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A Brief Analysis on the Burden of Proof on the Plaintiff and the Means of Proof under the Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Monopoly (Draft for Comments) (Author: Dong LIU; Ning LI)

On April 25, 2011, the Supreme People's Court issued the whole text of the *Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial off Monopoly Civil Dispute Cases (Draft for Comments)* (the "**Draft for Comments**") for public comments. The Draft for Comments comprehensively addresses rules on the jurisdiction and case acceptance of monopoly civil disputes, qualified parties, burden of proof, assumption of civil liability and statutory limitation of action. This article mainly analyses the provisions concerning burden of proof and means of proof under the Draft for Comments.

Burden of Proof

A party to litigation assumes the burden to prove the facts based on which such party raises its claims or refute the claims brought up by the opposite party. However, in monopoly civil disputes, a plaintiff (an individual, legal person or other entities) who is infringed by the monopoly behaviors may encounter difficulties in collecting evidence and proving the monopoly behaviors. Such difficulty has been jeopardizing the judicial practice of monopoly civil disputes. To deal with this issue, the Draft for Comments elaborates and specifies many issues in monopoly civil disputes such as allocation of burden of proof, exemption of burden of proof, request for the defendant to submit evidence, expert witness, etc. Such elaboration and specification will in no doubt promote the healthy development of the judicial practice in monopoly civil disputes.

Article 7 of the Draft for Comments lays down the principles on the matters to be proved by the victim. To be more specific, the victim should prove: a) the existence of the alleged monopoly behaviors, b) where the victim claims a compensation for its loss, the victim shall also bear the burden of proof in respect of the suffered loss and the causation between the alleged monopoly behaviors and such loss. Meanwhile, the Draft for Comments specifically provides the test for proving the existence of the monopoly behavior. Pursuant to Article 3 of the *PRC Anti-monopoly Law*, monopoly behaviors include entering into monopoly agreements by operators, abuse of dominant market position by operators and concentration of operators that lead, or may lead to elimination or restriction of competition. However, since concentration of operators is related to government administration, the Draft for Comments is silent on the concentration of operators due to its nature as a judicial interpretation on civil disputes. In monopoly civil disputes, the types of monopoly behaviors that should be proved by a victim are primarily monopoly agreements and abuse of dominant market position.

- **As to the monopoly agreement, the victim shall prove:**

a) the existence of the alleged monopoly agreement

Pursuant to Article 13 of the *PRC Anti-monopoly Law*, monopoly agreements refer to agreements, decisions or other concerted conducts designed to eliminate or restrict competition. Considering that the monopoly agreements are usually kept in confidential by operators or among operators and their trading counterparts, the victim still faces great obstacles in proving the existence of monopoly agreements. However, the Draft for Comments does not touch this problem.

b) the alleged monopoly agreement has an effect of eliminating or restricting competition

Pursuant to Article 8 of the Draft for Comments, for most of the monopoly agreements, the victim is not obliged to prove that such agreements have been entered into to the effect of eliminating or restricting competition, meaning that monopoly agreements entered into by operators in competition will be presumed to have effects of eliminating or restricting competition if such agreements fix or adjust price of commodities, restrict the quantity of goods to be produced or sold, divide sales market or purchase market of raw materials, restrict purchase of new technology, new equipments or restrict the development of new technology, new products, jointly reject trades, and that monopoly agreements entered into by operators and their trading counterparts will be presumed to have effects of eliminating or restricting competition if such agreements fix the price for the resale to a third party, set up a minimum price for the resale of goods to a third party. However, for other monopoly agreement determined by anti-monopoly authorities under the State Council, the victim needs to prove that such agreements eliminate or restrict competition.

- **As to the abuse of dominant market position, the victim needs to prove the following matters:**

a) the relevant market in which the alleged monopolizer involved.

The relevant market refers to the scope of commodity or scope of area within which the operators compete against each other, as far as a particular commodity or service is concerned. Determining the relevant market is in nature determining the scope of market in which the operators are competing. Such determination should be made mainly with reference to the *Guidance on the Determination of Relevant Market* published by the Anti-monopoly Committee under the State Council.

b) the monopolizer has dominant market position

The determination on whether an operators has dominant market position shall in principle be based on the elements such as market share, status of competition, the ability to control sales market and market of raw materials as provided in Article 18 of the *PRC Anti-monopoly Law*. In case the market share of the operators can be precisely ascertained, the said determination can also be made based on Article 19 of the *PRC Anti-monopoly Law* concerning the presumption of dominant market position. Notwithstanding the foregoing Article 18 and Article 19 of the *PRC Anti-monopoly Law*, it remains unclear as to the standard in determining the monopolizer's dominant market position and what kind of evidence is adequate to prove the monopolizer's market share and its ability to control the market.

