漢坤律師事務所
HAN KUN LAW OFFICES

Newsletter

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Legal Updates

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Legal Updates

1. The Impact of Two Draft Implementation Regulations on China's P2P Internet Finance Sector (Author: Jun WAN)

Following the release of the Guideline Opinions on Promoting the Healthy Development of Internet Finance on July 18, 2015 by 10 regulatory agencies, on August 12, 2015, the Legislative Affairs Office of the State Council issued the Regulations on Non-Deposit Loan Organizations (Draft for Comments) (the "Loan Regulations") and the Regulations on Financial Guarantee Companies (Draft for Comments) (the "Financial Guarantee Regulations"). The release of the Loan Regulations and Financial Guarantee Regulations have the market wondering whether these two regulations will be a comprehensive account of China's regulations of this sector. Irrespective of whether this is the case, and even though these two regulations are only draft for comments, they are nevertheless important guidance for what's to come. This memorandum compares the Loan Regulations and the Financial Guarantee Regulations and discusses their impact in charts.

Status – The Importance of the Issuance of "Regulations"

Before analyzing the Loan Regulations and the Financial Guarantee Regulations, it is important to stress that the type of such two regulations are "administrative regulations". Prior to the issuance of these regulations, the administration of micro-loan and financial guarantee companies were only made by way of departmental rules, which in the hierarchy of laws falls below "laws" and "administrative regulations." By contrast, an "administrative regulation" is a normative document that applies to the entire country, and is only below a "law." An "administrative regulation" has the same effect as a "law" except that an "administrative regulation" may not limit personal freedoms, which may be a very effective deterrent to the subjected party of these regulations. The fact that the Loan Regulations and Financial Guarantee Regulations are "administrative regulations" demonstrates the seriousness the authorities have placed in regulating the P2P sector, and the intentions that the publication and administration of these regulations can solve the issues and chaos in these two areas.

Loan Regulations

Item	Article	Impact on the P2P Sector
Business Scope	Article 3: A "loan" is the lending of principal to a borrower and obtaining such principal and gains according to the loan agreement, or other activity that does not involve a loan per se, but whose nature is that of a loan.	• Article 3: A "loan" is the lending of principal to a borrower and obtaining such principal and gains according to the loan agreement, or other activity that does not involve a loan per se, but whose nature is that of a loan.
License	Article 4: Without the consent of the administrative departments authorized by the People's Government at the provincial level, no organization or individual may operate a loan business. The following circumstances do not involve a loan business under the Loan Regulations. 1. Employer providing a loan to help its employees; 2. Occasional loans granted by individuals or organizations whose ordinary course of business or main businesses that do not involve loan; 3. Inter-company loans within company group; 4. Personal loans not designed for profit; 5. Insurance policies pledged loans granted by insurance companies; 6. Financial leasing businesses; and 7. Other loans not designed for normal business.	• The "Tangning Mode", in which key staff of P2P platforms first lend money in their own names and then transfer the debt, will not be able to continue. The reason is because this method does not fall within the exception given for occasional loans by individuals. • Those P2P platforms that are able to do so, will immediately obtain the license for loan business through their affiliates, after which they can design loan products with minimal disruption to their normal business. • The occasional investment of loans on P2P platforms by companies or individuals will not require licensure.
National Business	Article 8: Where non-deposit loan organizations have business across provinces, autonomous regions or municipalities directly under the central government, they shall be supervised and	• The license for loan business is the same as the license for micro-loan business, which has area limitations. The Loan Regulations do not define what constitutes the conduct of loan

