infringement of utility model or design patents filed on or after Oct. 1, 2009, the plaintiffs may provide the assessment reports.

### Conclusion

The Decision modifies the Provisions to be consistent with the changes to the Patent Law and the judicial interpretations thereof.

- *Decision of the Supreme People's Court on Revising the Several Provisions of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Patent Dispute Cases*

- 《最高人民法院关于修改〈最高人民法院关于审理专利纠纷案件适用法律问题的若干规定〉的决定》

- Issuing authority: Supreme People's Court

- Date of issuance: January 29, 2015 / Effective date: February 1, 2015

## 6. Supreme People's Court Interprets Issues Concerning the Application of Law in the Adjudication of Requests for Behavior Preservation in Intellectual Property Rights and Competition Disputes

最高人民法院对审查知识产权与竞争纠纷行为保全案件适用法律问题做解释 (02/26/2015)

On Feb. 26, 2015, the Supreme People's Court published the draft *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Adjudication of Requests for Behavior Preservation in Intellectual Property Rights and Competition Disputes (Draft for Comment)* (the **Draft**) to solicit public comments. The Draft purports to standardize the review of behavior preservation requests in intellectual property rights (IPR) cases, and it combines and enhances a previous interpretation by the Supreme People's Court regarding pre-suit behavior preservation requests in trademark cases—the *Interpretation of the Supreme People's Court on the Application of Law for Stopping the Infringement upon the Right to the Exclusive Use of a Registered Trademark and Preserving Evidence before Initiating Litigation* (the **Trademark Interpretation**)—and the existing provisions issued by the Supreme People's Court regarding pre-suit behavior preservation requests in patent cases—the *Several Provisions of the Supreme People's Court on Issues Concerning the Application of Law to Ceasing Patent Infringement Behavior Prior to Litigation* (the **Patent Provisions**). The key contents of the Draft are summarized below.

### Eligible Applicants

The Draft provides that the following parties may apply for in-suit behavior preservation requests in IPR cases: patentee, trademark registrant, copyright holder, any other IPR holder, and interested party (includes licensee to an IPR licensing contract and the assignees of an IPR). Further, among these eligible applicants, a licensee to an exclusive license agreement has an independent right to file a behavior preservation request. The licensee to a sole license agreement may file a request jointly with the rights holder, or may file a request alone if the rights holder does not file any application. The licensee to a general license agreement may file an application upon specific authorization by the rights holder.

### Review Procedures

The Draft provides specific procedures for the review of the requests for behavior preservation in IPR cases. For example, the courts are required to render a decision on behavior preservation requests within 30 days. Before ruling, courts should conduct inquiries with the applicant and the respondent. Further, courts are instructed to take the following factors into account when rendering their decisions: the possibility of the applicant to obtain a favorable judgment in the underlying IPR case, the risks of irreparable damage to the applicant brought by the respondent's behavior, and whether the

contemplated preservation measures will cause unreasonable damage to the respondent and the public interest.

### **Protection of the Rights of Respondents**

The Draft contains many features designed to protect the rights of respondents. For example, the Draft proposes that courts should render rulings in non-emergency cases within 30 days – which is a significantly longer period of time than the 48-hour review period provided under the Trademark Interpretation and the Patent Provisions. The Draft also provides for more specific procedures of review and detailed instructions on the considerations courts should study in making their rulings, reflecting that the Supreme People's Court is taking a more cautious approach with respect to the review of behavior preservation requests.

Note that same as the Trademark Interpretation and the Patent Provisions, the Draft requires applicants to provide reasonable guarantees, the amount of which should be sufficient to cover the loss of respondents in the case the behavior preservation requests are wrongfully submitted.

### **Conclusion**

The Draft combines and modifies the current Trademark Interpretation and Patent Provisions, creating a more complete system for the review of behavior preservation requests in IPR cases. The Draft also provides more protection to respondent rights than the currently existed provisions and interpretations.

- *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Review of Cases Involving Behavior Preservation for Intellectual Property Right and Competition Disputes (Draft for Comment)*
- 《最高人民法院关于审查知识产权与竞争纠纷行为保全案件适用法律若干问题的解释（征求意见稿）》
- *Issuing authority: Supreme People's Court*
- *Date of issuance: February 26, 2015 / Effective date: N/A*

## Dispute Resolution

### 7. SPC Issues Judicial Interpretation on Civil Procedure Law

最高人民法院发布《民事诉讼法司法解释》(01/30/2015)

On Jan. 30, 2015, the PRC Supreme People's Court (the **SPC**) promulgated its *Judicial Interpretation of the Civil Procedure Law* (the **Interpretation**), which came into effect Feb. 4, 2015. The Interpretation aims to assist the implementation of the current Civil Procedure Law, as last amended in 2012 (the **2012 CPL**).