In practice, the court enjoys relatively greater discretion in deciding, and it is difficult for the victim to prove, whether the alleged monopolizer has a dominant market position. In *Tangshan Renren Information Service Co., Ltd. vs. Baidu Wangxun Technology Co., Ltd*., the plaintiff, Tangshan Renren Information Service Co., Ltd. submitted nothing but two news reports regarding the dominant market position of the defendant, Baidu Wangxun Technology Co., Ltd., without providing the calculation method and the relevant supporting data as evidence. Beijing First Intermediate People's Court held that the evidence submitted by the plaintiff failed to convince the court that the asserted market share was based on reasonable and objective analysis and therefore ruled that the plaintiff failed to prove that the defendant enjoys a dominant market position in the "Search Engine Service Market in China". In Beijing Shusheng Electronic Technology Co., Ltd. vs. Shanghai Shengda Network Development Co., Ltd and Shanghai Xuanting Entertainment Information Technology Co., Ltd., Shanghai First Intermediate People's Court held that the evidence submitted by the plaintiff, Beijing Shusheng Electronic Technology Co., Ltd., was merely promotion materials posted on the website of the defendants, which was neither verified nor accompanied by other evidence, and based on such reason found that the evidence to prove the dominant market position of the defendants were insufficient.

In order to relieve the victim from the difficulties encountered in proving the dominant market position of the alleged monopolizer, Article 9 of the Draft for Comments supplements Article 19 of the *PRC Anti-Monopoly Law* in respect of situations under which the alleged monopolizer is preliminarily presumed to have a dominant market position if it is:

i. a public utility enterprise that supplies water, power, heat and gas etc.;

ii. an operator, other than a public utility enterprise, that is qualified for exclusively operating specific commodities or services by the laws, regulations and rules or other regulatory documents; or

iii. an operator whose commodities or services are highly depended and the relevant market is insufficient of competition.

It is noteworthy that the presumption made pursuant to Article 9 of the Draft for Comments can only be used as preliminary evidence of the dominant market position of the alleged monopolizer and the victim still needs to prove the dominant market position of the alleged monopolizer through other ways if the alleged monopolizer provide sufficient evidence to refute such preliminary evidence.

c) The alleged monopolizer has abuse its dominant market position.

Chinese law doesn't prohibit the operator from obtaining dominant market position but prohibit the operator from abusing its dominant market position. Therefore, even if the victim has proven that the activities of the alleged monopolizer fall under circumstances such as selling products at prices below cost as provided under Article 17 of *PRC Anti-Monopoly Law*, it cannot be presumed that such alleged monopolizer has abused its dominant market position provided that the alleged monopolizer proved the justifiability of its behaviors.

- **Other matters to be proved**

According to the Draft for Comments, the victim may claim the civil liabilities of the alleged monopolizer such as ceasing the infringement, eliminating the risk and making compensation for losses. Therefore, apart from what has been mentioned above, the victim may as well bear the burden of proof in respect of matters such as the losses suffered and the causal relationship between the suffered losses and the alleged monopoly behaviors.

Means of Proof

- **Presumption**

In order to relieve victim's burden of proof, the Draft for Comments establishes a series of presumption rules. For example, Article 8 of the Draft for Comments presumes that the alleged monopoly agreement falling under any circumstances provided in Section (1) to (5) of Paragraph 1 of Article 13 or Section (1) or (2) of Article 14 of the *PRC Anti-monopoly Law* has the effect of eliminating or restricting competition. Article 9 of the Draft for Comments presumes that a public utility enterprise supplying water or etc. with exclusive operating qualification has the dominant market position. Article 12 of the Draft for Comments prescribes that the court may presume that the claim of the victim is justified where the alleged monopolizer refuses to submit evidence ordered by the court without reasonable reasons and provided that such evidence is unfavorable to the alleged monopolizer.

- **Exemption of Burden of Proof**

Article 11 of the Draft for Comments exempts the burden of proof with respect to the facts as affirmed by a legally effective judgment of a people's court and the facts as affirmed by an effective final decision of the anti-monopoly authority which confirms the existence of monopoly behaviors.

It is noteworthy that, the Draft for Comments does not clarify whether it the facts as affirmed by an effective final decision of the anti-monopoly authority which confirms the non-existence of monopoly behaviors is exempted to be proved. Additionally, Article 15 of the Draft for Comments provids that "where the anti-monopoly authority investigates an alleged monopoly behavior but does not find that such behavior constitutes a monopoly behavior, the people's court shall conduct a comprehensive review upon the claims of the parties and make a judgment." (Note: The enactor of the Draft for Comments might have conceived that the operator whose behavior is determined to be a monopoly behavior by the anti-monopoly authority may apply for administrative review or file an administrative lawsuit pursuant to the *PRC Anti-monopoly Law*, which is not within the scope of civil dispute as concerned by the Draft for Comments.) However, it is uncertain under the Draft for Comments whether the court shall conduct a comprehensive review and make judgment in the event that the victim file a civil lawsuit after an effective final decision has been made by the anti-monopoly authority confirming an existent monopoly behavior, and whether the facts as affirmed by such decision may be used to prove the existence of monopoly behavior.

- **Recognition by the Alleged Monopolizer**

Article 9 of the Draft for Comments states that the disclosure information of public listed companies and recognition from the alleged monopolizer may constitute preliminary evidence for the dominant market position of such monopolizer. But doubt remains over whether the "listed company" mentioned in Article 9 of the Draft for Comments refers to the alleged monopolizer only or includes listed companies other than the alleged monopolizer.