	administered by authorities in their place of registration and where their business takes place, and cooperation mechanisms shall be established between such authorities. Article 15: Loan organizations may only operate their business within the provinces, autonomous regions or municipalities after obtaining the license for loan business. If the loan business covers different provinces, autonomous regions or municipalities directly under the central government, the examination and approval will come from the place where the business will take place, and be supervised and administered by the regulatory authorities there.	business across provinces, autonomous regions and municipalities. ● Borrowers on P2P platforms can come from throughout the country. Where a loan organization, through a P2P platform, grants loans to or takes guarantees from borrowers throughout the country, does this mean they are engaging in loan business across provinces, autonomous regions and municipalities? If so, then P2P platforms may need to obtain licenses from all places across the country, irrespective of time or cost considerations, resulting in a heavy compliance burden and putting such P2P platforms at a disadvantage.
Financing Channels	Article 6: Illegally taking deposits from the general public or illegally taking deposits from the general public in disguised form are prohibited. Article 16: Non-deposit loan organizations shall operate lending businesses by using their own funds, or financing obtained from issuing bonds, shareholder loans, bank loans or securitization.	● Although the Loan Regulations permit loan organizations to obtain financing for their operations, in practice typical loan organizations will have difficulty securing funding through these channels. Most loan organizations may only use their registered capital or shareholder loans. Therefore, even if P2P platforms obtain the required loan business license, it may lack operating assets for its business.
Transferring Loan Assets	Article 24: The loan assets of non-deposit loan organizations may be transferred.	● The Loan Regulations have made it clear that non-deposit loan organizations may transfer their loan assets, which set transferring the loan assets through P2P platforms being legal. ● The transfer of loan assets may itself produce income for the loan.
Legal Liabilities	Article 37: Any unapproved lending business may be banned or be assessed with a fine for 3 times the accumulated loan money or	● Although in the past it was technically illegal to operate a loan business without obtaining a license for loan business, there

	registered capital, whichever is higher, or 5 times such amounts for serious circumstances. If an offense constitutes a crime, then criminal liability will be investigated in accordance with the law. Article 38: Authorities are responsible for ratifying the operation of loan businesses across provinces, autonomous regions or municipalities directly under the central government, and impose penalties of 3 times the illegal amounts. In serious circumstances, the violating organization shall cease operations pending rectification or have its license for loan business revoked, and be assessed with a fine of 5 times the illegal amounts. If an offense constitutes a crime, then criminal liability will be investigated in accordance with the law.	were no serious legal liabilities associated with not obtaining such license. Therefore, impermissible operations were not rare in the market. However, the legal liabilities set forth in the Loan Regulations are comparatively serious, involving heavy fines and potential suspension or event revocation of the violating business. Therefore, any P2P platform operators and fund providers should rectify non-compliance and consider the costs of non-compliance.

Financial Guarantee Regulations

Item	Article	Impact on the P2P Sector
License	Article 2: A "financial guarantee business" consists of activities wherein a guarantor provides debt-financing guarantees. Article 8: The establishment of a financial guarantee company is subject to approval from the relevant administrative and supervisory departments. Except as otherwise prescribed by laws and administrative regulations, no entity or individual may operate a financial guarantee business, or use the words financial guarantee in its name without the prior approval of the relevant administrative and supervisory departments.	● Many P2P businesses use guarantee companies to provide guarantees for the purposes of enhancing trust. The provision of these guarantees involves the operation of a financial guarantee business, which in theory should only be carried out by approved financial guarantee companies. In practice, however, many guarantors are not approved financial guarantee companies, though they have erstwhile not been investigated by regulatory authorities. As the Financial Guarantee Regulations are binding nationally, and are issued by higher organs of government, P2P platforms may consider establishing an approved financial guarantee company for compliance