The Interpretation is divided into 23 chapters and composed of 552 articles. The most significant highlights of the Interpretation include the following aspects:

- *Protection of the Litigation Rights*

According to the Interpretation, a case acceptance registration system is required to be established. When a people's court receives a complaint from a party concerned, if the conditions for the institution of an action are satisfied, the people's court should register the complaint and put the litigation on file. If it is unable to judge whether the conditions for the institution of an action are satisfied on the site, the people's court should receive the litigation materials and issue a written receipt with the receiving date marked. If it is necessary to supplement the relevant necessary materials, the people's court should notify the party concerned in a timely manner. After the relevant materials are supplemented, the people's court should decide whether to put the litigation on file within seven days.

- *Court Rules*

The Interpretation added new provisions to regulate the court rules. According to the Interpretation, where participants in actions or other persons conducted sound recording, video recording and photographing without permission during the trial, or live communication of judicial activities by means of mobile communications or otherwise without permission during the trial, a people's court may temporarily detain apparatus used by participants in actions or other persons to conduct sound recording, video recording, photographing and communication of judicial activities, and order them to delete the relevant content. If they refuse to delete the relevant content, the people's court may take necessary measures to compulsorily delete the content.

- *Evidence*

The Interpretation has introduced detailed rules in principles for determining burden of proof, procedures and time limits for submitting evidence, as well as criteria for determining the probative value of evidence. The Interpretation also specifies that electronic data in the form of emails, electronic data interchange, online chatting records, blogs, microblogs, short messages, electronic signatures, and domain names may also be submitted as evidence.

- *Principle of Good Faith*

The Interpretation emphasizes the principle of good faith and includes articles prohibiting false lawsuits and evasion of enforcement. According to the Interpretation, where a party concerned with the burden of proof refuses to appear in court, receive inquiries or sign a guarantee, and there is no other evidence to demonstrate a fact to be proven, the people's court should not affirm the said fact claimed by the party concerned. Where a witness refuses to sign a guarantee, he/she should not give testimony and he/she should undertake the relevant expenses by himself/herself. Where a party subject to enforcement does not perform the obligations as determined by a legal instrument, a people's court may, in addition to imposing punishment on such party subject to enforcement, include such party in the list of parties who have lost their credit based on the circumstances, and inform the party's employer, credit information service agencies, and other related institutions of the information concerning the non-performance by such party subject to enforcement or its incomplete performance of his/her obligation.

- *Public Interest Lawsuits*

The 2012 CPL has a new article regarding public interest lawsuits, which read as follows: *legally designated institutions and relevant organizations may initiate proceedings at the people's court against conducts jeopardizing the public interest such as causing pollution to the environment or damaging the legitimate rights or interests of consumers at large.* The Interpretation has included a new chapter on this topic. According to the Interpretation, the following conditions need to be satisfied to initiate public interest lawsuits: (i) there is a definite defendant; (ii) there is a concrete claim; (iii) there is preliminary evidence on any damage to public interests; and (iv) the lawsuit is within the scope of acceptance of civil lawsuits by the people's court and jurisdiction of the people's court with which the lawsuit is filed.

Regarding the jurisdiction of public interest lawsuits, the Interpretation specifies that a public interest lawsuit shall be under the intermediate people's court in the place of the tort or domicile of the defendant, save as otherwise stipulated by laws and judicial interpretations. A public interest lawsuit filed against pollution of the marine environment should come under the jurisdiction of a maritime court in the place of occurrence of the pollution, damage or pollution prevention measures. Where a public interest lawsuit is filed with two or more people's courts against the same tort respectively, the lawsuit should come under the jurisdiction of the people's court which puts the lawsuit on file first. When necessary, the common superior people's court of such people's courts should designate jurisdiction.

- *Small Claims Procedure*

The Interpretation also provides a chapter regarding small claims procedure. According to the 2012 CPL, when hearing simple civil cases with the subject amount being below 30 percent of the average annual salary of the employees of each province, autonomous region and municipality in the previous year, the basic people's court or the tribunal dispatched by it may apply the small claim procedure. The ruling in the first trial should be final.