- **Third Party Investigation**

Article 13 of the Draft for Comments prescribes that a party may file an application with the people's court for entrusting any independent specialist agency or professionals to make a market research or economic analysis report on the specialized issues of the case, or may directly entrust an independent specialist agency or professionals to make the market research or economic analysis report. Article 9 of the Draft for Comments prescribes that the market research, economic analysis, monographic study, statistic result concluded by a third party agency with corresponding qualification may been deemed as primary evidence for the dominant market position of the monopolizer.

The author hereof is in a view that some definitions remain unclear under Article 9 and Article 13, for example,

a) The Draft for Comments has not defined the "corresponding qualification";

b) The market research is required to be made "independently" by a third party according to Article 9 of the Draft for Comments, then whether the victim is allowed to entrust a third party agency to make the market research on the dominant market position of the alleged monopolizer? If yes, whether the alleged monopolizer is allowed to entrust a third party to make market research? Answers to both questions seem to be yes according to Article 13 of the Draft for Comment. However, the connotation and legal effect of the third party research and analysis under Article 9 seem to be different from that under Article 13, namely that the third party research under Article 9 is likely to be made without entrustment of the parties and may be deemed as primary evidence of monopolizer's dominant market position while third party's market research under Article 13 is made with the entrustment by the parties and used to prove "specialized issues" whose legal effect, however, is subject to the "examination and discretion by the court by referring to the relevant provisions of the Civil Procedure Law and the relevant juridical interpretations".

c) Article 9 of the Draft for Comments prescribes that research and analysis independently made by a third party agency may be deemed as the primary evidence of monopolizer's dominant market position, however, it is unclear whether the research and analysis independently made by the third party agency may be used to define the relevant market and whether it can be used to identify the abuse of dominant market position by the alleged monopolizer, and what the "specializes issues" in Article 13 of the Draft for Comments refers to.

- **Order the Monopolizer to Provide Evidence**

Article 12 of the Draft for Comments states that under certain conditions the court may order the alleged monopolizer to submit evidence upon the application by the victim and its attorneys, and the court may fine or detain the principal or the person directly responsible of the alleged monopolizer or even pursue the criminal liabilities of such persons.

- **Expert Witness**

The Article 13 of the Draft for Comments prescribed that a party may file an application with the people's court for requesting professionals with expertise in economics or industry etc. to appear in court to explain specialized issues of the case. But as mentioned above, the Draft for Comments does not clarify the definition of "specialized issues".

- **Other Methods**

Though having not been clearly addressed in the Draft for Comments, the parties in the trial of monopoly civil disputes may also collect evidence with methods permitted by laws or judicial interpretations, for example, a party may apply for investigation and collection of evidence by the people's court in line with Article 15 to Article 19 in *Provisions of the Supreme People's Court on Evidence in Civil Proceedings.*

Legal Updates

1. Summary of Recent Regulation Interpretation Seminar on Qualified Foreign Limited Partner (QFLP) Pilot Program in Shanghai (Author: Yong WANG; Xiao LING)

In order to further standardize the implementing procedures for the newly established qualified foreign limited partnership pilot program ("QFLP Pilot Program") in Shanghai, clarify relevant procedures and responsibilities of various relevant authorities and accelerate the construction of Shanghai as an international financial center, Shanghai Financial Services Office, Shanghai Municipal Commission of Commerce and Shanghai Administration for Industry and Commerce, in reference with the qualified foreign institutional investor ("QFII") regime for the stock market, jointly promulgated *the Implementation Measures on the QFLP Pilot Program in Shanghai* (the "QFLP Implementation Measures") (you may find our detailed interpretation on the QFLP Implementation Measures in *Han Kun Newsletter* (Vol. 2011.01)). Recently, Shanghai Financial Services Office hosted a regulation interpretation seminar on the QFLP Pilot Program in Shanghai. Together with relevant officials from the Shanghai Branch of State Administration of Foreign Exchange ("SAFE") and Shanghai Administration for Industry and Commerce ("AIC"), they clarified relevant issues in the QFLP implementation measures and the QFLP Pilot Program and analyzed the current status and future direction of the QFLP Pilot Program. Members of our Fund Formation & Management Group attended the regulation interpretation seminar and had in-depth discussions with relevant officials. The following is a summary of the seminar and our discussion with them:

■ **Current status on QFLP Pilot Program:**

- The aforesaid relevant authorities have created implementing regulations and pilot procedures regulating the custody of QFLP pilot enterprises, foreign exchange settlement, capital repatriation and information reporting. A detailed operations manual has been created (we have obtained such manual and other relevant QFLP application materials, which we will be made available to you upon request);

- The aforesaid relevant authorities have started the preliminary review of QFLP pilot enterprises. As of March 18, 2011, Carlyle/Fosun, Blackstone and DT Capital have been approved as QFLP pilot enterprises.

■ **Area of Focus for Future QFLP Application Review:**

- The approved QFLP pilot enterprises to date are mostly large buyout funds. In the next phase, the examination and approval authorities will seek to diversity the applicant base by selecting different types of QFLP pilot enterprises --- in addition to large buyout funds, they would also like to attract funds focused on investing in technology, entrepreneurial and employment-based SMEs with a high growth rate.

