



# China Practice Global Vision



3rd Edition of 2010

Han Kun Newsletter Working Group

## **Insights & Ideas**

1. Chinese Government Issued Temporary Rules to Regulate Financing Guarantee Companies

## **Legal Updates**

1. Chinese Ministry of Health Released New Rules to Regulate Catering Business Operators
2. China Amends Regulations of Customs Protection of Intellectual Property Rights
3. CSRC Guidelines on Further Improving Sponsorship Work of the Growth Enterprise Board
4. China Issued Notice on Land Supply to Restrain Fast Housing Price Rise

## Insights & Ideas

### **Chinese Government Issued Temporary Rules to Regulate Financing Guarantee Companies (Author: Yeting CAI)**

On March 8, 2010, seven Chinese governmental departments including the China Banking Regulatory Commission, National Development and Reform Commission, Ministry of Industry and Information Technology, Ministry of Finance, Ministry of Commerce, the People's Bank of China and the State Administration for Industry and Commerce jointly issued the *Interim Measures on the Administration of Financing Guarantee Companies* (the "**Measures**"). The Measures are aimed at strengthening the supervision over and administration of financing guarantee companies ("**FGCs**"), regulating their financing guarantee actions and promoting the sound development of the financing guarantee industry. The Measures came into force as of the date of promulgation. Set forth below is a brief summary of the main content of the Measures.

#### **Applicable scope of the Measures**

The Measures mainly regulate financing guarantee entities in the form of companies, i.e. limited liability companies and joint stock companies lawfully established and engaging in financing guarantee business. Regulators may regulate non-corporate financing guarantee entities by reference to the Measures, and specific implementation rules in this regard are yet to be formulated by the provincial government. The Measures further states that foreign-invested FGCs are also subject to the Measures, unless the laws and administrative regulations provide otherwise.

#### **Regulatory departments of FGCs**

The Measures do not specify the regulatory department of FGCs, but only generally provide that the regulatory departments appointed by the provincial government (the "**Regulatory Departments**") shall specifically responsible for the establishment, closure and daily supervision of the FGCs under their respective jurisdiction. Under the Measure, the establishment of a financing guarantee company and any branches thereof shall be examined and approved by the Regulatory Departments and a FGC and any of its branch(es) are required to obtain an operation license issued by the Regulatory Departments before conducting any business. If a FGC wishes to establish a branch outside of its province of incorporation, it shall not only obtain consent from the Regulatory Department in which it is located but also the approval of the Regulatory Department where the branch is proposed to be established.

#### **Establishment conditions and minimum registered capital**

The Measures specify requirements for setting up a FGC, including, inter alia, the articles of association of the proposed FGC shall be in compliance with the *PRC Company Law*, it shall

meet the registered capital requirements under the Measures, and it shall have qualified directors, supervisors, senior management executives and qualified business professionals. The Measures provide that local Regulatory Departments may fix the minimum amount of registered capital of FGCs according to the local situations; however, such amount must not be less than 5 million RMB. Please take note that the Measures require that the registered capital of FGCs shall be monetary paid-up capital, i.e. investors are not allowed to make in-kind or installment capital contribution in FGCs.

### **Business scope of FGCs**

The Measures specify the business scope of FGCs. After approved by the Regulatory Departments, a FGC can provide guarantee for such financing activities as loan, acceptance of bills, trade financing, project financing, letter of credit, and so on. Meanwhile, the Measures allow FGCs to concurrently operate some other businesses, such as provision of guarantee of litigation preservation, investment with proprietary capital, etc.

In addition, the Measures provide that FGCs may provide re-guarantee for the guarantee liabilities of other FGCs and handle bond issuance guarantee business, provided that: 1) it has no record of any violation of law or regulations in recent two years; and 2) it shall meet with other prudential conditions as stipulated by the Regulatory Departments. In addition to satisfying the above-mentioned conditions, a FGC engaging in re-guarantee businesses shall have a registered capital of no less than 100 million RMB and have been operated for two years or above.

### **Prohibited activities**

The Measures provide that a FGC shall not engage in such activities as accepting money deposits, granting loans, granting loans or making investment as an agent and any other activities prohibited by the regulatory authorities. Besides, the Measures provide that a FGC shall not provide financing guarantee for its parent company or subsidiaries.

