漢坤律師事務所
HAN KUN LAW OFFICES

Newsletter

2nd Edition of 2014

Insights & Ideas

Legal Updates

MOFCOM Issued Provisions on Simple Cases Subject to Streamlined Merger Control Process (Authors: Joyce LI, Haoze LI)

On February 11, 2014, China's Ministry of Commerce ("**MOFCOM**") released the long-awaited *Tentative Provisions on the Standards Applicable to Simple Cases of Concentration of Business Operators* (the "**Tentative Provisions**"), which took effect on February 12, 2014. The Tentative Provisions set out the standards applicable to concentration transactions subject to a streamlined antitrust review process, the circumstances under which a concentration transaction cannot be deemed as a "simple" case, and the circumstances under which MOFCOM may revoke the "simple case" recognition.

Standards for the Recognition of Simple Cases

The Tentative Provisions set out standards for the recognition of a simple case, including:

a) The collective market shares of all business operators involved in the concentration are less than 15% in the same relevant market;

b) The market shares of the operators involved in the concentration with upstream or downstream relationships are less than 25% in either the upstream or the downstream market.

c) The operators involved in the concentration are not in the same market, or have upstream or downstream relationships, their market shares are less than 25% in every market relevant to the transactions.

d) The operators involved in the concentration have established joint ventures outside China, such joint ventures do not engage in economic activities in China.

e) The operators involved in the concentration have acquired equities or assets from overseas enterprises, such overseas enterprises do not engage in economic activities in China.

f) A joint venture enterprise that is under the common control of two or more business operators is controlled by one or more such business operators through concentration.

Circumstances under which the "Simple" Recognition Not Apply

The Tentative Provisions set out circumstances under which a concentration transaction cannot be deemed as a Summary Transaction, including：

a) A joint venture enterprise is under the common control of two or more business operators and is

controlled by one of such business operators through concentration, whereas the operator is the competitor of the enterprise in the same relevant market.

b) The relevant market pertaining to the concentration is difficult to define.

c) The concentration may make adverse impact on market access and technical progress.

d) The concentration may make adverse impact on the consumers and other relevant business operators.

e) The concentration may make adverse impact on the development of national economy.

f) Other circumstances that may be deemed by the MOFCOM as making adverse impact on market competition.

Circumstances under which MOFCOM May Revoke the "Simple" Recognition

The Tentative Provisions further set out circumstances under which MOFCOM may revoke the recognition of a Summary Transaction, including：

a) The applicants conceal important information or provide false materials or misleading information.

b) A third party claims that the concentration will or may exclude or restrict competition and provides relevant evidences.

c) MOFCOM finds that there are major changes in the concentration transactions or in the competition in the relevant market.

Our Observations

The Tentative Provisions only prescribe types and recognition standards for a "simple" case, and does not set out detailed procedures for the application, acceptance and review of a "simple" case. It is also silent on the application documents and review period for a "simple" case recognition. Therefore, from a practical perspective, there are some uncertainties in regard to the application of an expedited merger control process. According to explanations made by MOFCOM officials at some conferences, MFOCOM may further promulgate detailed measures for the summary case procedure based on its experience derived from practice going forward. Since the Tentative Provisions took effective on February 12, 2014, we understand that the parties to a concentration may request MOFCOM to recognize the concentration as a simple case and clear the transaction expeditiously, where certain conditions are satisfied. We will keep a close eye on detailed guidelines to be released by MOFCOM and update you of the same on a timely manner.

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Legal Updates

1. Long-awaited Private Investment Fund Registration Rules Released (Authors: James WANG, Evan ZHANG, Karina LUO)

On January 17, the Asset Management Association of China (the "**AMAC**") promulgated the long-awaited registration rules for private investment funds, the *Measures for the Registration of Private Investment Fund Managers and Filling of Private Investment Funds (for Trial Implementation)* (the "***Measures***"), which will become effective as of February 7, 2014.

Background of the Formulation of the *Measures*

The amended *Securities Investment Fund Law,* promulgated by the Standing Committee of the National People's Congress on December 28, 2012 and effective as of June 1, 2013, incorporates private offerings into its purview. It requires private investment fund managers ("**Fund Managers**") to perform registration formalities and make fillings for private investment funds ("**Private Funds**") under their management with the AMAC. In June 2013, the State Commission Office for Public Sector Reform (the "**SCOPSR**") issued the *Circular on the Division of Responsibilities for the Administration of Private Equity Funds*, specifying that the China Securities Regulatory Commission (the "**CSRC**") is charged with the supervision and regulation of Private Funds. With the consent of the SCOPSR, the CSRC authorized the AMAC to supervise the registration of Fund Managers and filling of Private Funds, and perform its self-regulatory role. Thus, the AMAC formulated the *Measures,* setting forth the procedures and requirements for the registration of Fund Managers and filling of Private Funds to perform self-regulatory administration of Private Funds.

