



# China Practice Global Vision



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## Insights & Ideas

### **China's Central Bank Released Draft Implementation Rules on Administration of Payment Services of Non-financial Institutions (Author: Jiaxin LIU)**

The People's Bank of China released the *Implementation Rules for Administrative Measures for Payment Services of Non-financial Institutions (Draft for Comments)* (the "**Draft**") on September 21, 2010. The Draft specifies relevant provisions of the *Administrative Measures for Payment Services of Non-financial Institutions* (the "**Administrative Measures**"). The main contents of the Draft are as follows:

#### **Specify the Qualifications of the Payment Institutions (the "Applicant")**

The Draft sets forth detailed provisions for the Applicant's qualification requirements, which are regulated by Article 10 of the Administrative Measures. According to the Draft:

- ◆ The requirement that the Applicant has at least 5 senior managers who are familiar with the payment services refers to the qualification that the Applicant has at least 5 senior managers who satisfy any one of the following conditions: (a) holding a degree of bachelor or above and having been engaged in payment service business or financial information processing business for at least 5 years; (b) holding a senior professional title of fields of accounting, economy, finance, computer or electronic communication;
- ◆ Anti-money laundering measures include basic policies and post setting of anti-money laundering and monitor system on suspicious trading.

#### **Specify the Definition of Major Capital Contributors of the Applicant**

Article 10 of the Administrative Measures provides that the major capital contributors of the Applicant include the capital contributor that has the right to actually control the Applicant or that holds more than 10% of the equities of the Applicant. The Draft specifies that the said capital contributor that has the right to actually control the Applicant refers to the capital contributor that directly or indirectly holds more than 50% of the equities of the Applicant in aggregate, or that has a material impact on the resolutions of the shareholders' meeting in virtue of the voting rights arising from his capital contribution though with less than 50%, directly or indirectly, of the equities of the Applicant in aggregate. The capital contributor holding more than 10% of the equities of the Applicant only refers to the capital contributor that directly holds more than 10% of the equities of the Applicant or that directly or indirectly holds more than 10% of the equities of the Applicant in aggregate.

#### **Specify the Content Requirements of the Application Materials**

Article 11 of the Administrative Measures sets forth the application materials required to be submitted by the Applicant while applying for a Permit on Payment Services (the "Permit") and the Draft provides more details on the content requirements of the said application materials.

- ◆ In regard to the submitted financial and accounting reports, the Draft regulates that the financial and accounting reports for the past one year until the submission date shall be submitted. In the event that the Applicant has been established for less than 1 year, the financial and accounting report for the period of its existence shall be submitted.
- ◆ In regard to the feasibility study report on payment business, the Draft provides that it shall include the following contents: (a) analyses on the market prospectus of the payment service to be engaged in; (b) the process of the payment service to be engaged in, which shall include the service contents and the relevant capital flowing information for all the service stages starting from initiation of the payment service by the client until completion of the payment service entrusted by the client; (c) the technical means to achieve the payment service to be engaged in; (d) risk analyses on the payment service to be engaged in and the according control measures, which shall be illustrated for every stage of the payment service; (e) the analyses on the economical interest arising from the payment service to be engaged in. In the event that the Applicant applies for various types of payment services, the Applicant shall provide the proceeding required contents for each type of payment service respectively.
- ◆ In regard to the certification materials of clean criminal records of the Applicant, the Draft provides that it shall be issued by the authority of public security of the registration place. In regard to the certification of clean criminal records of the senior managers, it shall be issued by the authority of public security of the place of the registered permanent residence thereof.
- ◆ In regard to the relevant materials of the major capital contributor, the Draft provides that it shall include the following documents and materials: (a) the statement on the affiliation relationship between the Applicant and its mayor capital contributors; (b) the copy of the duplicate of the business license of major capital contributors; (c) the evidencing materials regarding business cooperation as issued by the support and cooperation institution on information processing for the major capital contributor, which shall specify the service contents and service term and be affixed with the official stamp thereof; (d) the accounting reports for the major capital contributor for the past 2 years as audited by accounting firms; (e) the certification materials of clean criminal records of the major capital contributor for the past 3 years. In the case that the major capital contributor is a financial institution, the copy of the duplicate of the Permit on Financial Business and relevant proofing materials regarding approval on its investment on payment service institutions shall be submitted.