		purposes.
National Business	Article 15: Financial guarantee companies applying to establish branches covering different provinces, autonomous regions and municipalities directly under the central government, shall be approved by the local authority and shall meet the following conditions: 1. registered capital of not less than RMB 1 billion; 2. at least 3 years operating a financial guarantee business with profitability in the last 2 consecutive fiscal years; 3. no record of serious violations of laws and rules in the last 2 years. Once established, these branches will be regulated by local authorities with the cooperation of the supervisory and management departments of the financial guarantee company's place of incorporation.	● The Financial Guarantee Regulations clearly state that financial guarantee companies may not operate across provinces, autonomous regions and municipalities unless they establish approved branches. These branch requirements are stricter than those set forth to establish a financial guarantee company (e.g. registered capital only RMB 20 million, no profitability requirements). The Financial Guarantee Regulations imply that if a financial guarantee company wishes to operate nationally, it has to establish local branches in all places where it wishes to operate. We hope this ambiguity can be clarified in the official regulation. ● In the event financial guarantee companies do indeed have to set up branches in all places where it operates, they will face the same compliance difficulties as loan organizations that operate under the same model.
Business Restrictions	Article 23: Financial guarantee companies may not provide guarantees for financial products that violate regulations of the state.	● This is a new requirement that does not appear in the *Interim Measures for the Management of Financing Guarantee Companies*. The requirement imposes compliance burdens by requiring financial guarantee companies to audit financial products being offered on P2P platforms. In other words, financial guarantee companies may no longer turn a blind eye to illegal transactions on P2P platforms.

Related-party Guarantees	Article 24: The outstanding liability of a financial guarantee company to a single person and his or her's related parties may not exceed the limits set forth by the relevant regulations and rules. Article 25: Financial guarantee companies may not provide guarantees to its controlling shareholders or actual control persons. Other related party financial guarantees shall be approved by the board of directors, and may not be on terms that are more favorable than those provided to non-related parties. Related party guarantees shall be reported to the regulatory authority within 30 days and should be disclosed in accounting statement notes.	● If a financial guarantee company exists solely to provide guarantees for loans on a P2P platform, these restrictions on related party guarantees will likely apply, especially if a large number of loans offered on the P2P platform are connected to loan organizations that are affiliates of the P2P platform.
Legal Liabilities	Article 46: Without the approval from the supervisory authorities and management departments, no one may establish or operate a financial guarantee business or use the word financial guarantee in its company name. Any illegal income shall be confiscated and if it is RMB 500,000 or more, there shall be an additional fine of 1-5 times the illegal income amount, and if the illegal income is less than RMB 500,000, there shall be an additional fine of between RMB 500,000 and RMB 1,000,000. If an offense constitutes a crime, then criminal liability will be investigated in accordance with the law.	● Even before the release of the Financial Guarantee Regulations, it was unlawful to engage in the financial guarantee business without proper licensure, but there were no serious legal liabilities and such violations were commonplace. However, the Financial Guarantee Regulations changes this dynamic by setting forth substantial liability. Unapproved financial guarantee businesses will need to consider the costs of non-compliance. If released in its present form, we predict that unapproved financial guarantee businesses for P2P platforms will fade from the marketplace. ● The authorities will have to consider how to address the status of unapproved financial guarantee businesses currently in operation.

In sum, the Loan Regulations and the Financial Guarantee Regulations, if implemented in their present form, will have the significant impact on the current business models used by P2P platforms. We will continue to monitor developments in this area and provide you with real-time updates.

2. The Supreme People's Court Issues Interpretations on the Application of Laws in the Trial of Private Lending Cases (Author: Yaxing ZHANG)

The Supreme People's Court（**SPC**）issues the *Provisions on Several Issues Concerning the Application of Laws in the trial of Private Lending cases* (hereinafter referred to as *the Provisions*) on August 6, 2015. This judicial interpretation is regarded as a blockbuster by the media. The Provisions include clearer provisions and references to judicial judgments, such as definition of the loans between natural persons, between natural persons and legal persons, natural persons and other organizations, acceptance of and jurisdiction over private lending cases, ways to deal with crossed cases of civil law and criminal law, liabilities of internet lending platforms, judicial judging standards of fraud litigation, scope of protection for interest and so on. However, the most important thing is that the Provisions ensure that the lending between enterprises shall be valid in the level of judicial interpretation. With the Provisions coming into force, chaos existing for a long time in the trial of the lending between enterprises will be regulated, which leads to the stability of social economy and the unity of judicial judgments.