Main Content of the *Measures*

The *Measures* mainly cover the following five aspects: registration of Fund Managers, filing of Private Funds, personnel management, information report and self-regulatory management:

a) Registration of Fund Managers

The *Measures* provide that Fund Managers shall perform registration formalities with the AMAC through the private investment fund registration and filing system ("**System**"), and shall apply for membership with the AMAC. The AMAC may examine the application materials submitted by Fund Managers via on-site inspections, interviews with senior management staff or in other ways. If the application materials for registration application are complete, the AMAC shall, within twenty (20) working days upon receiving all requisite application materials, go through the registration procedures for Fund Managers and complete the registration process by posting their basic information on the AMAC's website.

b) Filing of Private Funds

The *Measures* provide that Fund Managers shall, within twenty (20) working days upon completion of fund raising, make filing for Private Funds through the System, specify the type of Private Funds in accordance with their respective investment orientation, and truthfully fill in their basic information. If the application materials for filing application are complete, the AMAC shall, within twenty (20) working days upon receiving all requisite application materials, go through filing procedures for Private Funds by publicizing their basic information on its website. Filed Private Funds can apply for opening securities accounts.

c) Administration of Private Funds Personnel

Fund Managers shall report basic information and any change of information regarding the senior management and other professionals of Private Funds to the AMAC pursuant to the *Measures*. Private Fund professionals are required to meet the qualifications specified in the *Measures*. The *Measures require s*enior management members to be honest and trustworthy, have no record of default within the most recent three (3) years and have not been prohibited from engaging in the Private Funds market by the CSRC.

d) Information Report

Under the *Measures*, the required frequency for the updating of relevant information varies for different types of Private Funds: for private securities investment funds, information report shall be made monthly; for non-securities private investment funds such as private equity funds, information report shall be made quarterly. In addition, Fund Managers shall report, on an annual basis, basic information regarding Fund Managers, shareholders or partners, senior management staff and other professionals, Private Funds managed by Fund Managers, and the annual financial report audited by accounting firms. Fund Managers entrusted to manage venture capital funds that received financial or tax support from the state shall also submit reports describing the contribution to social economy by relevant venture capital funds and basic information regarding investments into small and medium-sized enterprises by such venture capital funds. The *Measures* also enumerate certain important matters which Fund Managers shall report to the AMAC.

e) Self-regulatory Administration

The *Measures* provide that the AMAC shall establish relevant professional committees based on the different types of Private Funds managed by Fund Managers and differentiate self-regulatory administration. The AMAC may carry out on-site or off-site inspections on Fund Managers and their personnel, establish credit records, accept complaints from Fund Managers and their personnel, resolve industry disputes through mediation, and protect legitimate rights and interests of Private Funds' investors. The *Measures* also make clear that the AMAC may take such measures as giving warnings, circulating a notice of criticism in the industry,

condemning openly and other measures against Fund Managers, senior management staff and other personnel that violated the *Securities Investment Fund Law* or the *Measures or* conducting such activities as submitting false information to the AMAC, depending on the severity of the violation.

Following the issuance of the *Measures*, the AMAC published on its official website (http://www.amac.org.cn/) a *Concise Guide to the Registration and Filing of Private Investment Funds,* provided the website of the System (http://pf.amac.org.cn) and the filing flowcharts. The AMAC has also provided other guidance materials for the reference of Fund Managers, such as the *Operation Manual for the Registration and Filing of Private Investment Funds System*, *Guidelines on Filling Forms for Registration and Filing of Private Investment Funds System* and *FAQ.* In order to promptly answer questions from users of the System, the AMAC also provides consultation hotline (010-66578200) and consultation email (pf@amac.org.cn).

2. MOHRSS Releases Interim Provisions on Labor Dispatch (Author: Wenyu JIN, Tracy TANG, Alan WANG)

On December 28, 2012, China's Standing Committee of the National People's Congress adopted the *Decision on Amending the PRC Employment Contract Law* (the "**Decision**"), to amend and regulate the current system of labor dispatch. On January 26, 2014, the Ministry of Human Resources and Social Security of the People's Republic of China (the "**MOHRSS**") promulgated the *Interim Provisions on Labor Dispatch* (the "**Interim Provisions**"), to further specify the rules of labor dispatch. The Interim Provisions shall come into effect on March 1, 2014.