## Specify the Regulations on Clients' Excess Reserve

- ◆ Definition of Clients' Excess Reserve. The Draft specifies that clients' excess reserve refers to currency capital reserved or retained by the client that is held by the payment institution and the currency capital charged or paid by the payment institution for the client. Clients' Excess Reserve shall include (a) the currency capital entrusted by the payee or payer for custody; (b) the currency capital entrusted by the payee to charge which has been received by the payment institution; (c) the capital currency entrusted by the payer to pay which has not been paid by the payment institution; (d) the currency capital equivalent to the prepaid value of the prepaid card that has not been used.
- ◆ Opening of the Special Deposit Account for Clients' Excess Reserve. The Draft provides that the Applicant shall provide the duplicate of the Permit and duplicate of the deposit agreement on excess reserve besides the proofing materials as specified in the *Administrative Measures on RMB Bank Settlement Accounts*(《人民币银行结算账户管理办法》) provided that the Applicant applies to open a special deposit account for clients' excess reserve. The name of the special deposit account for clients' excess reserve shall be constituted by the name of payment institution and the term of "Clients' Excess Reserve".
- ◆ Deposit Agreement on Excess Reserve. The Draft provides that the deposit agreement on excess reserve shall specify the liabilities of the deposit bank for excess reserve in the case of loss of excess reserve, which shall include: (a) the circumstances where the deposit bank for excess reserve shall be free from liabilities in the case of loss of the currency in the special deposit account for excess reserve; (b) the circumstances where the deposit bank for excess reserve shall prepay the compensation in the case of loss of the currency in the special deposit account for excess reserve and the limit amounts of the said pre-compensation; (c) the provision that the deposit bank for excess reserve shall assume the full compensation liability in advance in the case of loss of the currency in the special deposit account for excess reserve arising from the matters that are not covered by the deposit agreement.
- ◆ Non-bank Settlement Account. The Draft provides that the non-bank settlement account refers to the various accounts of payment business established by the payment institution for indication of the increase or decrease of clients' excess reserve. The payment institution shall not set up any conditions on clients' use of the currency capital on the non-bank settlement account in the case of opening of a non-bank settlement account by the payment institution for a client. Unless provided otherwise by laws and regulations, the payment institution shall ensure the currency capital of the client can be used immediately after it reaches the special deposit account for excess reserve provided that the payment institution also opens a non-bank settlement account for the client. The payment institution shall not prepay for the client the currency capital that has not reached the special deposit account for excess reserve.

- ◆ Regular Reporting Obligation. The Draft provides that the payment institution and the deposit bank for excess reserve shall report the following information to the local branch of People's Bank of China within 3 days after the end of each month by the electronic means: (a) the sum occurring of all the special deposit account for excess reserve for the previous month; (b) the balance of the special deposit account for excess reserve for the end of each day for the previous month; (c) the amount of cash deposit of all the special deposit account for excess reserve for the previous month.

Except for the proceeding contents, the Draft also regulates the determination criteria of prepaid cards, the requirements to make public the Permit on daily business, the approval procedures required to comply with when renewing the Permit, the re-application procedures in the case of loss or damage of the Permit during the valid term, the scheme regarding safeguard of clients' lawful interest required to be submitted in the case of application for termination of payment service by the payment institution and the scheme on payment business information processing.