According to the Interpretation, the small claims procedure should apply to the trial of the following cases concerning payment of money: (i) disputes over sales contracts, loan contracts and lease contracts; (ii) disputes only over support payment, upbringing payment, and maintenance payment in respect to the amount, time and method of payment, on the premise of

a clear identity relationship; (iii) disputes over damages for a traffic accident and other personal injuries in respect to the amount, time and method of payment, on the premise of clear liability; (iv) disputes over contracts for the supply of water, electricity, gas and heating power; (v) disputes over bank card; (vi) disputes over labor contracts in respect of the amount, time and method of payment of labor remuneration, medical fees for work-related injury, economic compensation or indemnities, on the premise of a clear labor relationship; (vii) disputes only over labor service contracts in respect of the amount, time and method of payment of remuneration for personal services, on the premise of a clear labor service relationship; (viii) disputes over service contracts on properties, telecommunications or others; and (ix) other disputes over payment of money. The small claims procedure does not apply to the trial of the following cases: (i) disputes over the verification of personal relations or property rights; (ii) foreign-related civil disputes; (iii) disputes over intellectual property rights; (iv) disputes needing assessment and examination by experts or over objections to pretrial assessment or examination results; and (v) other disputes to which the rule that the first trial decision should be final does not apply.

- *Judicial Interpretation on Civil Procedure Law*
- 《民事诉讼法司法解释》
- *Issuing Authority: PRC Supreme People's Court*
- *Date of Issuance: January 30, 2015 / Effective Date: February 4, 2015*

## 8. SPC Releases Provisions on Issues Concerning the Hearing of Cases by Circuit Courts

最高人民法院发布《关于巡回法庭审理案件若干问题的规定》(01/28/2015)

On Jan. 28, 2015, the PRC Supreme People's Court (the **SPC**) released the *Provisions on Several Issues Concerning the Hearing of Cases by Circuit Courts* (the **Provisions**), which came into effect Feb. 1, 2015.

### Base Locations of Circuit Courts

According to the Provisions, the SPC officially launched its two circuit courts. The first circuit court is based in Shenzhen, Guangdong Province, and covers Guangdong Province, Hainan Province, and the Guangxi Zhuang Autonomous Region. The second circuit court is based in Shenyang, Liaoning Province, and covers three northeastern provinces of Liaoning, Jilin, and Heilongjiang. The circuit courts are adjudicatory organs designated by the SPC. Their judgments, orders and decisions equal those of the SPC. All judges working in the circuit courts will be selected and sent by the SPC.

### Cases to Be Handled by Circuit Courts

The Provisions specify that the circuit courts will hear or handle the following cases that should be accepted by the SPC within the circuits:

- (i.) first-instance administrative cases that are significant and complicated on a national scale;
- (ii.) first-instance civil and commercial cases that are of significant nationwide influence;
- (iii.) cases in relation to the appeal against the first-instance administrative or civil or commercial judgments rendered by the high people's courts;

- (iv.) cases in relation to the application for a retrial of legally effective administrative or civil or commercial judgments, rulings and mediation decisions that are rendered by the high people's courts;
- (v.) criminal appeal cases;
- (vi.) cases in relation to the application for a retrial that is filed according to the legitimate authority;
- (vii.) cases in relation to the application for reconsideration of penalty or detention decisions made by the high people's courts;
- (viii.) cases brought by the high people's courts to the SPC for judgments or decisions due to jurisdictional issues;
- (ix.) cases brought by the high people's courts for extension of the duration of hearing;
- (x.) civil or commercial cases and judicial assistance cases involving Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan; and
- (xi.) other cases that should be heard or handled by the circuit courts according to the opinions of SPC.

- *Provisions on Issues concerning the Hearing of Cases by Circuit Courts*

- 《关于巡回法庭审理案件若干问题的规定》

- *Issuing Authority: PRC Supreme People's Court*

- *Date of Issuance: January 28, 2015 / Effective Date: February 1, 2015*

## Consumer Rights

### 9. SAIC Publishes the Measures for the Punishment of Conduct Infringing the Rights and Interests of Consumers

国家工商总局发布《侵害消费者权益行为处罚办法》(05/01/2015)

On Jan. 5, 2015, the State Administration for Industry and Commerce of the People's Republic of China (SAIC) published its *Measures for the Punishment of Conduct Infringing the Rights and Interests of Consumers* (the **Measures**). The Measures contain a number of provisions defining circumstances under which enterprise operators may be deemed to have infringed the rights or interests of consumers. These terms are consistent with the basic rules in the currently effective *Law on the Protection of Consumer Rights and Interests* (the **Consumer Protection Law**). The Measures took effect March 15, 2015.