Judicial Authorities' Opinions on the Validity of the Lending Between Enterprises before the Provisions Came into Force

Administrative authorities and judicial authorities have been denying all the legal effect of the lending between enterprises for a long period of time. The regulations denying the legal effect of the lending between enterprises include:

- Reply of the People's Bank of China on Issues concerning the Lending between Enterprises
- General Rules for Loans
- Reply of the General Office of the People's Bank of China on Issues concerning Lending and Borrowing in convert form between Companies to be listed
- Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws in the trial of Disputes over a Joint Operation Contract
- Reply of the Supreme People's Court about How to Solve the Problem of the Borrower Failing to Repay the Loan within the Time Limit

It wasn't until 2013 that Xi Xiaoming, the former vice president of SPC, acknowledged the legal effect of lending between enterprises for the first time in the *Several Problems in the trial of Business Cases* (hereinafter referred to as *the Statement*). He stated that, when it comes to the lending between enterprises that don't have aptitudes for financial business to meet the needs of production and operation, if the lender doesn't take financial business as his regular business and the lending doesn't fall into the circumstances violating the mandatory provisions of national regulation on finance, then the loan contract shall not be considered null and void.

The Statement has largely changed the judicial authorities' opinions on the validity of the lending between enterprises, so SPC acknowledges the legal effect of lending between enterprises meeting requirements in further judgments. Of course, this acknowledge doesn't mean any lending between enterprises shall be valid. The Statement establishes determining standards to find the lending valid or not, which include:

a) Meeting the needs of production and operation

b) The lender doesn't take financial business as his regular business

c) Not falling into the circumstances violating the mandatory provisions of national regulation on finance

Chaos in Judicial Judgments before the Provisions Came into Force

Although lending between enterprises was always considered null and void before the Statement came out, no one can ignore that there is a need for high-level laws and regulations. Despite the fact that lending between enterprises saw the light, the statement fails to make a clearer definition of lending between enterprises fundamentally, but causes chaos in judicial judgments to some degree.

a) The People's Court's Judgments Ruling that Lending between Enterprises is Null and Void Lacked a Legal Basis

Although there are several provisions, rules and replies denying the legal effect of lending between enterprises，there aren't any laws and administrative regulations before the Statement came out.

The article 52 of *Contract Law of the People's Republic of China* ((hereinafter referred to as *the Contract Law*) stipulates a contract that violating the compulsory provisions of laws and administrative regulations shall be null and void, which is the major provision used by SPC to invalidate lending between enterprises. However, there is a common belief that the article 52 should not be abused and the effectiveness of the contract should not be easily considered null and void. Especially, with *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China* coming into force, article 14 of the interpretation states: The term "mandatory provisions" as mentioned in subparagraph 5 of Article 52 of the Contract Law refers to the mandatory provisions on effectiveness. This provision limits the use of the article 52 of Contract law.

As a direct result，the courts have to consider lending between enterprises null and void on the basis of violating financial regulations. However, the courts can't figure out which particular provision of financial regulations that the parties violates, can't talk about the legal levels of these financial regulations, can't decide whether these financial regulations are the mandatory provisions on effectiveness. These judgments absolutely can't convince the parties.

b) SPC's Judgments about Lending between Enterprises Lack a clear Legal Basis, also Contradict the Valid Reply Made by SPC

After the Statement came out, the SPC and some local people's court turn the spirit of the Statement into the reasons in the court's reasoning part of the verdict, to indirectly use the spirit of the statement to consider lending between enterprises valid. This way is a little awkward，though it conforms with Contract Law and SPC's interpretations. But the reasoning part of the verdict contradicts the spirit of *Reply of the Supreme People's Court about How to Solve the Problem of the Borrower Failing to Repay the Loan within the Time Limit,* that lending between enterprises should be considered null and void because of violating financial regulations.

c) There is a Difference in Judging the Effectiveness of Lending between Enterprises in the Court System

After the Statement came out, the SPC's opinion on the effectiveness of lending between enterprises have changed, but local courts may not agree with SPC because of the reason that the Statement, a kind of guidance, lacks the effectiveness of judicial interpretations. Some local courts including Beijing court's opinions on the effectiveness of lending between enterprises are consistent with SPC's, while the other local courts including Shanghai court hold a different view by insisting on applying *Reply of the Supreme People's Court about How to Solve the Problem of the Borrower Failing to Repay the Loan within the Time Limit* as the legal basis of their judgments.