## Legal Updates

### 1. SPC Interpretation on Application of Laws in Adjudicating Labour Dispute Cases (Author: Muchun XU)

On September 13, 2010, the Supreme People's Court issued the *Interpretation of the Supreme People's Court on Several Issues Concerning Application of Laws in Adjudicating Labour Dispute Cases (III)* (the "**Interpretation**"). The Interpretation contains 18 articles, and addresses 5 main issues on application of laws in the trial of disputes over labour issues, which include the scope of accepting cases of labour disputes, parties to sue in labour disputes, burden of proof for the existence of the fact of working overtime, the standard for determining final ruling, and the jointing system of arbitration and litigation.

#### **Scope of Accepting Cases of Labour Disputes**

The Interpretation reasonably defines the scope of accepting cases of labour disputes. It states "Where a dispute arises from a claim for damages from an employing entity by a worker on the ground that the employing entity has failed to undergo social insurance formalities for him/her, and the social insurance handling institution cannot make up for this, resulting in the worker's inability to enjoy relevant social insurance benefits, the people's court shall accept such dispute. Disputes arising from an enterprise's voluntary restructuring shall be accepted by the people's court." Disputes arising from the situation where an employing entity has undergone formalities for social insurance, but has defaulted or refused to pay social insurance, and disputes arising from the years of payment or base of premium payment, shall be accepted by the social insurance administration authority, rather than the people's court.

Article 85 of the *PRC Employment Contract Law* provides that if an employer fails to pay an employee his labor compensation in full and on time as stipulated in his employment contract or prescribed by the state, pays labor compensation below the local minimum wage rate, arranges overtime without paying overtime pay, or terminates or ends an employment contract without paying the employee severance pay pursuant to this Law, then the labor administration authority shall order it to additionally pay damages. Such disputes shall be accepted by the people's court.

#### **Parties to Sue in Labour Disputes**

The Interpretation explicitly specifies the parties to sue in labour disputes. It states "In a dispute between a worker and his employing entity that has failed to undergo formalities for obtaining a business license, whose business license has been revoked or that has continued its operation after its term of business has expired, the employing entity or the person who has contributed capital to the entity shall be taken as a party to the dispute. Where an

employing entity that has failed to undergo formalities for obtaining a business license, whose business license has been revoked or that has continued its operation after its term of business has expired, continues its operation by borrowing another person's business license in the manner of treating the said another person as a dummy or nominal equity holder, the employing entity and the lender of the business license shall both be taken as parties to the dispute.”

The Interpretation further provides that “where a party refuses to accept the arbitration award made by the employment and personnel disputes arbitration committee and files a lawsuit at a people's court, if the people's court holds after examination that a party who should have jointly participated in the arbitration is omitted in the arbitration award, it shall add the omitted party as a party to the lawsuit in accordance with law. If the added party shall bear liability, the people's court shall handle the matter along with other matters.”

### **Burden of Proof for the Existence of the Fact of Working Overtime**

The Interpretation reasonably allocates the burden of proof for the existence of the fact of working overtime. It states “A worker claiming for overtime payment shall bear the burden of proof for the existence of the fact of his working overtime. However, if the worker has evidence to prove that the employing entity has at hand the evidence for the existence of the overtime, which the employing entity, however, does not provide, the employing entity shall bear the adverse consequence therefrom.”

### **Standard for Determining Final Ruling**

The Interpretation clarifies the standard for determining final ruling, and corrects the common misunderstanding in dealing with the labour dispute cases. “Where a worker files claims for labour remuneration, medical care expense for occupational injury, economic indemnity or compensation pursuant to the provision of Item (1) of Article 47 of the *Law on Labour Dispute Mediation and Arbitration*, if the arbitration award concerns more than one of the claims and each of the amounts determined does not exceed the amount of the lowest local standard monthly wage for 12 months, such arbitration award shall be final.”