- It is hoped that the QFLP Pilot Program will spur a large amount of domestic private capital and help nurture domestic long-term investors.

■ **The Premise of Applications for the Pilot Policy:**

- The QFLP applicant must be a Shanghai-registered equity investment management enterprise ("EIME") or another type of Shanghai-registered investment management enterprise primarily engaged in the business of equity investment (mostly venture capital investment management enterprise, or "VCIME").

- Investors are clearly identified and the management team is in place. The investors have issued contribution commitment letters and letters of confirmation.

■ **Certain Key Considerations in Review of QFLP Applications for the Pilot Program:**

- The fund management team's investment experience in China, especially successful experience of exit;

- Priority given to enterprises with participation from domestic capital such as government guidance funds, state-owned enterprises and domestic non-state-owned enterprises;

- Priority given to enterprises investing in new industries with management teams that have prior experience in such industries;

- Preferred enterprises shall have a clear organizational structure, clear contribution of capital, clear investment plans and a market mechanism of governance structure and profits allocation / incentive system.

■ **Status of Establishment:**

- As of March 18, 2011, a total of 53 foreign-invested equity investment enterprises ("EIEs") and EIMEs have been established; two of these are foreign-invested EIEs (with a total amount of registered capital of $140 million), and the other 51 are foreign-invested EIMEs;

- *Shanghai Administration for Industry and Commerce's Several Comments of Positive Support on Enterprises' Innovation-driven and Restructuring Development* promulgated in February revealed important policies about the QFLP Pilot Program:

  - Permitting qualified PRC individuals to establish Sino-foreign equity joint ventures and cooperative enterprises;

  - Permitting the business and operation scope of equity investment enterprises and equity investment management enterprises to be described separately as "equity

investment"/"equity investment fund" and "equity investment management"/"equity investment fund management". This is a breakthrough to the limitations of enterprises' name regulated in *Notice on Business Registration and Relative Matters of Equity Investment Enterprises in Shanghai* promulgated in August 2008, in which such enterprises' name are not permitted to reference the word "fund".

- ◆ According to actual needs, permitting names of certain qualified equity investment enterprises and equity investment management enterprises' to have a suffix of "Fund I", "Fund II", "Fund III" and so on to better promote such enterprises' brands as intangible asset.

- ◆ Permitting EIEs and EIMEs with management responsibility to share the same business address.

- ■ ***Status of Foreign-invested Equity Investment Partnership and Its Portfolio Company.*** Officials from Shanghai Municipal Commission of Commerce interpreted the regulations regarding "foreign-invested partnership enterprises with the main business of investment shall be treated as foreign investors" in the *Notice on Issues about Foreign Investment Management* promulgated by Ministry of Commerce in 2011 (the "*Notice*"). The officials indicated that the Notice defined the status of the foreign-invested equity investment partnership more clearly --- such enterprises are deemed foreign investors and not foreign-invested enterprises ("FIEs"). This treatment is similar to that of the other two types of investment enterprises with foreign participation --- foreign-invested investment companies and foreign-invested venture capital investment enterprises. China adopts an independent and relatively liberal regulatory regime on domestic reinvestments by foreign-invested enterprises, compared to that of foreign investors. Pursuant to relevant laws and regulations, when an FIE invests in China, if the target investment falls in the "encouraged" category or "permitted" category according to *the Catalogue of Industries for Guiding Foreign Investment*, the examination and approval procedure by the Ministry of Commerce (or its local counterpart) is not required and only registration with the Administration for Industry and Commerce is required; the approval from the Ministry of Commerce (or its local counterpart) is required only when the investment involves a "restricted" category. If it is treated as a foreign investor, then the full-blown foreign-investment examination and approval process is required regardless of the category of investment. Since foreign-invested equity investment partnership funds are expressly defined as foreign investors, prior to its domestic listing, a portfolio company of such funds will need to be converted to foreign-invested joint stock company pursuant to *the Interim Provisions on Several Issues about the Establishment of the foreign-invested Incorporated Corporation* promulgated in 1995, including the requirement of profitability for three consecutive years prior to the listing.

- ***Industry entry*.** In addition, for the first time, the Notice referenced equity investment from an industry entry perspective, indicating that the Ministry of Commerce has recognized foreign equity investment industry as an industry permitted for foreign investment.

- ***Foreign Exchange Management.*** QFLP enterprises are permitted to use foreign currency capital to make equity investments in China. QFLP enterprises are permitted to apply for foreign exchange registration and account and to make investments with RMB settled from foreign currency capital; provided that foreign exchange settlement may be conducted only when there is a specific investment project. The advantage of QFLP is that, once a QFLP pilot enterprise is approved, its manager may give direct orders to its custodian bank to settlement foreign exchange and transfer the funds to the recipient in one step without the review and approval by the State Administration of Foreign Exchange on a project by project basis. The officials from State Administration of Foreign Exchange also cleared rumors about the foreign exchange quota of US$3 billion for the Shanghai Pilot Program and indicated that such foreign exchange quota does not exist.