### **Conclusion**

Finally, the Measures provide that if any FGCs established prior to the effective date of the Measures do not comply with the requirements of the Measures, they shall endeavor to meet the requirements before March 31, 2011. The detailed ratification plan will be formulated by the provincial government. We recommend that existing FGCs examine their business in accordance with the Measures and make corrections, where necessary.

## ■ ■ Legal Updates

### 1. Chinese Ministry of Health Released New Rules to Regulate Catering Business Operators (Author: Xiaolin TENG)

To enhance the supervision and administration of catering service and to ensure the food safety in each phase of catering service, the Chinese Ministry of Health (the “MOH”) promulgated the *Measures on Administration of Catering Service Licensing*(餐饮服务许可管理办法, the “MACSL”) and the *Measures on Supervision and Administration of Food Safety in Catering Service*(餐饮服务食品安全监督管理办法, the “MSAFSCS”) on February 8, 2010. The two Measures will come into force as of May 1, 2010 when the *Measures on Administration of Food Hygiene License*(食品卫生许可证管理办法) promulgated by MOH on December 15, 2005 and the *Measures on Administration of Food Safety in Catering Industry*(餐饮业食品卫生管理办法)promulgated by MOH on January 16, 2000 shall be abolished simultaneously.

The *PRC Food Safety Law* (the “FSL”) came into force last June under which catering service suppliers shall apply for a Catering Service License(“餐饮服务许可证”) instead of a Food Hygiene License(“食品卫生许可证”) which had been used for years before the FSL took effect. The MACSL was stipulated to specify and carry out the rules and principles with respect to the administration of catering service licensing set out under the FSL. According to the MACSL, the State adopts a licensing system to administrate the catering service industry. To engage in catering service business, catering service suppliers shall obtain a Catering Service License. Mess catering suppliers are also subject to the administration of catering service licensing system pursuant to the MACSL.

According to the MACSL, the State Food and Drug Administration and its local counterparts (collectively, the “FDA”) are in charge of the administration of catering service licensing within their respective jurisdictions. To apply for a Catering Service License, a catering service supplier shall file the application to the acceptance and approval authorities which are designated by provincial-level FDA pursuant to the MACSL. FDA shall issue the Catering Service License to the applicant within ten (10) business days from the date of approving the application, otherwise, FDA shall explain in writing to the applicant the reason of refusing its application. The validity period of a Catering Service License is three (3) years. The validity period of a Catering Service License for temporary use is no more than 6 months. Food Hygiene Licenses obtained by catering service suppliers before the MACSL came into force shall continue to be in effect within their validity period. According to the MACSL, Catering Service License is a not a qualification in personam which is issued to a catering service supplier, but a qualification in rem which shall be issued to a catering service place. Where a catering service supplier engages in catering service at different places, the catering

service supplier shall separately obtain a Catering Service License for each place. Where the place changed, the catering service supplier shall reapply for a new Catering Service License.

The MACSL sets forth certain legal liabilities that catering service suppliers may be subject to if they commit any illegal actions in applying for a Catering Service License or during the course of engaging in catering service business. Specifically, applicants who conceal facts or provide false materials in applying for a Catering Service License are prohibited from reapplying for the license within one (1) year thereafter; applicants who obtain the Catering Service License in violation of the MACSL by cheating, bribery or any other improper means shall not reapply for the license within five (5) years thereafter. Where a catering service supplier violates the FSL during the course of providing catering services and its Catering Service License is revoked, its directly responsible person in charge shall not engage in the management of catering service within five (5) years as of the date on which the punishment decision is made.

The MSAFSCS was stipulated on the basis of the FSL and its implementing provisions, which set out the detailed provisions with respect to the administration of food safety in catering service. Pursuant to the MSAFSCS, FDA may establish and carry out a food safety supervision system in catering service industry to administrate the food safety on a basis of quantification grading and classification according to the business scale of the catering service.

## **2. China Amends Regulations of Customs Protection of Intellectual Property Rights (Author: Li ZHANG)**

On March 24, 2010, the State Council promulgated the *Decision to Amend the Regulations of Customs Protection of Intellectual Property Rights of the People's Republic of China* (the "**Decision**"), which amends and supplements certain articles of the *Regulations of Customs Protection of Intellectual Property Rights of the People's Republic of China* effective as of March 1, 2004 (the "**Regulations**"). The Decision will come into force on April 1, 2010.

