



1. Draft of the Revised Anti-Unfair Competition Law Released for Public Commenting

国务院法制办就《反不正当竞争法（修订草案送审稿）》公开向社会征求意见

On Feb. 25, 2016, the Legislative Affairs Office of China's State Council released draft revisions to the Anti-Unfair Competition Law (AUCL) for public commenting. The draft revisions may redefine how commercial bribery is interpreted and enforced in China. In releasing the draft revisions, the State Council noted that the AUCL has not been updated since it went into effect in 1993, and that the time was ripe to amend the law to reflect the current economic realities of the country.

If adopted, the draft revisions to the AUCL would: (i) define commercial bribery with greater specificity, including liability provisions for bribes paid through third party agents; (ii) include vicarious liability concepts whereby employers are liable for certain conduct of their employees; (iii) potentially increase the penalties for commercial bribery; and (iv) impose broader record keeping requirements.

Commercial Bribery Redefined

Under the AUCL's current definition, commercial bribery exists where a business operator has "resorted to bribery, by offering money or goods or by any other means, in selling or purchasing commodities." This definition of commercial bribery was frequently criticized for being circular in meaning. The draft revisions adopt an entirely new definition for commercial bribery, now defining it as existing where "a business operator providing or offering to provide financial benefits to its transaction counterparty or a third party that has influence on the business transaction to induce them to procure transaction opportunities or competitive advantages for the business operator."

Employer's Vicarious Liability

The draft revisions provide that “the act of an employee using commercial bribery to seek a transaction-related opportunity or competitive advantage for a business operator should be deemed as an act of the business operator.” Given that the phrasing does not contemplate a finding of fault on the part of the employer, it would appear that employers are strictly liable if their employees engage in commercial bribery.

Penalties

The penalties for commercial bribery under the current AUCL include fines of RMB 10,000 to RMB 200,000 and the confiscation of illegal income and gains. The draft revisions contemplate modifying the penalties to a percentage of the revenue obtained as a result of the commercial bribery.

Record Keeping

As currently drafted, the AUCL provides that companies have the right to provide legitimate discounts and commissions to business partners as long as accurate accounting records are maintained. The draft revisions would broaden the scope of this provision to not only include legitimate discounts and commissions, but also other “economic benefits,” and requires that those benefits be transparently and accurately reflected in books and records, as well as in agreements.

- Draft Revisions to the Anti-Unfair Competition Law
- 《反不正当竞争法（修订草案送审稿）》
- Issuing authority: Legislative Affairs Office of the State Council
- Date of issuance: Feb. 25, 2016

2. New Regulations Implemented for Online Publications

工业和信息化部、国家新闻出版广电总局发布《网络出版服务管理规定》

On Feb. 4, 2016, the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) together with the Ministry of Industry and Information Technology (MIIT) jointly released the Administrative Rules for Online Publishing Services (the Rules). The Rules, which will become effective March 10, 2016, replace the Internet Publishing Administration Interim Rules issued in 2002, and represent a formalization of the Chinese government's already strict administration of online publishing.

Broad Scope

The Rules apply broadly to online publication services, which are defined as “the provision of online publications to the public through information networks” in the PRC. “Online publication” is in turn defined to include (i) works of literature, art, science and technology, including literary works, pictures, maps, videogames, animation, audio, video, and audio-visual works; (ii) digitized books, newspapers, magazines, sound and/or video recordings and electronic publications that were previously published in other media; (iii) online databases of digital works developed from the selection, edition and collection of the above two types of works; and (iv) other categories of digital publications identified by SAPPRFT.

New Permitting Requirements

Under existing law, any person or entity using the Internet for commercial purposes must hold an Internet Content Provider license (ICP license), issued by the MIIT. Under the Rules, an online publisher must also obtain an “Online Publication Services Permit,” (OPS Permit) in addition to the ICP license. The OPS Permit must be obtained prior to engaging in online publication services, and is valid for a period of five years. Among other things, applicants for the OPS Permit are required to meet the following criteria as a condition for eligibility: (i) servers used for online publications must be located in China; (ii) the legal representative of the applicant must be a Chinese citizen residing in China; (iii) have at least 8 eight full-time editorial staff with technical and vocational accreditation by the SAPPRFT; and (iv) the applicant must maintain a “content review system.”

Limitations on Foreign Investment

While rules prohibiting Sino-foreign equity joint ventures, Sino-foreign cooperative ventures, and foreign-funded entities from engaging in online publication services are not new, the Rules require domestic PRC entities that cooperate with Sino-foreign equity or cooperative joint ventures and foreign-operated enterprises to report to SAPPRFT for examination and approval in advance. The implication of this is that companies currently operating in the online publication space through “VIE structures,” which reside in a legal gray area under PRC law, may face additional government scrutiny.