- ***Understanding Article 24 of the Pilot Measures*.** It provides that "the QFLP that is approved to participate in the Pilot Program can use foreign currency capital to make capital contribution to the equity investment enterprise established by it. However, the amount of foreign currency capital shall not exceed 5% of the total fund raised, which capital contribution will not affect the original status of the equity investment enterprise in which the QFLP invests." We understand that, within the 5% investment limit, Article 24 exempts QFLP pilot enterprises from the restrictions imposed by *the Notice of the General Affairs Department of the State Administration of Foreign Exchange on the Relevant Operating Issues concerning the Improvement of the Administration of Payment and Settlement of Foreign Currency Capital of Foreign-funded Enterprises* (Circular 142) promulgated by the SAFE on equity investment using funds with the settlement of foreign currency capital. Moreover, the investment in funds within the above 5% limit will not affect the original status of the equity investment enterprise that the QFLP invests in, that is, where there is no foreign limited partner, even if the general partner is a foreign-invested enterprise, it does not affect the domestic status of the fund.

- Relevant government officials also cleared rumors that the foreign currency capital portion of the registered capital of a QFLP pilot enterprise is capped at 50%. They indicated that there is no mandatory cap on the proportion of foreign currency capital for a QFLP pilot enterprise (theoretically, the QFLP pilot enterprise may be comprised solely of foreign

currency capital); however, when reviewing applications for the Pilot Program, the domestic capital participation (especially the participation of guidance funds, state-owned enterprises and other state-owned entities) will be viewed favorably. (Please refer to *Certain Key Factors for the Review of QFLP Applications for the Pilot Program* above for more information.)

The Notice of the General Office of the National Development and Reform Commission on Further Regulating the Development of Equity Investment Enterprises in Pilot Regions and the Relevant Record-filing Administration promulgated this year requires the mandatory record-filing of equity investment enterprises established in designated pilot regions (including Shanghai) in excess of RMB500 million. With regard to the coordination of the aforesaid mandatory record-filing requirement and the requirements regarding record-filing in the QFLP Pilot Measures, relevant government officials indicated that the Pilot Measures promulgated in Shanghai, as local policies, shall be able to conform to relevant rules promulgated by the central government easily and that such matter shall be the primary responsibility of the government and should not be a main concern for QFLP pilot enterprises.

2. MOFCOM Released Service Standards for Third-party E-commerce Trading Platforms (Author: Yinshi CAO; Yuan LIN)

After publishing a draft for comment on February this year, the Ministry of Commerce (MOFCOM) officially promulgated and implemented the *Service Standards for Third-party Ecommerce Trading Platforms* (the "**Standards**") on April 12, 2011. The Standards, with nine sections and thirty-two clauses in total, cover issues such as platform establishment and basic code of conduct, platform participants (i.e., individuals and enterprises engaging in trading and related service provision activities on the platform) management and consumer protection by platform operators, coordination and supervision between platform operators and relevant service suppliers, etc. The Standards particularly clarify and reinforce platform participant management and protection for consumers by platform operators. Set forth below is a summary of salient points of the Standards.

Business Separation Principle

Where a platform operator trades on its own platform, the Standards require the platform operator to separate its platform operation business from its trading activities, and disclose the relevant information on its platform. This principle ensures the openness, fairness and impartiality of the platform to the trading parties.

The Standards further explicitly regulate in Section 6.9 that, where a third-party trading platform uses its own platform to engage in online goods (service) transactions, it shall not conclude with each other or take advantage of its convenient position to manipulate market price or disrupt market order, causing damage to the lawful rights and interests of other business operators or consumers.

Information Disclosure and Data Storage

The Standards require that platform operators shall disclose the following information on the homepage of their websites or on the webpage through which their business activities are carried out: a) business license, organizational code certificates, tax registration certificate, and a variety of business permits; b) internet-based information service permit registration or electronic verification identifier which has been filed with the relevant authorities for record; c) contact information including business premises, postcode, telephone numbers, and email, and the address for the service of relevant legal documents; d) contact information of relevant supervisory authorities or organizations responsible for processing consumer complaints; e) other information to be disclosed as required by laws and regulations.

Also, the Standards require that identity information of platform participants and their trading counterparts shall be kept by platform operators for at least two year after their last login; and transaction information shall be kept for at least two years after relevant transactions are conducted. With respect to third-party trading platform with a daily turnover of RMB 100 million or more, remote systems for data backup and disaster recovery shall be set up, and contingency plans shall also be prepared. Platform participants shall be entitled to checking, downloading or printing information pertaining to their own transactions within said periods for information reservation; the Standards encourage third-party trading platforms to handle other entities' inquiry, download and printing requests via independent data service providers.

Formulation of and Modification to User Agreements and Trading Rules

According to the Standards, user agreements of platform operators and modifications thereof shall be disclosed at least 30 days in advance. Where consumers' rights and interests are affected, the agreements concerned shall be forwarded to local consumer right and interest protection organizations; any changes to the trading rules shall be announced at least 30 days in advance. In the event that the change is not accepted by a user, the user may withdraw from the platform, with a written notice, within 60 days after the announcement. Platform operators shall process such withdrawals properly in accordance with the original trading rules.