### **Jointing System of Arbitration and Litigation**

The Interpretation stipulates the jointing system of arbitration and litigation. It states, where a party goes back on what he has agreed in a legally-effective letter of mediation made by the employment and personnel disputes arbitration committee, and files a lawsuit, the people's court shall not accept the lawsuit; if it has already accepted the case, the court shall rule to dismiss the lawsuit. If a party directly files a lawsuit where the employment and personnel disputes arbitration committee fails to make a decision on acceptance of the case or give an arbitration award in due time, the people's court shall accept the lawsuit; where a party files a

lawsuit on the ground that the employment and personnel disputes arbitration committee fails to give an arbitration award within the time limit, he shall submit the notice on acceptance of the case for arbitration or other voucher or proof on entertainment of the application for arbitration.

Finally, to protect the interest of employees who are re-employed by the same employing entity after mandatory retirement, the Interpretation explicitly provides that “where a lawsuit is filed at a people’s court over a dispute on employment between an employing entity and the employee who enjoys the treatment of pension insurance or is paid a pension, the people’s court shall regard it as a case of service relationship. Where a lawsuit is filed at a people’s court for a dispute on employment between a person who remains in the list of employees of but is not paid by his enterprise, who has internally retired before reaching the age of retirement, who has been dismissed from his post and is waiting for new employment, or who is taking long-term leave due to operational suspension of production in his enterprise, and his new employing entity, the people’s court shall regard it as a case of labour relationship.” Mr. Du Wanhua, director of the first civil trial tribunal of the Supreme People’s Court, also commented on this provision, stating that the relationship between employing entity and employee who is re-employed by the same employer after mandatory retirement should be regarded as service relationship, rather than labour relationship. In addition, if an employee, who has retired before reaching the age of retirement, is employed by a new employer, the relationship between the new employer and him should be deemed as labour relationship.

## **2. Two Ministries Jointly Released New Rule on Real Estate Land Use and Construction Administration (Author: Kaiying WU)**

On September 26, 2010, the Ministry of Land and Resources (the “**MLR**”) and the Ministry of Housing and Urban-Rural Development (the “**MHURD**”) released the *Circular on Further Reinforcement of the Administration and Adjustment of Real Estate Land Use and Construction* [Guo Tu Zi Fa (2010) No. 151] (the “**Circular**”). The Circular manifests concrete measures from these two ministries to implement the *Circular of the State Council on Resolutely Curbing the Housing Price in Certain Cities From Rising Too Fast* [Guo Fa (2010) No. 10], thus to further reinforce the administration and adjustment of real estate land use and construction. The key measures in the Circular are highlighted as follows:

### **Strengthening Plan Administration, Accelerating Governmental Approval**

With respect to the annual plan of housing land use and construction, the Circular points out that it shall be first ensured the gross amount of land for affordable housing, shantytowns conversion housing and small-medium normal housing reaches 70% of the total amount of land provided for housing, and then, the local administrative authorities may select appropriate lands to explore the ways for enhancing public rental house land through

appropriation and assignment, merging the public rental house with low-rent house gradually and simplifying and implementing the classified safeguard for rental house, in accordance with the respective local circumstances and practice.

The Circular also indicates, in the areas with high housing price, the amount of land for constructing small-medium house shall be increased, and the supply of land for affordable houses shall be ensured as the first priority. Where the plan of land supply for affordable housing has not been completed, it shall be prohibited in such area to provide land to large and superior housing construction.

With respect to speeding up the administrative approval procedures for land supply and construction projects, the Circular firstly declares that the relevant authorities should strengthen the supervision on land for affordable housing, make sure that the nature and application of land already provided for affordable housing would not be changed, and the standard of construction or unit area would not be upgraded; secondly, it urges such authorities to enhance the efficiency of their administrative approvals for housing construction projects.