Details Yet to Come

Rulemaking at the central government-level is frequently followed by more detailed regulations regarding implementation. Practitioners and companies potentially affected by the Rules should expect and be mindful of such subsequent regulations, as they will signal the way in which the Chinese government intends to execute and enforce the Rules.

- Administrative Rules for Online Publishing Services
- 《网络出版服务管理规定》
- Issuing authority: State Administration of Press, Publication, Radio, Film and Television and the Ministry of Industry and Information Technology
- Date of issuance: Feb. 4, 2016/Effective date: March 10, 2016

3. New Regulations Issued Regarding Online Payment Services Provided by Non-Bank Entities

中国人民银行公布《非银行支付机构网络支付业务管理办法》

Payments made through non-bank payment platforms such as WeChat and Alipay are becoming increasingly common throughout China. The rapid development of such payment services, however, has also led to increasing concerns regarding their misuse and perceived lack of traditional banking know-your-customer (KYC) mechanisms. It is perhaps due to these concerns that the People’s Bank of China issued the Administrative Measures for Online Payment Services of Non-Banking Payment Institutions (the Measures) on Dec. 28, 2015. The Measures will become effective July 1, 2016.

The Measures apply to online payment services provided by “non-bank payment institutions” (NPI), which are defined as institutions that are not banks, but which nevertheless hold payment business permits authorizing them to provide online payment services.

Pursuant to the Measures, NPIs are required to adopt KYC mechanisms including (i) maintaining real-name client management systems; (ii) verifying the validity of client identification documents; and (iii) establishing unique identification codes for clients, so as to prevent the opening of anonymous or pseudonymous accounts. In addition, the Measures prohibit NPIs from opening accounts for other financial institutions or institutions which provide financing services, loans, asset management services, foreign exchange services, guarantees, and other services traditionally performed by banks.

Another focus of the Measures is the protection of personal information. For example, the Measures restrict an NPI’s ability to store information such as the effective term of their client’s bank cards, as well as passwords and verification codes. The Measures also provide that where personal information is stored, the information should be encrypted.

- Administrative Measures for Online Payment Services of Non-Banking Payment Institutions
- 《非银行支付机构网络支付业务管理办法》
- Issuing authority: People’s Bank of China
- Date of issuance: Dec. 28, 2015/Effective date: July 1, 2016

4. Intercompany Loans Between Chinese Non-Financial Service Entities Recognized

最高人民法院颁发《关于审理民间借贷案件适用法律若干问题的规定》

Intercompany loan arrangements between two Chinese non-financial service entities were previously prohibited, resulting in the use of so-called “entrustment loan” arrangements, whereby a bank was entrusted to act as an intermediary to assist in making and collecting on the loan’s repayment. The entrusted bank would receive a commission for participating in the arrangement and typically assumed no credit risk. Use of the “entrustment loan” arrangement was also a hotly debated topic, as the mechanism was criticized as a legal fiction which emphasized form over legal substance.

On Aug. 6, 2015, China’s Supreme People’s Court promulgated the Provisions on Several Issues concerning the Application of Law in the Trial of Private Lending Cases (the SPC Provisions). SPC Provisions entered into effect on Sept. 1, 2015, and subject to certain exceptions, provide the basis for private loan agreements between non-financial entities to be recognized by the lower courts.

Specifically, the SPC Provisions provide that intercompany loan agreements executed for the purpose of supporting production and business operations (which includes working capital and fixed asset investments) are to be upheld by courts unless:

- (i) credit funds are fraudulently obtained from financial institutions and subsequently lent to a borrower with a high interest, and the borrower knew in advance or should have known this situation;

- (ii) funding of the loan was obtained from other loans taken out by companies or are raised from employees of a company and then lent to a borrower to make profit from such arrangement, and the borrower knew in advance or should have known of this situation;
- (iii) the lender knew in advance or should have known that the borrower will use the loan for illegal or criminal activities but still provided the loan; or
- (iv) the loan is in violation of public order or mandatory laws and administrative regulations.