Platform Participant Management and Guidance Provided by Platform Operators

The Standards explicitly require platform operators to assume the responsibility of platform participant management and guidance. The following is the key requirements:

- Platform Participant Registration

The Standards require that any entities, before running any operation on the platform, need to apply with platform operators, supplying necessary licenses and information such as their identity certificates, business license, company address, and contact details; platform operators has the obligation to verify business licenses, tax registration certificates and various business permits provided by platform participants. The Standards further require that, platform operators shall conduct regular verifications regarding registration information of platform participants registered using their real names on a yearly basis, indicating platform participants whose registration information cannot be verified.

- Reasonable and Cautious Information Examination and Inspection

The Standards require platform operators to disclose relevant trading information, ensure the authenticity of such information, and assume the management responsibility of such information on their platforms. According to the Standards, platform operators assume the following management responsibilities and obligations against platform participants: a) in the event that any platform participant publishes advertisements in violation of laws and/or regulations, measures shall be adopted to stop such conducts and, where necessary, online transaction platform services may be suspended for the platform participants concerned; b) where evidence supplied by a complaint proves that an act of infringement has been committed, or any illegal advertisement has been published, by a platform participant, the platform operator concerned shall issue a warning against the party in question, stop the infringement act, or delete harmful information, and may provide the complainant, at his or her request, with registered ID and contact details of the respondent; c) the Standards further explicitly require platform operators to assume the "responsibility to conduct reasonable and cautious information examination and inspection". The requirement not only includes the two obligations above, but also requires in a nutshell that for any information which is evidently illegal or of infringement nature, platform operators shall conduct positive information examinations and inspections, delete in a timely manner, and issue warning against platform participants involved.

Trading Order Maintenance and Consumer Protection by Platform Operators

Besides platform participant management and guidance, the Standards also require and

encourage platform operators to establish relevant system to protect consumers' interests and maintain regular trading order. According to the Standards, for the convenience of consumers to supervise and complain, platforms shall require and urge platform participants to establish and implement various product credit rating systems by contracts or other ways, in order to restrain platform participants from conduction improper actions.

- Pre-warning Mechanism and Double Transaction Confirmation

The Standards require that platform operators shall, by adopting technical or other means, guide users to read the entire user agreement, remind users, to a reasonable extent, of transactions risks, limitation of liability and disclaimer clauses. Moreover, platform operators shall request users to confirm on transaction details before executing transaction payment instructions received from users; in the case of operators engaging in online payment services, payers shall also be requested to confirm before his payment instruction can be executed.

- Quiet Period System

The Standards encourage platform operators to set up a "quiet period" system, whereby consumers are allowed to cancel an order unconditionally within the quiet period. This system allows consumers to return products with no cause in a certain period. According to public statement by Mr. Jinqi Li, director of Department of Information Technology of the MOFCOM, this is not a mandatory requirement. Whether to set up such quiet period is in the sole discretion of platform operators; and also, not all products are subject to such quiet period. Certain special products such as frozen products, food, cosmetic, and medicines are excluded.

- "Seller Deposit" System

The Standards encourage online third-party trading platform and platform operators to provide consumers with "seller deposit" services, where deposits are used to compensate consumers for their losses occurred during transactions. The amount and payment methods of such deposits shall be reported in advance to local administrations for industry and commerce for record-filing and published by said administrations. The seller deposit system which is aimed at protecting consumers' interests, ensure that the consumers can get compensation from third-party platform in advance in the event they cannot find the seller.

Now several group purchase websites have established similar deposit system. For example, in the dispute between Meituan and DQ, Meituan has activated the "compensation in advance" system.

- Returning and Changing Products

The Standards set forth that platform operators shall require, by signing a contract or employing other means, platform participants to adopt after-sales service and product exchange/return systems in accordance with relevant regulations of the State. Where a platform participant is found in violation of after-sales service and/or product exchange/return regulations, platform operators concerned shall process consumer complaints and may invoke default liabilities clauses against said participants according to the contract.

It should be noted that, the Standards explicitly state that all technical contents thereof are recommendative. Thus, from a legal perspective, relevant contents in the Standards are not binding on and enforceable against platform operators. However, taking a long term perspective, the promulgation of the Standards has significant implications in guiding and regulating business activities on third-party e-commerce trading platforms, safeguarding lawful rights and interests of enterprises and consumers, and creating a fair, trustworthy, safe transaction environment.

3. NDRC Issued Guidelines to Further Regulate Mandatory Filing of Large and Medium-sized Private Equity Funds in Pilot Areas (Author: Shaokai WANG)

On January 31, 2011, the National Development and Reform Commission (the "**NDRC**") issued the NDRC Notice on Further Regulating the Administration on Development and Filing of Equity Investment Enterprises (Fa Gai Ban Cai Jin [2011] 253 Hao) (the "**Notice**"), which came into effect on the day of its issuance. On March 21, 2011, NDRC published on its website detailed guidelines in relation to the filing under the Notice, which contain 11 documents (the "**Guidelines**") (These Guidelines are available at http://cjs.ndrc.gov.cn/qytzycyjj/gqtzqyba/bawgqtzqysqwb/t20110321_400481.htm). The Equity Investment Enterprise Filing Application Template therein contains 8 application forms. The Guidelines details the filing formalities of equity investment enterprises (including fund of funds or the so-called mother fund) and equity investment management enterprises based on the Notice.