I. Scope of Labor Dispatch and Employment Proportion Limitation

The Interim Provisions reiterates the applicable scope of labor dispatch provided in the Decision, i.e., labor dispatch should only be applicable to temporary, auxiliary or substitute positions (the "**Three Positions**"). The Interim Provisions further provides that if an employer intends to use dispatched workers to hold any auxiliary positions, its employees' congress or all employees shall hold discussions and provide proposals and opinions, and the employer shall negotiate with the labor union or employees' representatives on an equal basis, and shall also internally announce the decision.

The Interim Provisions further provides that, the number of the dispatched workers of an employer shall not exceed 10% of its total workforce, and the total workforce of an employer shall refer to the sum of the number of the workers who have executed labor contracts with the employer and the number of workers who are dispatched to the employer. It's worth noting that, the *Several Provisions*

on Labor Dispatch (Exposure Draft), only provided that, the number of the dispatched workers to hold auxiliary positions of an employer shall not exceed 10% of its total workforce and only the workers who have executed labor contracts and the dispatched workers who hold auxiliary positions constitute the total workforce. Thus, it is obvious that the Interim Provisions reflects the tighten restriction on the use of labor dispatch in China.

To facilitate smooth implementation, the Interim Provisions provide that any employer that uses dispatched workers exceeding the aforementioned 10% limit before the effective date of the Interim Provisions shall make a plan to adjust the current proportion of dispatched workers and submit the plan to the local human resource and social insurance authority for record. The employer shall reduce the current proportion to the required proportion within 2 years from the effective date of the Interim Provisions, and shall not use any additional dispatched workers until the proportion is reduced to 10%. However, if labor contracts or labor dispatch agreements are legally executed prior to the promulgation of the Decision (December 28, 2012) and will expire after 2 years from the effective date of the Interim Provisions, such contracts or agreements may continue to be performed until the expiration of their respective terms.

Dispatched workers used by representative offices of foreign enterprises or foreign financial institutions in China (for purposes hereof, China excludes Hong Kong, Macau and Taiwan), or international ocean seamen engaged by seamen employers in the form of labor dispatch are not subject to the limitations concerning the Three Positions or the proportion of dispatched workers used.

II. Legal Obligations of Labor Dispatch Entity and the Employer

Labor dispatch entities represent the employers of dispatched workers. The Interim Provisions explicitly provides the legal obligations of labor dispatch entities, which mainly include the following:

- conclude written labor contracts with dispatched workers for a fixed-term of at least 2 years;
- make true disclosure of the dispatched workers on matters prescribed in the labor contract, the rules and regulations to be observed and the contents of the labor dispatch agreement;
- provide training and education for the dispatched workers on job knowledge and safety;
- make full payment of labor remuneration and social insurance contributions in timely manner;
- supervise and urge employing entities to provide labor protection, occupational safety and health conditions for dispatched workers;
- issue certificates concerning the dissolution or termination of labor contracts with dispatched workers;
- coordinate with disputes between the dispatched workers and their employing entities;

- apply for determination of work-related injuries for dispatched workers who suffered from work-related injuries.

It is explicitly provided that in the event that a dispatched worker applies for the diagnosis and/or assessment of an occupational disease, the employer/employing entity shall be responsible to deal with the matters relating to the diagnosis and/or assessment of the occupational disease, and provide the materials such as the dispatched worker's occupational history, history of exposure to the occupational disease and test results of hazardous factors at workplace for the occupational diseases that are necessary for the diagnosis and/or assessment of the occupational disease in a truthful manner, and the labor dispatch entity shall provide the dispatched worker with other materials necessary for the diagnosis and/or assessment of the occupational disease.

Employers/Employing entities directly manage the labor process of dispatched workers. The Interim Provisions explicitly provides that employing entities shall provide dispatched workers with benefits in relation to their positions, and shall not discriminate against dispatched workers.

III. Situations of Returning Dispatched Workers

In accordance with Article 65 of the *Employment Contract Law*, under any circumstance as stated in Article 39 (major fault by dispatched worker), Item 1 of Article 40 (dispatched workers take sick leave for a period exceeding the statutory sick leave period) or Item 2 of Article 40 (dispatched workers are unqualified for the job) of the *Employment Contract Law*, the employer may return the workers to the labor dispatch entity. The labor dispatch entity may dissolve the labor contracts with the relevant dispatched workers.