#### Definition and Protection of Consumer Personal Information

The Measures provide a list of actions that enterprise operators may not undertake because they infringe upon consumers' personal information. This is an important development because it provides a definition of "consumer personal information," which refers to "information collected by an enterprise operator during the sale of products or provision of services, that can, singularly or in combination with other information, identify a consumer." The Measures also provide a list of specific examples of "consumer personal information," including a consumer's "name, gender, occupation, birthdate, identification card number, residential address, contact information, income and financial status, health status, and consumer status." Under the Measures, business operators are prohibited from:

- > Collecting or using personal information without the consumer's consent;
- > Disclosing, selling, or illegally transferring personal information to third parties; or
- > Sending commercial information to the consumer if the consumer has neither agreed to receive it, nor asked for it, or the consumer has communicated clearly that he or she does not want to receive it.

The failure to comply with the above requirements is subject to the various (and onerous) penalties set out in the Consumer Protection Law. Under the Consumer Protection Law, SAIC can punish non-compliant business operators with an order for remediation and one or more of the following penalties:

- > A warning;
- > Confiscation of illegal gains;
- > A fine of one to 10 times the amount of illegal gains, or if there are no illegal gains, up to a maximum of RMB 500,000; and
- > In serious circumstances, closure of the business for remediation or revocation of the company's business license.

#### Return and Replacement of Purchased Goods

Under the Measures, business operators bear several obligations to consumers, including repair, remanufacturing, replacement, return of goods, making up for quantity shortage, refund of payment for

goods and services, or compensation for losses in accordance with the law or agreement reached by the parties concerned. Business operators also are prohibited from deliberately delaying their response to the requirements of a consumer, or refusing to satisfy the legitimate demands of a consumer.

If goods are sold via the Internet, television or phone, by mail order or otherwise, business operators are obligated to accept the return of goods by consumers for any reason, and should not deliberately delay performing, or refuse to perform such obligations.

#### **Prohibitions on False or Misleading Publicity**

According to the Measures, business operators are not allowed to engage in any false or misleading advertising activities. For instance, business operators are prohibited from utilizing deceptive pricing practices—such as false "clearance prices," "sale prices," and "lowest prices"—or false campaigns of "prize-giving sales" or "sales that return costs to consumers."

#### **Conclusion**

The Measures propose to further enforce the Consumer Protection Law and protect consumer rights. In addition, although the definition of "personal information" applies only in the context of consumer protection, it is an instructive milestone in the legislation of collection and use of personal information.

- *Measures for Punishments against Infringements on Consumer Rights and Interests*

- 《侵害消费者权益行为处罚办法》

- *Issuing authority: State Administration for Industry and Commerce*

- *Date of issuance: January 5, 2015/ Effective Date: March 15, 2015*

## Tax

### 10. SAT Releases Trial Administrative Measures on Individual Income Tax on Income from Equity Transfer

国家税务总局发布《股权转让所得个人所得税管理办法（试行）》(12/07/2014)

On Dec. 7, 2014, the State Administration of Taxation (**SAT**) released the *Trial Administrative Measures on Individual Income Tax on Income from Equity Transfer (SAT Announcement [2014] No.67)* (the **Administrative Measures**), which became effective on Jan. 1, 2015.

The Administrative Measures address the individual income tax (**IIT**) treatment and reporting requirements applicable to transfer of shares in Chinese companies by its individual shareholders. Individuals will be required to pay a 20 percent IIT under the tax category of “income from the transfer of property” on such transfers, and submit relevant documentation to the local tax authorities. The taxable amount of the gain derived from the transfer of shares by an individual will be calculated by deducting from gross income the original cost of the shares and reasonable expenses incurred in connection with the transfer.

The Administrative Measures indicates that gross income from a share transfer must be recognized at a fair market value. The tax authorities are empowered to reassess the gross income if the taxpayer fails to provide relevant documents, or if the gross income is “significantly low” without a “justifiable reason.”

In addition, the Administrative Measures introduces pre-transfer and post-transfer reporting requirements applicable to the transferor, the transferee and the investee enterprise.