As indicated by the Equity Investment Enterprise Filing Application Template, when an equity investment enterprise applies for a filing with the NDRC, it shall submit the following documents to NDRC: a) copies of its business license; b) prospectus; c) the articles of association of the company or the partnership agreement; d) commitment letter for capital contribution; e) capital verification report; f) statement issued by the promoter regarding whether the fund raising activities of the equity investment enterprise are in compliance with

laws and regulations; g) certification materials in connection with the curriculum vitae of senior executives; and h legal opinion issued by the relevant law firm. The key guidelines of the aforesaid documents and other documents required to be submitted by the NDRC are summarized as follows:

Guidelines for Copies of Business Licenses

An equity investment enterprise applying for filing shall submit copies of its own business license to the NDRC. Where it is managed by a separate management company, copies of the business license of the management company shall also be submitted. Where its general partners are institutions, copies of the business licenses of GPs shall be submitted.

Guidelines for Prospectuses

Under the specific guidelines for prospectuses, a prospectus shall specify the basic information of the equity investment enterprise, subscription requirements for investors' investment, organizational structure, management, investment, assets, returns, expenses, performance incentive reward cost and allocation, taxes, termination and liquidation, risk disclosure and information disclosure of the equity investment enterprise, etc..

It is worth noting that the Guidelines made the following requirements for the subscription of investors: a) the number of investors shall be no more than 200 in case that the equity investment enterprise is established in the form of joint stock limited company and shall be no more than 50 in case of limited liability company or limited partnership; b) all investors shall not entrust other investor to invest in the equity investment enterprise on their behalf; c) the NDRC suggests the investment amount of respective investors shall be no less than 100,000 RMB. Furthermore, according to the Guidelines, the taxes of the equity investment enterprise shall be only specified as: the equity investment enterprise pay taxes in accordance to relevant tax regulations of the country.

Guidelines for the Articles of Association or the Partnership Agreement of the Equity Investment Enterprise

The equity investment enterprise established in the form of limited liability company or joint stock limited company shall stipulate articles of association according to relevant laws and submit relevant articles of association according to the requirements of the NDRC. The articles of association shall prevail in case of any discrepancy between the articles of association and the shareholders' agreement. The equity investment enterprise established in the form of limited partnership shall stipulate partnership agreement according to relevant laws.

The Guidelines emphasis that, according to stipulations of Article 3 in the PRC Partnership Law and the requirement to comply with establishment requirements of relevant stipulations of the Company Law, Partnership Law in Article 1 of the Notice, wholly state-owned companies, state-owned enterprises, listed companies and public welfare institutions shall not become general partners of equity investment enterprise. The state-owned enterprise aforementioned means an enterprise whose aggregate state-owned shareholding percentage reaches or exceeds 50%.

Form of Commitment Letter for Capital Contribution

The commitment letter is issued by capital subscribers to the promoters of equity investment enterprise and executed by all investors. It shall be noted that, in the presentation and warrant part of the letter, capital subscribers shall promise to the promoters of the equity investment enterprise that "the fund used by this company/individual to subscribe for the equity investment enterprise's equity interest is self-owned fund and from legitimate sources."

Guidelines for Capital Verification Report

The NDRC requires the equity investment enterprise applying for filing to submit verification report(s) issued by the capital verification institution regarding capital contributions actually made by all investors and further clarifies that filing requirement may be exempted in case that the subscription capital size promised by investors is more than RMB 500 million or its equivalent in foreign currencies but capital contribution actually made is less than RMB 100 million.

Guidelines for Statement Regarding Whether the Fund Raising Activities of An Equity Investment Enterprise Are in Compliance with Laws and Regulations

The Statement shall be issued by promoters and contain (but not limited to) the following contents: a) the capital is only raised from specific targets but not made directly or indirectly to non-specific targets through publishing announcements in the media (including the institution website), posting up notices in communities, handing out leaflets to the public, sending text messages, or holding seminars or speeches, or other activities in public, whether or not in disguised form, (including putting placement prospectuses at the counters of institutions such as commercial banks, securities companies and trust investment companies); b) there is no such situation as the investment of one investor entrusted by more than one investors; c) it shall not promise that the principal or a fixed return is guaranteed and shall fully disclose the information pertaining to the investment risks and the potential investment loss to the investors of the equity investment enterprise.

Guidelines for Legal Opinions Issued by Law Firms

The legal opinion shall be issued by qualified law firms and shall have definite conclusions. The lawyers shall issue reserved opinions and specify relevant reasons on the issues that fails to comply with laws, regulations and relevant stipulations of filing administration department, or issues whose legal character or legality cannot be accurately determined in spite of due diligence. The legal opinion submitted for filing shall be signed by more than two lawyers with official stamps of the law firm. No changes shall be made after the legal opinion signed by lawyers is submitted. Supplements to the legal opinion shall be issued in case that it is considered by the lawyers as necessary to make supplements or alterations.