The key articles of the Regulations amended by the Decision are as follows:

- ◆ The Decision adds a second paragraph to Article 11 of the Regulations, providing that if an intellectual property right ("**IP right**") holder does not go through the procedures to alter or cancel the recordation in a timely manner pursuant to the Regulations and thus affects seriously others' legal import and export or the Customs' performance of its supervision duties, the General Administration of Customs may revoke the relevant recordation based on the application of interested parties or revoke the relevant

recordation initiatively. This amendment sets forth the aftereffect of failing to alter or cancel recordation in a timely manner and grants to interested parties the right to apply for revocation of the relevant recordation, which urges the IP right holders to complete the procedures in time when the recorded IP right changes, otherwise, the IP right holders may bear the risk of losing customs protection of their IP rights.

- ◆ The Decision revises the first paragraph of Article 23 of the Regulations to read as “an IP right holder may, after applying for customs protection measures to be taken by the Customs, apply to the people’s court for an injunction of stopping infringing acts or property preservation measures with regard to the detained suspected infringing goods in accordance with the *Trademark Law of the People’s Republic of China*, the *Copyright Law of the People’s Republic of China*, the *Patent Law of the People’s Republic of China* or other relevant laws. This amendment extends the scope of legal basis for IP right holders to apply for the courts’ injunctive measures. It also deletes the timing requirement of applying to the court “before bringing a lawsuit” as stipulated in the Regulations.
- ◆ The Decision adds a paragraph to Article 24 of the Regulations as Article 24(5), providing that “an IP right holder withdraws the application for detaining suspected infringing goods before the Customs identifies the suspected infringing goods that are detained as infringing goods,” which is added as one of the conditions under which the Customs shall release the suspected infringing foods that are detained.
- ◆ The decision amends the third paragraph of Article 27 of the Regulations, providing that the Customs may legally auction the imported goods with counterfeit trademark after removing all the infringing features on such goods. However, such goods are not allowed to be traded after only removing their counterfeit trademark labels except under special circumstances. The Customs shall destroy the infringing goods with counterfeit trademark if the infringing features on such goods cannot be removed. This amendment clarifies that the Customs shall adopt all reasonable protection measures to remove the infringing features on the infringing goods with counterfeit trademark besides removing the counterfeit trademark labels before auctioning such goods to protect the legal interests of trademark owners and to ensure such goods no longer commit infringement in all respects when being auctioned.
- ◆ The Decision moves Article 28 of the Regulations to Article 31 to read as: if the articles carried or mailed in or out the border by an individual are beyond the personal use and the reasonable quantity and have infringed others’ IP rights, the Customs may treat such articles as infringing goods and may confiscate such articles.

### **3. CSRC Guidelines on Further Improving Sponsorship Work of the Growth Enterprise Board (Author: Hong JIANG; Lulu HAN)**

To further clarify and reiterate the functions of the Growth Enterprise Board ( “GEB” or “ChiNext”) in facilitating the development of enterprises engaged in independent innovation and other growing venture enterprises, the China Securities Regulatory Commission ( “CSRC”) issued the *Guidelines on Further Improving Sponsorship Work of the Growth Enterprise Board* (CSRC Announcement [2010] No.8, the “Guidelines”) on March 19, 2010. The Guidelines may shed some new light on investments into Chinese SMEs and proposed IPOs on GEB.

#### **Preferentially-recommended industries and fields**

The Guidelines expressly require that sponsors should preferentially recommend enterprises which are in line with the development direction of national strategic emerging industries, especially those enterprises in the fields of new energy, new materials, information, biotechnology, new medicine, energy-saving, environmental protection, aerospace, marine, advanced manufacturing, and high-tech services, etc., as well as those enterprises having self-innovation abilities and strong growth potentialities in other fields.

#### **Prudently-recommended industries and fields**

The Guidelines clearly point out the industries and fields which shall be prudently recommended by sponsors, including: (1) textile and clothing; (2) public service industries, such as the production and supply of electricity, gas, water, etc.; (3); development and operation of real estate and civil engineering construction; (4) transportation; (5) wine, food and beverages; (6) finance; (7) general service; and (8) industries with over-capacity of production and overlapping projects clearly inhibited by national industrial policy.

In addition, the Guidelines also stipulate that where a sponsor recommends an enterprise in the above fields, it shall conduct a strict examination on whether the enterprise complies with the positioning of GEB. The sponsor shall set forth in detail the process and conclusion of the examination in the sponsoring letter for issuance and the sponsoring report for issuance. Special focus shall be placed on whether the enterprise has outstanding self-innovation ability in respect of technology and business models and whether the enterprise is good for promoting industrial restructuring and technology upgrade.