In addition, the interest rate for intercompany loans are subject to the following stipulations:

- (i) if the agreed upon interest rate is not above 24 percent per year, the lender is entitled to the interest in its entirety;
 - (ii) if the agreed upon interest rate is above 24 percent per year but lower than 36 percent per year, the interest exceeding 24 percent is void; although if the borrower has already paid such interest to the lender, the borrower is not entitled to claim return; and
 - (iii) if the agreed upon interest rate is above 36 percent per year, the interest exceeding 36 percent is void, in which case a borrower has the right to demand lenders to return the part of interest accrued over the 36 percent threshold if it has already been paid.
- Provisions on Several Issues concerning the Application of Law in the Trial of Private Lending Cases
 - 《关于审理民间借贷案件适用法律若干问题的规定》
 - Issuing authority: PRC Supreme People's Court
 - Date of issuance: Aug. 6, 2015/Effective date: Sept. 1, 2015

5. MOFCOM Relaxes Registered Capital Requirements for Foreign Invested Enterprises

商务部颁发《关于修改部分规章和规范性文件的规定》

In recent years, China has begun to remove restrictions on the registered capital of corporations through revisions to the PRC Company Law (as well as pronouncements such as the Decision of the State Council on Abolishing and Amending Certain Administrative Regulations). However, as foreign invested enterprises (FIEs) are regulated under special laws in addition to general laws applicable to business entities, it remained uncertain what extent the relaxed registered capital regime under the Company Law would be applicable to FIEs. On Oct. 28, 2015, the PRC Ministry of Commerce issued the Decision on Amending Certain Rules and Normative Documents (the MOFCOM Decision). The MOFCOM Decision took effect upon issuance, and seeks to remove any perceived inconsistencies between those rules applicable to FIEs and the laws applicable to business entities generally.

Specifically, the MOFCOM Decision removes the minimum registered capital requirements on the following types of FIEs: (i) venture capital enterprises; (ii) the management companies of venture capital enterprises; (iii) holding companies; (iv) joint stock companies; (v) auction companies; (vi) financial leasing companies; (vii) logistics companies; and (viii) international freight forwarding companies.

In addition, the MOFCOM Decision removes the statutory time limit on capital contribution for the following types of FIEs: (i) venture capital enterprises; (ii) holding companies; and (iii) joint stock companies. The full contribution of registered capital is also no longer required for an FIE to: (i) make equity investments in China; (ii) merge with another FIE; (iii) be divided; and (iv) in the case of a foreign invested commercial enterprise, set up new stores in China. At the same time, full contribution of registered capital to an FIE is no longer required for its equity holders to invest their equity interest in the FIE into a different FIE.

The MOFCOM Decisions represent an important step towards harmonizing general laws applicable to business entities, and the special laws governing FIEs. Given, however, that local authorities act as the primary interface for corporate registrations and changes, it remains to be seen how the MOFCOM Decisions will be applied in practice at the local level.

- Decisions on Amending Certain Rules and Normative Documents
- 《关于修改部分规章和规范性文件的决定》
- Issuing authority: PRC Ministry of Commerce
- Date of issuance: Oct. 28, 2015/Effective date: Oct. 28, 2015

6. China Promulgates Counter-Terrorism Law

全国人民代表大会常务委员会制定《中华人民共和国反恐怖主义法》

On Dec. 27, 2015, the Standing Committee of the National People's Congress passed the Counter-Terrorism Law of the People's Republic of China (Counter-Terrorism Law). The Counter-Terrorism Law came into effect Jan. 1, 2016.

While the purpose of the Counter-Terrorism Law is to deter and punish terrorist activities, as well as to safeguard the security of the state and its people, the Counter-Terrorism Law may have important implications for businesses, especially those engaged in the telecommunications, transportation and logistics, aviation, banking, and Internet sectors.

Under the Counter-Terrorism Law, "telecommunications operators and Internet service providers must provide technical interfaces, decryption and other technical support assistance to public security organs and state security organ conducting prevention and investigation of terrorist activities." In addition, the Counter-Terrorism Law requires telecommunication operators and Internet service providers to adopt security measures and monitoring mechanisms to identify terrorist and extremist information. Upon discovery of such information, dissemination must be immediately halted, relevant records preserved, and a report made to relevant public security organizations. Moreover, the Counter-Terrorism Law requires telecommunications, Internet, and banking service providers to verify the identity of customers prior to the provision of services.

Businesses engaged in industries impacted by the Counter-Terrorism Law should review relevant internal measures/procedures and consider how they might respond to any governmental request for assistance made under the Counter-Terrorism Law. In addition, businesses should be familiar with the requirements of the Counter-Terrorism Law, as well as laws governing protection of state secrets, as both legal

frameworks may be implicated in a governmental request for assistance arising under the Counter-Terrorism Law.

- Counter-Terrorism Law of the People's Republic of China
- 《中华人民共和国反恐怖主义法》
- Issuing authority: PRC National People's Congress
- Date of issuance: Dec. 27, 2015/Effective date: Jan. 1, 2016

7. State Council Announces Qualified Domestic Individual Investor Program

国务院推出合格境内个人投资者计划

On Oct. 21, 2015, China's State Council announced that the Qualified Domestic Individual Investor Program, commonly referred to as QDII2, will be compiled. Although the timeline has not yet been confirmed, it is expected that the program will be implemented shortly.