Other Guidelines

Aside from the abovementioned guidelines, entrusted management agreement shall be executed by and between the equity investment enterprise and the entrusted management institution according to stipulations in the Guidelines in case that other equity investment enterprise or equity investment management enterprise is entrusted by the equity investment enterprise to be in charge of investment management business as entrusted management institution, and the entrusted custodial agreement shall be signed according to stipulations in the Guidelines in case that a custodial institution is entrusted with the custody of the assets. The entrusted management agreement and the entrusted custody agreement shall specify contents such as “relevant systems of investment decision and risk control of equity investment enterprise, the organization of investment decision institution and risk control institution and qualifications for their members”, “the rate, calculating method and way of payment of management fees and other contents of the entrusted management institution”, “principle, proportion, scheme and operational procedure of performance sharing of entrusted management institution” and “type, calculating method and way of payment of fees other than management fees and performance shares of management institution due by equity investment enterprise” and other contents.

The NDRC also provides clear guidelines for articles of association and partnership agreement of equity investment management enterprise in the Guidelines: The articles of association shall prevail in case of any discrepancy between the content of articles of association and shareholder’s agreement. The Guidelines at the same time suggest that the Partnership Agreement shall not stipulate that limited partners may, in any direct, indirect or disguised ways, participate in the management of management institution and the investment decision.

4. State Council Issued Regulation on Individual Industrial and Commercial Households (Author: Taoran WANG)

For the purposes of fully playing their role in accelerating social economy development and raising employment rate, the State Council, on April 16, 2011, issued the *Regulation on Individual Industrial and Commercial Households*（the "**Regulation**"）, which shall come into effect on November 1, 2011 and, at the same time, supersede the *Interim Administrative Regulation on Urban and Rural Individual Industrial and Commercial Households* (the "**Interim Regulation**") issued by the State Council on August 5, 1987. The Regulation makes modifications to the Interim Regulation in several respects, cancels some former restrictions that are inappropriate, and provide policy supports to encourage the development of individual industrial and commercial households (the **"Household(s)**"). In the meanwhile, it sets for provisions to regulate their operation activities.

Cancel Previous Restrictions

The modifications made by the Regulation to the former restrictions set forth in the Interim Regulation are as follows:

Firstly, it removes the restriction on the number of employees that a Household can employ. The Interim Regulation provides that a Household may employ one or two assistants based on its business conditions and a Household who has skills may employ three to five apprentices. The Regulation removes such restriction and provides that a Household may hire employees according to its business demand. The Regulation further provides that the registration authority and the relevant governmental authorities shall facilitate the application for transforming into enterprises by those Households satisfying the legal conditions.

Secondly, it removes the limitations to persons who are qualified to establish Households. The Interim Regulation provides that the scope of persons who can apply for establishing Households includes the urban and rural unemployed persons who are capable of operating businesses, villagers and other persons that are qualified pursuant to the applicable national policies. The Regulation broadens the former scope of qualified persons and provides that those who are capable of operating businesses, perpetual residents in the Hong Kong Special Administrative Region and the Macaw Special Administrative Region with nationality of Republic of China and residents in Taiwan are allowed to establish Households.

Thirdly, it broadens the Households' scope of business. Under the Interim Regulation, the scope of business of Households may be industry, handicraft industry, construction business, industry of traffic and transportation, commerce, catering industry, service, repair and other

industries that are allowed by the laws and policies of the country. The Regulation broadens the scope of business set forth in the Interim Regulation and provides that the registration authority shall approve the registration of the Households pursuant to the principles of equal access to market and equitable treatment, provided that the scope of business of the individual industrial and commercial households dose not exceed the scope of industries within which the Households are allowed to operate business according to the applicable laws and regulations.

Fourthly, it removes certain administrative fees. According to the Regulation, the administrative fees charged on the Households set forth in the Interim Regulation are cancelled.

Provide Policy Supports

The Regulation provides new supports and assistance to the Households as follows:

Under the Regulation, the registration authority (i.e. the administrative authority of industry and commerce) and other relevant governmental authorities shall publicize the conditions, procedures, term, list of required filing documents, charge standard and etc. on their governmental websites and in their offices. In addition, the Regulation specifies the procedures and term of the registration with the registration authority.

The Regulation expressly provides that the registration authority should conduct annual inspection of the Households' business licenses for free.

According to the Regulation, the Households, by submitting their business licenses and tax registration certificates, may open accounts in banks or other financial institutions and apply for loans pursuant to the laws. The financial institutions shall improve and perfect their financial service and facilitate the loan applications submitted by the Households.

Regulate Operation Activities

The Regulation sets out the following provisions to regulate the Households' operation activities:

For the purpose of protecting the rights and interests of employees of the Households, the Regulation provides that the Households should enter into labor contracts with their employees pursuant to applicable laws, perform their obligations under the relevant laws,

regulations and the contracts and may not cause damages to the legal rights and interests of their employees.

The Regulation sets out the corresponding liabilities of the Households for violating the relevant provisions therein. For example, the Regulation provides that if the Households fail to apply for annual inspection within the provided term, they would be ordered to rectify the violating acts within a limited period of time, and if they still fail to rectify the violating acts within the said period, their business license would be revoked.

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.

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