#### Pre-transfer Reporting

The transferee must report the transaction to the competent tax authorities within five business days after the transfer agreement is signed. The investee enterprise must submit copies of the board resolutions and minutes of shareholder meetings to the competent tax authorities within five days after the relevant meeting is held.

#### Tax Reporting

The transferor and transferee must report income and file a tax return with the competent tax authorities within 15 days of the month subsequent to that in which any of the following events take place: (i) the transferee paid, in whole or in part, the consideration for the shares; (ii) the transfer agreement is signed or becomes effective; (iii) the transferee actually fulfilled the shareholder’s obligations or executed the shareholder’s rights; (iv) the registration or announcement procedure with the relevant government department is completed so that the transfer becomes effective; (v) the relevant transfer action is completed; or (vi) other events as determined by tax authorities indicating that there was a share transfer.

#### Post-transfer Reporting

The investee enterprises must report the change in individual shareholders’ ownership of the shares to the competent tax authorities within 15 days of the month following the month in which the change occurred.

- *Trial Administrative Measures on Individual Income Tax on Income from Equity Transfer*
- 《股权转让所得个人所得税管理办法（试行）》
- *Issuing Authority: State Administration of Taxation*
- *Date of Issuance: December 7, 2014 / Effective Date: January 1, 2015*

## 11. Chinese State Administration of Taxation Issues Circular on Several Issues Concerning Enterprise Income Tax from Indirect Transfer of Property by Non-Resident Enterprises

国税局发布《关于非居民企业间接转让财产企业所得税若干问题的公告》(02/03/2015)

On Feb. 3, 2015, the State Administration of Taxation (**SAT**) issued the *Circular on Several Issues Concerning Enterprise Income Tax from Indirect Transfer of Property by Non-resident Enterprise* (the **Circular**), which became effective on the same day. This Circular clarifies the indirect transfer of property of a non-resident enterprise provided under the *Notice of State Administration of Taxation on Strengthening Administration of Corporate Income Tax on Income from Transfer of Equity by Non-resident Enterprises* (the **Notice**).

### Scope of Application

The Circular provides that when a non-resident enterprise indirectly transfers “taxable property”—including, for example, equity interest in a Chinese-resident enterprise and real properties located in China—under an unreasonable business arrangement in order to circumvent the tax obligation associated with such transfer, such transfer would be re-characterized and recognized as a direct transfer of the taxable property to which the Chinese enterprise income tax regime is applicable. An example of an indirect transfer includes a transfer of equity interest of the offshore entity that directly or indirectly holds the taxable property (the **Offshore Intermediary**).

Under the Circular, when determining whether an indirect transfer is under an unreasonable business arrangement, the tax authority has to take into account the whole structure of the subject transaction to analyze:

- > whether the main value of the equity interest of Offshore Intermediary is derived from the taxable property;
- > whether the assets of Offshore Intermediary is directly or indirectly constituted by the investments in China or whether the revenue of such Offshore Intermediary is directly or indirectly generated from China;
- > whether the performance of function and risk exposure of the Offshore Intermediary or its subsidiaries which directly or indirectly hold the taxable property can substantiate and justify that the whole group structure is bona fide commercially reasonable;
- > the history, the business and the organization of the Offshore Intermediary;
- > the tax levied or to be levied by offshore tax authority in relation to such indirect transfer of taxable property;
- > whether it would have been possible for the transferring party to directly invest in and transfer the taxable property, instead of investing in or transferring the taxable property indirectly; and

- > the tax pact or treaty in China applicable to such indirect transfer and other factors.

#### **Per Se Unreasonable Business Arrangement**

The Circular provides several circumstances under which an indirect transfer of taxable property will be deemed to be, per se, an unreasonable business arrangement. Examples include the following:

- > 75 percent or more of the value of the equity interest in the Offshore Intermediary is derived from or attributable to the taxable property;
- > at any time in the preceding year prior to the indirect transfer, 90 percent or more of the aggregate assets (excluding cash) of the Offshore Intermediary directly or indirectly consists of or is attributable to the investment in China, or 90 percent or more of the revenue of the Offshore Intermediary is directly or indirectly derived from China;
- > the tax levied by the offshore tax authority in relation to the indirect transfer is lower than that of which may be levied by the PRC tax authority if a direct transfer of taxable property were to occur.

#### **Safe Harbor**

The Circular also provides a “safe harbor” for certain indirect transfers by non-resident enterprises which will not be subject to the PRC enterprise income tax regime:

- > when the non-resident enterprise trades the shares of an offshore public company which holds interest in the taxable property;
- > when the proceeds generated from the indirect transfer are exempted from PRC enterprise income tax due to applicable tax treaty and arrangement; and
- > for certain qualified transfers between affiliates.