### **Enhancing Administration of Housing Land Assignment**

The Circular sets forth requirements on housing construction land from four aspects, i.e. drawing up the program for land to be assigned normatively, making the plan for land assignment and construction conditions strictly, restricting the examination for land bidders' qualification, and restricting the administration on land appropriation decision and assignment contract, in which the prominent parts are as follows:

- ◆ Adopting rigorous measures to prohibit the developers conducting illegal acts, such as reselling and hoarding land, from entering the market. Bidders and their holding shareholder(s) shall be enjoined by the land and resources authorities from attending land bids until the case completed and the wrongful acts fully corrected, once they are discovered to take part in illegal or default acts below: (a) to obtain the land through counterfeiting official documents and to resell the land illegally; (b) to assign the land use right illegally; (c) to leave the land unused due to the reason of such enterprise and; (d) to develop the land by the constructing enterprise in a manner which violates the conditions stipulated in the assignment contract.
  
- ◆ Enhancing the administration on land appropriation decision and assignment contract to prevent enterprises from hoarding land: the housing construction projects should be virtually launched within 1 year following the land delivery date stipulated in the appropriation decision or assignment contract, and be completed within 3 years following the date it launched. In case the land is under integrated-use, the contract shall

stipulate the plan, construction and other conditions for commercial building and house respectively.

### **Reinforcing the Supervision on Supply and Construction of Housing Land**

The Circular emphasizes the supervision on the supply of housing land and the period while the construction program is in progress, it requires the local provincial level land and resources authorities to reinforce the timely supervision over public announcement for assignment and contents of assignment contracts. Where an assignment announcement contains bundling assignment, over-size land, “gross land” assignment, land assignment over 3-years cycle, the provincial authorities should order to revoke such announcement, and re-assign the land under an adjusted assignment plan.

### **Intensifying Investigation over Illegal Acts**

To fight against various illegal acts in the field of land use and construction effectively, thus keep a healthy real estate market, the Circular requires the land and resources authorities and the planning departments to severely investigate and rectify the acts of hoarding, reselling land, leaving land unused, changing the plot ratio without approval, constructing and selling house illegally.

Finally, the Circular also calls to make public illegal land use information, the provincial authorities of land and resources shall announce on specified websites quarterly the illegal land use acts discovered and rectified, as well as copy the name list of such wrongdoers to other supervising authorities for their easy reference. In addition, the MLR shall put such information together and announce it to the public at the end of each quarter.

### **3. The State Council Promulgated the Opinions on Accelerating Merger and Restructuring of Enterprises (Author: Guanglei ZHANG)**

The State Council promulgated the *Opinions on Accelerating Merger and Restructuring of Enterprise* (hereinafter referred to as “**Opinions**”) on August 28, 2010. The Opinions points out that emphasis shall be put upon the six chief industries including automobile, steel and cement, and that superior enterprises shall be encouraged to implement inter-regional merger and restructuring, overseas merger and investment cooperation. Regarding merger and restructuring of enterprises, the Opinions put forward guiding opinions on how to eliminate policy obstacles, enhance policy support, and improve management and service. The main contents of the Opinions are as follows:

#### **Eliminate Policy Obstacles of Merger and Restructuring of Enterprises**

The Opinions point out that the rules restricting or being disadvantageous to inter-regional merger, and those impeding fair competition, especially the rules which were promulgated by the regions and restricted non-local enterprises from merger and restructuring with local enterprises shall be eliminated. The market access of private capital shall be relaxed; the industries and areas which are not prohibited by law and regulations shall be really open to private capital; the limitation upon proportion of equity shall be relaxed. The reform of monopoly industries shall be accelerated; private capital shall be encouraged to enter into competition business areas of monopoly industry through methods including merger and restructuring, and be supported to enter into infrastructure, public service, financial service and social service and other relevant sectors.