Resulting from the chaos, the parties have to consider whether the court will use the Statement as the legal basis as a key factor in judging whether the court will acknowledge the effectiveness of lending between enterprises or not, which leads to people's negative judgments about judicial authority's credibility.

There is Chaos in Business Because Enterprises use Several Legal Ways to Cover up the Lending between Enterprises to Avoid Legal Risk

There is an increasingly intensified contradiction between the judicial authority's judgments about that lending between enterprises should be null and void in a long term and the growing demands for lending between enterprises in the market with the development of economy. In order to avoid legal risk and realize financing at the same time, there begins to appear many "freaks" in business, including:

a) Nominally as Joint Operation, Actually as Lending

This pattern generated during the transition between planned economy period and market economy period. To stop this practice，*Provisions of the Supreme People's Court on Several Issues Concerning the Application of Laws in the trial of Disputes over a Joint Operation Contract* made by SPC came out in 1990, which directly considers it null and void.

b) Nominally as Contribution, Actually as Lending

This pattern is same with the former pattern mentioned above, which means cooperating between enterprises by agreeing on fixed income, but by means of equity trading. The lender bails out of the company which lender has made capital contribution to, after the deal closes.

c) Nominally as Bargain, Actually as Lending

In practice, the lender usually pretends to be buyer, while the borrower pretends to be seller. The lender makes a one-time payment for goods to the borrower, and the borrower won't supply the goods when it's due, then the borrower pay a certain sum of liquidated damages in accordance with the terms of the sales contract and return all the payment for goods in the end. The lender can collect the repayment of principal by collecting the payment for goods, and collect the interest by collecting the payment of liquidated damages.

This pattern develops into a more high-end pattern. The fact that many enterprises participate in serial transactions makes this pattern more hidden.

There are more hidden patterns other than those listed above play an important role in covering up lending between enterprises. These business patterns which enterprises are forced to adopt can't effectively protect the parties' legitimate rights. In the meantime, these patterns make it harder for the courts to unify the definition and judgment of the deal.

The Provisions can Exercise a Large Degree of Control over Chaos in Business and Judicial Practices

With the Provisions coming into force, whether lending between enterprises is valid can be judged on the legal basis of judicial interpretations. So the people's courts can directly quote the Provisions，avoiding the embarrassment that there is only spirit, with no law can be resorted to.

On the other hand, the Provisions are different from the Statement, because the latter is just a guidance spirit while the former is a legal basis with which the courts should comply in its adjudications. There is no need to consider whether the court dealing with the lawsuit agrees with the Statement, so we can achieve the unity of judicial judgments.

The Provisions, in principle, acknowledge the effectiveness of lending between enterprises, but take opposite views under exceptional circumstances. There is no need for enterprises to find ways to cover up this behavior so the "freaks" can be stopped on account of lacking in market demands.

In consequence，the Provisions' coming out is of positive significance, both from a judicial practice prospective and from a business practice prospective.

The Provisions Never Mean to Indulge Lending between Enterprises without Limits

Although the Provisions deregulate lending between enterprises, it doesn't mean that enterprises can finance without limits. Lending between enterprises should still be regulated by Contract Law, and it should be null and void if violating the article 52 of Contract Law.

Besides, the article 14 of the Provisions lists the circumstances under which lending between enterprises shall be null and void, including:

a) The lender illegally obtains credit funds from a financial institution and relends them to other people at a high interest rate and the borrower knew or should have known;

b) The lender obtains funds from other enterprises or raises funds from staffs and relends them to borrower for profit and the borrower knew or should have known;

c) The lender knew or should have known that the borrower use loans for crimes;

d) Violating the public order and good morals;

e) Violating the mandatory provisions of laws and administrative regulations.