#### **Withholding Obligation**

The Circular requires that in an indirect transfer by a non-resident enterprise if any PRC enterprise income tax is payable, the entity or individual who directly pays the consideration for the transfer has the obligation to withhold the applicable PRC enterprise income tax on behalf of and for the non-resident enterprise.

#### **Conclusion**

The Circular further clarifies the tax exposure of indirect transfers of taxable property by non-resident enterprises.

- *Circular on Several Issues Concerning Enterprise Income Tax from Indirect Transfer of Property by Non-resident Enterprise issued by State Administration of Taxation*

- 国家税务总局发布《关于非居民企业间接转让财产企业所得税若干问题的公告》

- *Issuing authority: State Administration of Taxation*

- *Date of issuance: February 03, 2015 / Effective date: February 03, 2015*

## 12. China Issues Notice on Several Issues Concerning Enterprise Income Tax Generated by Contribution of Non-Cash Assets as Equity

中国政府发布《关于非货币性资产投资企业所得税政策问题的通知》(12/31/2014)

On Dec. 31, 2014, the Ministry of Finance and the State Administration of Taxation jointly issued the *Notice on Several Issues Concerning Enterprise Income Tax Generated by Contribution of Non-Cash Assets as Equity* (the **Notice**). The Notice sets forth the rules regarding the enterprise income tax levied on resident enterprises in relation to the investment in kind.

### Recognition of Income

When a Chinese resident enterprise (the **Investor**) incorporates a new company with non-cash property or subscribes the capital increase of an existing company with non-cash property (the **Non-cash Contribution**), as the appraised fair market value of such Non-cash Contribution may be higher than its book value, the difference between appraised fair market value and book value of such Non-cash Contribution will be recognized as income to the Investor. As a result, certain enterprise income tax would be levied on the Investor.

The Notice provides that when the Investor contributes a Non-cash Contribution, the Non-cash Contribution must be appraised by third party to determine the fair market value.

The income in relation to the Non-cash Contribution will be recognized upon the completion of registration with Administration for Industry and Commerce of the new incorporation or capital increase. The Investor is permitted to allocate such income over a period of five years; however, any unpaid deferred income tax will become immediately payable upon the transfer of its equity by the Investor, the withdrawal of the Non-cash Contribution, or the deregistration of the invested company.

This Notice became effective retroactively from Jan. 1, 2014.

### Conclusion

Going forward, if a company intends to contribute non-cash property as its form of capital contribution, it has to be concerned with potential tax exposure.

- *Notice on Several Issues Concerning Enterprise Income Tax Generated by Contribution of Non-Cash Assets as Equity*
- 《关于非货币性资产投资企业所得税政策问题的通知》
- *Issuing authority: Ministry of Finance and State Administration of Taxation*
- *Date of issuance: December 31, 2014 / Effective date: January 01, 2014*

## Foreign Exchange

### 13. SAFE Releases Circular on the Pilot Operation of the Cross-border Foreign Exchange Payment Business for Payment Institutions

国家外汇管理局发布《关于开展支付机构跨境外汇支付业务试点的通知》(20/01/2015)

On Jan. 20, the State Administration of Foreign Exchange (**SAFE**) released the *Circular on Launching Pilot Cross-Border Foreign Exchange Payment Services for Payment Institutions* (the **Circular**), which became effective the same day.

The Circular enables payment institutions to provide foreign exchange settlement services. Payment institutions seeking to engage in the pilot scheme need to register with the local SAFE by submitting a written application, business operation scheme, payment business permit issued by the People's Bank of China, and the bank cooperation agreement. Furthermore, according to the Circular, the limit on single transactions for cross-border payment has been raised to \$50,000 (from the previous \$10,000). The restrictions on the number of foreign exchange reserve accounts opened by a payment institution have also been relaxed. In addition, the payment institutions are required to strictly review the identity of their clients involved in the cross-border foreign exchange payment business and retain relevant information for five years.

The most direct effect for this Circular is on the cross-border online shopping market with the single transaction limit raised from \$10,000 to \$50,000.