#### **Focusing on innovation capabilities of recommended enterprises**

Under the Guidelines, where a sponsor chooses and recommends an enterprise for GEB, it shall put its focus on the innovation ability of the enterprise and make a in-depth examination on whether the enterprise has core technologies, outstanding advantages in R&D, creative business modes and strong marketing abilities, which shall be discussed in the special opinions on growth potentiality.

### **Issuing special opinions on an enterprise's growth potentiality**

According to requirements provided in the Guidelines, sponsors shall, in the principle of due diligence, issue a special opinion on the growth potentiality of the enterprise in concern by considering such factors as industry prospects, qualities of products or services, business modes, technical levels, R&D capabilities, market outlooks, the enterprise's marketing abilities, etc., together with potential constraints on the enterprise's continuous growth.

Sponsors shall emphasis on the influences that an enterprise's self- innovation abilities may have on its growth potentialities. For those enterprises engaging in product manufacturing, specific and definite analysis shall be given with regard to the influences the enterprises' core technologies and abilities of continuous technological innovation may have on their growth potentials; for other types of enterprises, specific and definite analysis shall be given with regard to the influences the enterprises' business features and creativities of their business modes may have on their growth potentials.

#### **4. China Issued Notice on Land Supply to Restrain Fast Housing Price Rise (Author: Yue ZHENG)**

To improve the efficiency of utilization of land supply and development and promote the healthy, stable and orderly operation of the real estate market, on March 8, 2010, the Ministry of Land and Resources (MLR) published the *Notice on Several Issues Regarding Enhancing the Supply and Supervision of Real Property Land* (the "**Notice**"). The relevant issues of the Notice are hereby clarified as follows:

- ◆ Compile land supply plan of low-income housing. The Notice requires that land supply for low-income housing, shanty area renovation and middle to small size self-living commercial housing shall be guaranteed, which should be more than 70% of the whole land supply. The Notice stipulates that land supply for construction of large size houses shall be strictly controlled and land supply for villa construction shall be prohibited. It also urges provincial land and resources administration departments to make pre-arrangement for annul land use plans of cities and counties, and report the same to MOL before the end of March
- ◆ Strictly regulate land transfer price. The Notice requires the lowest land transfer price shall not less than 70% of the base land price, and the bid deposit shall not less than 20% of the lowest transfer price.
- ◆ Strict management of land transfer contract. Transfer contracts shall be executed within 10 business days after successful bids, and 50% of the transfer price shall be paid within

month after executing the contract. The rest of the transfer price needs to be paid timely according to the contract; however, the final payment shall be made within 1 year. Failure to pay up the transfer price in time may cause the land to be withdrawn by the land administration department.

- ◆ Reporting system will be used in housing development. The Notice requires that municipal and/or county-level land and resources administration departments shall establish a reporting system for real property construction and completion starting from April 1, 2010. MLR shall disclose non-reporting land users to the public and restrict them from participating in land purchases within at least one year.
  
- ◆ Strengthen punishments on idle land. The Notice further provides that provincial (district and municipal) land and resources administration departments shall comprehensively control the investigations and disposal of idle land within their regions and punish idle lands that have escape investigation according to laws and regulations. Besides, provincial land and resources administration departments shall notify competent financial supervising departments of the circumstances of idle lands.

Given that housing prices are too high and increase too fast in some cities, the Notice stipulates that municipal and/or county-level land and resources administration departments may choose certain parcels of land to sell through bidding or auction at a price fixed by the government so as to restrain the housing price from increasing too fast.

## **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  
1 East Chang An Ave.  
Beijing 100738, P. R. China

#### **Wenyu JIN Attorney at-law**

Tel.: +86-10-8525 5557  
Email: wenyu.jin@hankunlaw.com

#### **Shanghai Office**

Tel.: +86-21-6080 0919  
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.: +86-755-2681 3854  
Suite 4715, Diwang Commercial Centre,  
Shun Hing Square, 5002 Shennan Dong Lu,  
Luohu District, Shenzhen, P. R. China

#### **Jason WANG Attorney at-law**

Tel.: +86-755-2681 3854  
Email: jason.wang@hankunlaw.com