### **Enhance Policy Supports on Merger and Restructuring of Enterprises**

the Opinions put forward specific tax, finance, capital market, land measures and other areas to supporting corporate merger and restructuring:

- ◆ Implement policies of tax preferences. Tax preferences shall be given to appreciation of assets evaluation, proceeds from debts restructuring and rights transferring of land and houses relating to merger and restructuring. The specific measures should be exercised in accordance with the *Notice on Issues about Enterprise Income Tax in Merger and Restructuring of Enterprises* (Caishui [2009] No.59) and *Notice on Deed Tax Policies about Enterprise Transformation and Restructuring*, promulgated by the Ministry of Finance and the State Administration of Taxation.
- ◆ Increase financial fund investment. Special funds shall be established in central state-owned capital budgets. Merger and restructuring of central government-owned enterprises shall be supported through methods including discount on technical renovation and credit rewards and subsidies. Local people's governments shall be encouraged to, through methods including financial discount and credit rewards and subsidies, push commercial banks to strengthen credit support for merger and restructuring of enterprises. Special funds can be established in qualified regions to support the merger and restructuring of intra-regional enterprises. Financial capital shall be preferentially utilized to support merger and restructuring of enterprises in the adjustment and revitalization plan of key industries.
- ◆ Strengthen financial support efforts. Commercial banks are encouraged to exercise comprehensive credit extension to post-merger enterprises. Securities companies, assets management companies, equity investment funds and industry investment funds are encouraged to participate in corporate merger and restructuring activities and provide enterprises with such financing supports as direct investment, entrusted loans and bridge loans. New financing models of merger and restructuring like establishing special merger

funds shall be actively explored, exit systems for equity investment shall be improved, and social funds shall be attracted into enterprises' merger and restructuring. Cross-border merger and acquisitions shall be supported through methods including merger loans, inside and outside consortium loans and discounted loans.

- ◆ Sufficiently perform the function of capital market in enhancing enterprise restructuring. Qualified enterprises shall be supported to finance for merger and restructuring through methods including issuing stocks, bonds and convertible bonds. Listed companies are encouraged to use equity, cash and other innovative financial methods as payment method, broadening financing channels and improving efficiency of merger and restructuring in capital market.
- ◆ Perfect relevant land administration policies. Upon approval of the people's governments at and above county level, the allocated land related to merger and restructuring shall continue to be used in manner of allocation if the land satisfies the qualifications of use of allocated land; if the land does not satisfy the qualifications, it shall be of paid use and the premiums can be treated as rights and interests of the land use right holders in accordance of law. The former allocated land used for production and operation relating to merger and restructuring of enterprises in the adjustment and revitalization plan of key industries, upon approval of land and resources administrations at and above province level, can be treated as state equity contribution.

### **Improve Merger and Restructuring Management and Services**

- ◆ Provide sound consulting services. Import and training of special talents familiar with merger and restructuring business, especially cross-border M&A transactions, shall be accelerated. Consulting services, including market information and strategic consulting, legal and financial consulting, assets evaluation, property right transactions, financing agencies, independent audit and enterprise management, shall be improved. More professional intermediaries providing merger and restructuring consultation services shall be nurtured.
- ◆ Enhance risk supervision and control. Insider trading and market manipulation shall be effectively prevented and cracked down; hostile takeovers shall be prevented; tax dodging and debts dodging in name of merger and restructuring shall be prevented; loss of state-owned assets shall be prevented. The consulting service function of financial institutions including domestic banks and securities companies shall be sufficiently performed in cross-border M&A transactions.
- ◆ Safeguard fair competition and national security. Relevant administrative rules shall be perfected; administration on high-profile merger and restructuring transactions shall be

strengthened and perfected; enterprise satisfying legal standard for declaration of concentration shall be merged and restructured; concentration of business operators shall be reviewed in accordance with law; administrative rules on foreign capital merger shall be further perfected; review system on national security in the foreign capital acquisition of inside enterprises shall be established and perfected; foreign capital shall be encouraged and regulated to participate, in manner of share and merger, in reorganization and reconstruction and merger and restructuring, safeguarding national security.

## **Important Announcement**

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