- *Circular on Launching Pilot Cross-Border Foreign Exchange Payment Services for Payment Institutions*
- 《关于开展支付机构跨境外汇支付业务试点的通知》
- Issuing authority: State Administration of Foreign Exchange
- Date of issuance: January 20, 2015/ Effective Date: January 20, 2015

### 14. SAFE Issues Notice Concerning Further Simplifying and Improving Foreign Exchange Administration on Inbound and Outbound Direct Investment

国家外汇管理局发布《关于进一步简化和改进直接投资外汇管理》(02/13/2015)

On Feb. 13, 2015, the State Administration of Foreign Exchange (the **SAFE**) issued the *Notice Concerning Further Simplifying and Improving Foreign Exchange Administration on Foreign Direct Investment* (the **Notice**) which will become effective June 1, 2015. The Notice aims to simplify and improve the administration of foreign exchange in order to improve and facilitate the flow of the cross-border funds between enterprises.

#### **SAFE Registration for Inbound/Outbound Direct Investment Abolished**

The Notice provides that SAFE will not be responsible for foreign exchange registrations for inbound and outbound direct investment. Instead, the banks will administer the foreign exchange registrations for both inbound and outbound investment, while SAFE will play an indirect supervisory role over these registrations.

### Foreign Exchange Registration Process Simplified

Regarding inbound investment by foreign investors, the Notice eliminates the registration for in-kind capital contribution and the registration for capital contribution to acquire equity interest of a domestic company. When a foreign investor makes a capital contribution in cash, the bank will, upon receipt of the capital funds, handle the registration entry for the capital contribution directly through the capital account information system maintained by SAFE.

Regarding outbound investments, an offshore enterprise established or controlled by a domestic enterprise will no longer have filing obligations when it establishes or invests in other offshore entities.

In addition, SAFE also abolished the foreign exchange annual examination relating to direct investments. Instead, the relevant entities are required to submit data on their equity in domestic direct investment or overseas direct investment on an annual basis.

### Conclusion

To internationalize RMB, SAFE is gradually liberalizing the conversion of RMB. The Notice is another step towards this goal.

- *Notice Concerning Further Simplifying and Improving Foreign Exchange Administration on Inbound and Outbound Direct Investment*
- 《关于进一步简化和改进直接投资外汇管理》
- *Issuing authority: State Administration of Foreign Exchange*
- *Date of Issuance: February 13, 2015 / Effective Date: June 1, 2015*

## Anti-Monopoly

### 15. MOC Releases the Trial Provisions on Imposing Restrictive Conditions on the Concentration of Business Operators

商务部印发《关于经营者集中附加限制性条件的规定（试行）》（12/04/2014）

On Dec. 4, 2014, the Ministry of Commerce (the **MOC**) released the *Trial Provisions on Imposing Restrictive Conditions on the Concentration of Business Operators* (the **Trial Provisions**), which came into effect Jan. 5, 2015.

#### Background

*The People's Republic of China Anti-Monopoly Law* (the **Anti-Monopoly Law**) released by the MOC on Aug. 30, 2007, provides that in the event a concentration of business operators has or may have the effect of eliminating or restricting competition, the MOC may decide to impose restrictive conditions on such concentration, in order to reduce the adverse effect it may have on market competition. On July 5, 2010, the MOC further released the *Tentative Provisions on Implementing Divestiture of Assets or Business in Concentration of Business Operators* (the **Tentative Provisions**), which provide the requirements and procedures for divestiture of assets or business at the request of the MOC as the restrictive conditions for a concentration. The Tentative Provisions were abolished as the Trial Provisions took effect.

Compared to the Tentative Provisions, the Trial Provisions established a more systematic and detailed procedure for imposing restrictive conditions on concentration that may adversely affect competition. The key changes of the Trial Provisions are summarized as follows:

#### Categories of Restrictive Conditions

According to the Trial Provisions, there are three types of restrictive conditions that may be imposed by MOC on a concentration of business operators:

1. structural conditions (e.g., divestiture of tangible assets, intangible assets including intellectual property rights or the relevant rights and interests);
2. behavioral conditions (e.g., opening infrastructures including networks or platforms, licensing key technologies such as patents, know-how or other intellectual property rights, and terminating exclusive agreements); and
3. comprehensive conditions combining both structural conditions and behavioral conditions.

#### Procedure for Imposing Restrictive Conditions

1. Initiation of Restrictive Conditions. After the MOC reviews the application of concentration of business operators, in the case it considers the concentration has or may have the effect of eliminating or restricting competition, the MOC should inform the applicant in time. The applicant should propose restrictive conditions suggestions for the concentration within a prescribed period. The applicant may also propose such suggestions before the MOC raises concern of the concentration's effect on competition.

