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HAN YI LAW OFFICES

China Regulatory Updates

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ANTI-MONOPOLY

MOFCOM Regulates Business Divestitures in Anti-Monopoly Review

OFFSHORE FINANCING

SAFE Simplifies Foreign Related Guarantees

TAXATION

SAT Guides Foreign Tax Credits on Worldwide Incomes

DISPUTE RESOLUTION

Revised UNCITRAL Arbitration Rules Adopted

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ANTI-MONOPOLY

MOFCOM Regulates Business Divestitures in Anti-Monopoly Review

On July 5, 2010, the Ministry of Commerce ("MOFCOM") issued the *Provisional Rules on Implementing Divestiture of Assets or Business in Concentrations of Business Operators* (the "Rules"). The Rules provide for the first time the detailed requirements and procedures with respect to the implementation of divestiture requirements specified by MOFCOM in its review decisions made for concentrations of business operators according to applicable PRC anti-monopoly regulations, and were enacted to smooth the consummation of such divestiture of relevant business and/or assets (the "Divestment Business") in M&A deals.

According to the Rules, the party required by MOFCOM to divest the Divestment Business in a concentration (or the divestiture obligor) shall: (i) within the time limit as specified in the MOFCOM review decision, find a proper purchaser for the Divestment Business and enter into relevant sales agreements with it; or (ii) in the event that the divestiture obligor fails to complete the divesture according to the above, it shall entrust a qualified person (*individual, legal entity or other organization*) to find a proper purchaser within the time limit as specified in the MOFCOM review decision and reach relevant sales agreements with such purchaser. Unless otherwise approved by MOFCOM, the divestiture obligor shall, within three months (*instead of six months in practice beforehand*) after the execution of such sales agreements, complete the transfer of the Divestment Business.

Moreover, in order to ensure the fairness and effectiveness of such divestiture, the Rules also put certain restrictions on the prospective purchasers of the Divestment Business (*e.g., they shall be independent from the parties participating in the concentration, and the purchase of such Divestment Business shall not result in eliminating or restricting competition*). The Rules also prohibit parties to the concentrations from conducting any act that may adversely impact the Divestment Business prior to the consummation of divestiture, including among others, recruiting employees from or acquiring confidential information of the Divestment Business.

OFFSHORE FINANCING

SAFE Simplifies Foreign Related Guarantees

The State Administration of Foreign Exchange ("SAFE") released the *Circular on Administration of Foreign Related Guarantees Provided by Domestic Entities* (HUI FA [2010] NO.39, the "Circular") on July 30, 2010, simplifying relevant requirements and procedures for onshore entities to provide guarantees to foreign creditors with an aim to further promote offshore financing.

The Circular generally maintains the current PRC legal framework for foreign related guarantees and still separates the domestic guarantors into the following three categories, namely banks, non-bank financial institutions, and non-financial enterprises (*including domestic enterprises and FIEs*). The revisions introduced by the Circular generally include, among others:

(a) Qualifications for Guarantees Lowered. The qualified guarantees were originally required to be PRC domestic enterprises or their overseas subsidiaries with certain financial conditions. Under the Circular, however, the scope of the guarantees qualified to be guaranteed by each type of domestic guarantors has been expanded respectively. For example, the Circular reduces the financial requirements of the guarantees and no longer limits the guarantee amounts according to the PRC investment proportion in a Sino-foreign joint venture. Particularly, if a domestic bank provides a foreign related financial security, the guarantee under such security is no more required to be a PRC subsidiary, and no restriction will be exerted on its financial situations such as net assets, profits, and etc.