Under the existing regulatory framework, PRC individual investors are generally only able to convert up to \$50,000 in any calendar year and cannot invest in overseas capital markets except for purchasing financial products issued by Chinese financial institutions. Compared with the existing framework, QDII2 will relax the \$50,000 conversion restriction and allow domestic individual investors to invest in a wider assortment of overseas investment classes.

Though the details of QDII2 have yet to be finalized, it is expected that the Shanghai Free Trade Zone will be the first to launch QDII2. The program will then be rolled out to five other pilot cities which include Tianjin, Chongqing, Wuhan, Shenzhen, and Wenzhou. Under QDII2, Chinese investors who are residents in one of the approved pilot cities (among other qualifications), who hold at least RMB 1,000,000 in financial assets in the previous three months, may enjoy relaxed foreign exchange conversion restrictions in making their overseas investments. It is also expected that QDII2 will permit investments in broader asset classes including (i) shares, bonds, funds, insurance products, foreign exchange and derivative products; (ii) greenfield and joint venture projects; and (iii) real estate.

Implementation of QDII2 represents an important component in China's efforts to globalize the RMB. Equally important, liberalization of existing conversion restrictions are likely to lead to additional outbound investment opportunities for Chinese citizens looking to invest abroad. Commentators have noted that in the real estate sector alone, implementation of QDII2 may free upward of US\$661 billion in Chinese capital, if fully implemented.

- Qualified Domestic Individual Investor Program
- 国务院推出合格境内个人投资者计划
- Issuing authority: PRC State Council
- Date of issuance: Oct. 21, 2015

8. New Administrative Measures Issued for the Certification of New and High Technology Enterprises

科技部、财政部、国家税务总局修订《高新技术企业认定管理办法》

China's preferential tax policies for new and high technology entities (NHTE) represent an important inducement for investment in research and development, and provide an important incentive for companies to move up the value chain. On Jan. 29, 2016, China's Ministry of Finance, the State Administration of Taxation (SAT) and the Ministry of Science and Technology jointly issued the Administrative Measures for the Determination of NHTEs (the Measures), which makes important changes to the current NHTE determination process.

While the Measures lower the requirements for qualifying as a NHTE, they raise the requirements for intellectual property ownership and record keeping.

Ownership of Key Intellectual Property

Under the Measures, qualified NHTEs are required to maintain ownership of key intellectual property related to the production of products or services. Ownership may be derived from proprietary research, acquisition, or other means. However, intellectual property made available to an enterprise through an exclusive licensing agreement is not included.

Research and Development Requirements

Under previous measures, 30 percent of a NHTE's employees must be engaged in research and development. The Measures now lower this threshold to 10 percent of a NHTE's employees. In addition, research personnel are no longer required to hold a college diploma. The research and development expenditure ratio has also been lowered from 6 percent to 5 percent for small and medium sized enterprises with an annual sales revenue of less than RMB 50 million.

The Measures also require NHTEs to conduct yearly reporting of intellectual property status, research and development personnel and expenses, sales revenue, and related information to relevant authorities.

- Administrative Measures for the Determination of High and New Technology Enterprises
- 《高新技术企业认定管理办法》
- Issuing authorities: Ministry of Finance, State Administration of Taxation (SAT), and Ministry of Science and Technology
- Date of issuance: Jan. 26, 2016/Effective date: Jan. 1, 2016

9. China Relaxes 'One Child' Policy

《全国人民代表大会常务委员会关于修改〈中华人民共和国人口与计划生育法〉的决定》

On Dec. 27, 2015, the Standing Committee of the National People's Congress voted to amend the Population and Family Planning Law (the Law), effectively ending China's "one child" policy. Under the amended Law, couples are encouraged to have two children and an application for bearing more children can be made if the couple "conform[s] to the conditions provided by laws and regulations."

The effect of ending the "one child" policy is expected to result in significant demographic changes in the country, and therefore will have both short term and long term effects on business. Expected short-term effects include increased consumption for items such as children's clothing, toys, education services, and baby food. The precise longer term effects are difficult to estimate, but the labor force may expand and it may result in a healthier housing market.

Companies doing business in China should review their labor policies for topics such as parental leave, late-marriage or delayed childbearing leave, and employee codes of conduct which provide disincentives for birth control policy violations based on the "one child" policy.

- Amendment of the Population and Family Planning Law
- 《全国人民代表大会常务委员会关于修改〈中华人民共和国人口与计划生育法〉的决定》
- Issuing authority: PRC National People's Congress
- Date of issuance: Dec. 27, 2015/Effective date: Jan. 1, 2016

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