2. The MOC's Decision. The MOC would discuss the proposed restrictive conditions suggestions with the applicant, obtain opinions from other relevant parties, make evaluations, and finally reach a decision on the restrictive conditions. In the case there is risk that the proposed suggestions cannot be implemented, the MOC may request that the applicant propose an alternative plan, which should be stricter than the previous plan. In the case the applicant does not propose an alternative plan within the prescribed period or such suggestions are insufficient to reduce the adverse effect on competition, the MOC should forbid such concentration.
3. Implementation of Restrictive Conditions. The applicant should fulfill the restrictive conditions requirements according to the MOC's decision, such as divestiture of assets and/or opening infrastructures within the prescribed period. For violations of the MOC's decision, the relevant business operator may be ordered to rectify them within prescribed period. For serious violations, the MOC should order to cease the concentration, dispose the equity or assets, transfer business, and take other necessary actions to restore to the state before the concentration, in addition to fines below RMB 500,000.

- *Trial Provisions on Imposing Restrictive Conditions on the Concentration of Business Operators*
- 《关于经营者集中附加限制性条件的规定（试行）》
- *Issuing authority: Ministry of Commerce*
- *Date of issuance: Dec.4, 2014/ Effective date: Jan. 5, 2015*

## Miscellaneous

### 16. CBRC Releases Draft of Administrative Measures for Entrusted Loans Undertaken by Commercial Banks

中国银行业监督管理委员会就《商业银行委托贷款管理办法（征求意见稿）》公开征求意见（01/16/2015）

On Jan. 16, 2015, the China Banking Regulatory Commission (the **CBRC**) released for public comment the proposed draft of the *Administrative Measures for Entrusted Loans Undertaken by Commercial Banks (Draft for Comment)* (the **Draft**). The public comment period ended Feb. 16, 2015.

Before the Draft was released, entrusted loans undertaken by commercial banks were regulated by the commercial banks themselves. The Draft is intended to enhance CBRC's management on commercial banks' entrusted loan business and to facilitate the healthy development of such business. Key contents of the Draft are summarized below:

#### Definition of Entrusted Loans

The Draft defines an entrusted loan as a loan where the funds are provided by an entruster and issued by commercial banks on behalf of the entruster according to the borrower, purpose of loan, amount, currency, term, and interest rate determined by the entruster, and the use and recovery of which will be assisted and supervised by commercial banks. It is notable that the Draft also explicitly excludes financial asset management companies or institutions with loan business qualifications from eligible entrusters.

#### Application for Entrusted Loans with Commercial Banks

The Draft requires the entruster and borrower to jointly submit the entrusted loan business application with a commercial bank. In the event the entruster or borrower is not a natural person, it should submit the resolution from a competent authority authorizing the entrusted loan or a document with equal legal effect. After the commercial bank, the entruster, and the borrower agree on the relevant entrusted loan matters, the above parties should enter into an entrusted loan agreement.

#### Restriction on the Usage of Entrusted Loans

According to the Draft, the usage of entrusted loans should comply with legal provisions and credit policies. The funds shall not be used for (i) engaging in production or operation of, or investing in products or projects which are specifically banned by the state, (ii) investing in bonds, futures, financial derivatives, finance products or equity investments etc., (iii) registered capital injection or verification or capital increase, or (iv) other purposes specifically banned by the state.

#### Restrictions on the Source of Entrusted Loans

The Draft also proposes the commercial banks should request documents from entrusters to prove that the source of entrusted loan funds is legitimate. The Draft prohibits commercial banks to issue entrusted loans based the following source of funds: (i) special funds which are mandated for special purposes by the state, (ii) credit funds granted by banks, (iii) funds raised by issuing bonds, (iv) funds raised for others, and (v) funds the source of which cannot be proven.

**Secured Entrusted Loans**

In the event the entrusted loan is secured, the Draft proposes the entruster and the guarantor should enter into a guarantee contract for the entrusted loan. The Draft also clarifies that if the entrusted loan is secured by mortgage or pledge, the mortgagee or pledgee shall be the entruster.

- *Administrative Measures for Entrusted Loans Undertaken by Commercial Banks (Draft for Comment)*
- 《商业银行委托贷款管理办法（征求意见稿）》
- Issuing authority: China Banking Regulatory Commission
- Date of issuance: Jan. 16, 2015/Public Comment Deadline: Feb. 16, 2015

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