Subparagraph 1 and 2 are similar to the judgment rule requested by SPC that "the lender's lending with his own funds is valid" after the Statement came out. But the difference is that the provisions restrict the courts' judgment rule, more specifically：

In fact, subparagraph 1 of article 14 of the Provisions doesn't deny the effectiveness of lending by use of credit funds obtained from a financial institution. If the lending satisfies both of the following two criteria: relending them to other people at a high interest rate and the borrower knew or should have known, the lending shall be null and void. Or lending by use of credit funds obtained from a financial institution shall be valid.

In fact, subparagraph 2 of article 14 of the Provisions doesn't deny the effectiveness of lending by use of funds obtained from other enterprises or raised from staffs. If the lending satisfies both of the following two criteria: relending them to borrower for profit and the borrower knew or should have known, the lending shall be null and void.

Moreover, lending for illegal purposes or violating the public order and good morals shall be null and void.

Deregulation of the Lending between Enterprises by the Provisions Remains to be Further Verified

Admittedly，the Provisions have positive effect on the business practice as well as the judicial

practice. However, the implementation of the Provisions remains to be further verified.

In the writer's opinion, we should focus on the following two major issues at least:

a) Is it reasonable that the provisions don't include the standard that "The lender doesn't take financial business as his regular business" mentioned in the Statement?

The provisions don't include the standard that "The lender doesn't take financial business as his regular business" mentioned in the Statement. Under this circumstances，if the lender takes financial business as his regular or major business, it is worth considering whether the lending should be considered valid or not.

In other words, if the lender takes financial business as his regular business and finally grow into a "bank", will the lending be considered valid? There is no legal basis in the Provisions to answer no. Otherwise，if we take yes as an answer, it remains to be further verified in practice whether normal economic order will be influenced if a larger number of these kind of banks appear.

b) Is it reasonable that the Provisions consider lending by use of funds of others valid, with subjective and strict circumstances as the exceptions?

Subparagraph 1 and 2 of article 14 of the Provisions have largely acknowledged the effectiveness of lending by use of "funds of others", which leads to that the following four circumstances shall be valid:

- Lending by use of credit funds obtained from a financial institution, and the borrower knew or should have known, but the lender didn't make super-profit;
- Lending by use of credit funds obtained from a financial institution and the lender made super-profit, but the borrower was not aware of that;
- Lending by use of funds obtained from other enterprises or raised from staffs, and the borrower knew or should have known, but the lender didn't make profit;
- Lending by use of funds obtained from other enterprises or raised from staffs and the lender made profit, but the borrower was not aware of that.

The Provisions mentioned above may result in that the enterprise lacking in corresponding credit can obtain funds from a financial institutions through another enterprise, may also result in that the enterprise with corresponding credit can make reasonable profit by relending funds obtained from a financial institutions to other enterprises. Besides, funds obtained from other enterprises or raised from staffs can be used for lending and making profit. It's worth paying attention to the question whether the deregulation will cause a threat to the fund security of financial institutions, other enterprises, and staffs in this enterprise.

Furthermore, the subjective element that "the borrower knew or should have known" mentioned in subparagraph 1 and 2 of article 14 of the Provisions is a necessary condition for denying the

effectiveness of lending between enterprises. If the borrower was never aware that the lender relends funds obtained from a financial institution or other third party to other people at a high interest rate and make profits, then the lending shall be valid. Under this circumstance, it remains to be further verified in practice that whether the subjective element can control the legal risk accompanying lending by use of funds of others.

In a word, the promulgation of the Provisions, deregulating lending between enterprises, meets the reasonable requirements of enterprise funds collecting from multiple channels, and provides necessary legal support for judgments on effectiveness of lending between enterprises in the judicial interpretation. No one can deny this immeasurable positive effect. However, on the other hand, without any strict restrain on “operating financing as regular business” and “lending by use of funds of others”, the Provisions may result in potential risks on economic stability. Especially, the Provisions legitimize fraudulent obtaining on financial capital for lending in particular case, causing some potential problems, which need to be tested further in practice. It remains to be seen that whether the article 14 of the Provisions stipulating conditions in order to control non-equity capital lending may take effect as expected in the judicial practice. We will continue to focus on it.

Important Announcement

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