Article 12 of the Interim Provisions further provides that under any of the following circumstance, an employer may return dispatched workers: (a) the occurrence of Item 3 of Article 40 (significant changes in objective circumstances), or Article 41 (economic lay-off) under the Employment Contract Law; (b) the employer is declared bankrupt, its business license is revoked, the employer is ordered to be shut down or cancelled in accordance with laws, the employer decides to dissolve in advance, or discontinues operation upon the expiration of its business term; and (c) the labor dispatch agreement is terminated upon expiration.

However, where a dispatched worker falls under the situations as stated in Article 42 of the Employment Contract Law (medical treatment period, a female worker who is going through pregnancy, pre-natal or lactation period, etc.), the employer shall not return the dispatched worker to the labor dispatch entity according to item (a) listed in the previous paragraph. Meanwhile, even the term for labor dispatch expires, the dispatched worker shall not be returned until the relevant abovementioned situations disappear.

During the period when a dispatched worker who is returned but has no work to do, the labor dispatch entity shall pay remuneration on a monthly basis to the dispatched worker in an amount no

less than the minimum wage required by the local government.

IV. Dissolution and Termination of Labor Contract under Labor Dispatch

Although labor dispatch entities are special employers, the labor contracts they executed as employers shall also be subjected to the Employment Contract Law. However, the labor dispatch relations are different from common labor relations, the Employment Contract Law and relevant regulations have not explicitly specified the parties' rights and obligations upon the dissolution and termination of labor contract under labor dispatch. At this point, the Interim Provisions explicitly provides the conditions of dissolution and termination of labor contracts and economic compensation under labor dispatch, including:

a) Unilateral dissolution right of dispatched workers. A dispatched worker may dissolve the labor contract by giving a written notice to the labor dispatch entity concerned 30 days in advance or 3 days in advance if within the probation period. The labor dispatch entity shall inform the employer concerned of the dissolution of the labor contract by the dispatched workers in a timely manner.

b) A labor dispatch entity may dissolve the labor contract with a dispatched worker who is returned by an employer under Article 12 of the Interim Provisions and who then disagrees with the new labor dispatch arrangements made by the labor dispatch entity under conditions that are the same as or higher than those agreed in the labor contract. However, if the conditions are lower than those agreed in the labor contract and the dispatched worker disagrees with the new labor dispatch arrangements, the labor dispatch entity shall not dissolve the labor contract.

c) If a labor dispatch entity is declared bankruptcy, its business license is revoked, or it is ordered to be shut down or cancelled in accordance with laws, or if it decides to dissolve in advance or discontinues operation upon the expiration of the business term, the labor contracts concluded by such labor dispatch entity shall be terminated. However, the employing entities concerned shall consult with the labor dispatch entity on the proper arrangements of dispatched workers.

d) The payment conditions of economic compensation. The Interim Provisions explicitly provides that, besides the situations provided by Employment Contract Law, under the situation of aforesaid b) and c), the economic compensation shall also be paid to the dispatched worker.

V. Trans-regional Labor Dispatch and Relevant standards

The Interim Provisions explicitly provides that, if a labor dispatch entity dispatches a worker to work in another region, the labor dispatch entity shall pay social insurance contribution for the dispatched worker at the place where the employer is located. In the meantime, the Interim Provisions provides

that, where a labor dispatch entity establishes a branch at the place where an employer is located, the branch shall complete the formalities for social insurance contribution for the dispatched worker, and pay premiums for social insurances. Where the labor dispatch entity does not have any branch at the place where the employer is located, the employer shall, on behalf of the labor dispatch entity, complete formalities for social insurance contribution for the dispatched worker, and pay premiums for social insurances.

The Interim Provisions represents a major development for labor dispatch to specify the rights and obligations of labor dispatch entities, dispatched labors and employers that accept dispatched workers.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Contact Us

Beijing Office
Tel.: +86-10-8525 5500
Suite 906, Office Tower C1, Oriental Plaza
No. 1 East Chang An Ave.
Beijing 100738, P. R. China

Estella CHEN Attorney-at-law
Tel.: +86-10-8525 5541
Email: estella.chen@hankunlaw.com

Shanghai Office
Tel.: +86-21-6080 0909
Suite 5709, Tower 1, Plaza 66, 1266 Nanjing West Road,
Shanghai 200040, P. R. China

Yinshi CAO Attorney-at-law
Tel.: +86-21-6080 0980
Email: yinshi.cao@hankunlaw.com

Shenzhen Office
Tel.: +86-755-3680 6500
Suite 4709, Excellence Times Plaza, 4068 Yitian Road, Futian District,
Shenzhen 518048, P. R. China

Jason WANG Attorney at-law
Tel.: +86-755-3680 6518
Email: jason.wang@hankunlaw.com