(b) Balance Management System Expanded with Index Mechanism Adjusted. Currently, most foreign related guarantees are examined on a case-by-case basis by competent SAFE offices with the only exception that foreign related financial guarantees provided by domestic banks to offshore subsidiaries are subject to balance management supervision. According to the Circular, (i) financial guarantees provided by domestic banks targeting both the domestic and offshore lenders are subject to balance management; (ii) non-financial overseas guarantees provided by domestic banks are not subject to the verified balance but should be limited by other risk control requirements nevertheless; (iii) foreign related guarantees provided by non-banking financial institutions and non-financial entities are generally subject to verification on a case-by-case basis, while such guarantors may apply for balance administration if they are frequently engaging in overseas guarantees with sound internal management; (iv) mechanisms determining the balance index have been adjusted to be more flexible and practical.

(c) Registration and Approval Procedures Simplified. The Circular simplifies relevant requirements during the supervision of foreign related guarantees in terms of guarantee contracts registration, enforcement approval of such guarantee, and etc. For example, local banks, after provision of foreign related guarantee, shall only file with the competent SAFE office for record, and performance of such guarantee is no longer subject to SAFE's approval (*however, performance of guarantees provided by non-banking financial institutions and non-financial enterprises shall still be subject to approval by local SAFE office on a case-by-case basis*). Meanwhile, the Circular specifies that wholly foreign-owned enterprises not based on balance management shall be generally subject to the registration and approval procedures applicable to ordinary enterprise in the course of foreign related guarantees.

TAXATION

SAT Guides Foreign Tax Credits on Worldwide Incomes

With an aim to mitigate potential double taxation, the State Administration of Taxation ("SAT") recently released the *Operating Guidelines on Foreign Tax Credits for Enterprises' Worldwide Income* (the "Guidelines"), interpreting the *Circular on Relevant Issues regarding Foreign Tax Credits for Enterprises' Worldwide Income* (CAI SHUI [2009] NO. 125, the "Circular") article by article to further regulate the reduction of enterprise income tax based on foreign tax credit ("FTC").

China allows FTC pursuant to the *PRC Enterprise Income Tax Law* (*including its implementing rules*) effective on January 1, 2008, which provides direct FTC and indirect FTC as two different credit systems to mitigate double taxation. The Ministry of Finance and SAT, accordingly, jointly issued the Circular at the end of 2009, outlining the fundamental legal framework for FTC. The newly released Guidelines explain in detail diversified questions that may be encountered during implementation of the Circular, including among others, the applicable ranges for FTC, basic items in implementing FTC and their respective calculation methods, shareholding ratio calculation to which indirect FTC applies, tax sparing credit and etc. Moreover, the Guidelines provide abundant examples for illustration and are expected to be of practical significance for both tax authorities and enterprises (*especially those with considerable foreign sourced income*).

DISPUTE RESOLUTION

Revised UNCITRAL Arbitration Rules Adopted

On 25 June, 2010, the United Nations Commission on International Trade Law adopted the revised UNCITRAL Arbitration Rules (the "Rules"), which were originally adopted in 1976. Being widely used for settlement of a broad range of disputes, the Rules have been recognized as one of the most successful international dispute resolution instruments arbitration area. The revised Rules will be effective as of 15 August, 2010.

The revisions have not altered the original spirit, structure or drafting style of the Rules. They are generally aiming at enhancing the efficiency of arbitration under the Rules and meeting changes in arbitral practice over the last thirty years. It is especially noteworthy that the revised Rules have: (i) expanded the scope of arbitrable issues from "contractual disputes" to "any legal relationship, whether contractual or not"; (ii) removed the requirement that arbitration agreements should be in writing; and (iii) added new provisions to further regulate the arbitration procedure or enhance its efficiency, such as permitting joinder in limited circumstances, detailing provisions on interim measures, and etc.

The revisions are generally applauded in the arbitration world and may have an effect on the current arbitration practices of other international arbitration centers (*including HKIAC and CIETAC frequently chosen for China-related disputes*). Please note that, however, several revisions (*such as the expanded arbitrable issues*) in the new Rules may not be implemented in China due to their conflict with the currently applicable PRC laws.

For further information, please write us at inquiry@hanyilaw.com.