

# CHINA REGULATORY UPDATES

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## CIVIL AND COMMERCIAL LAW / 民商法

### Supreme Court Issued New Judicial Interpretations on Private Lending 最高人民法院发布民间借贷司法解释

The Supreme People's Court has recently released the *Provisions on Several Issues Concerning Application of Law in Trial of Private Lending Cases* (the "Provisions"), with effect from September 1, 2015. The Provisions have further specified and regulated the private lending transactions in such aspects as definition of private lending, acceptance and jurisdiction of private lending cases, validity of private lending contracts, responsibilities of online lending platforms, identification of transactions mixed with private lending and sale and purchase activities, and ways to deal with private lending cases involving illegal fundraising, among others.

Noteworthy highlights of the Provisions include the following, among others:

- (a) Acknowledgment of private lending transactions between enterprises. Private lending between enterprises had been deemed noncompliant practice for quite a long time and until recent years have been recognized by the relevant courts in limited situations. The Provisions, for the first time, have clearly stated that enterprises and other organizations are allowed to enter into private lending contracts with each other for production and operation purposes; provided, however that the contracts concluded do not fall into any of the following circumstances: (a) where the private lending contracts could be deemed null and void in accordance with the general principles provided under the *PRC Contract Law*; (b) where an enterprise obtains credit funds from financial institutions and lends them to other enterprises at a higher interest rate, and the borrowers knew or ought to have known such situation; and (c) where an enterprise obtains funds from another enterprise and lends them to a borrower for profit and the borrower knew or ought to have known such situation. It is noteworthy that the Provisions only recognize the validity of private lending contracts concluded by enterprises for production and operation purposes, and whether an investment institution such as PE/VC fund could make equity investments with the funds borrowed from other enterprises

remains unclear.

#### (b) Clarification of responsibilities of online lending platforms.

Pursuant to the Provisions, online lending platforms may only provide brokerage services to private lending transactions and will not assume guarantee responsibilities for the private lending transactions concluded through the online lending platform unless the platform expressly agrees to provide guarantees for the underlying lending. The aforesaid provision seems to be inconsistent with the provision of the *Guiding Opinions on Promoting the Healthy Development of Internet Finance* promulgated by the People's Bank of China and other nine PRC governmental authorities on July 28, 2015 (the "Opinions") which prohibits online lending platforms from providing credit enhancement services for the underlying lending transactions. We understand that, different from the Opinions which emphasize compliant operation of the online lending platforms, the Provisions mainly regulate the rights, obligations and liabilities of the parties involved in online lending transactions, which means that online lending platforms in principle shall not provide guarantee services for the lending transactions concluded through the platforms, but if such platforms try to solicit customers by declaring that they will provide guarantees for the relevant borrowings, they shall bear the corresponding guarantee responsibilities.

#### (c) Establishment of new criteria for legally enforceable interest rates.

According to previous judicial interpretations, if the interest rate of a private lending is higher than 4 times of the corresponding bank lending rate for similar loans, the excess part of interest rate will not be protected by law.

According to the Provisions, if the annual interest rate of a private lending is not higher than 24%, such interest rate will generally be recognized and protected by courts, but for any annual interest rate higher than 36%, the part higher than 36% will be deemed null and void. The Provisions are silent on the validity of the annual

interests between 24% and 36%, but according to a further explanation by the Supreme People's Court at a public press conference incidental to the issuance of the Provisions, the borrower could voluntarily pay the part between 24% and 36% under such circumstances and as long as the payment is made, any claim for refund of any part of these interests will generally not be upheld by courts.

Through further regulating and clarifying the previously unclear or unaddressed issues in private lending practice, the Provisions will help facilitate the establishment of a more stable and healthy private lending market.

最高人民法院于近期发布了《关于审理民间借贷案件适用法律若干问题的规定》（“《规定》”），该《规定》自2015年9月1日起施行。《规定》在民间借贷的范畴、民间借贷案件的受理与管辖、民间借贷合同的效力、网络借贷平台的责任、民间借贷合同与买卖合同混合情形的认定、民间借贷与非法集资交叉的处理等方面对民间借贷进行了进一步的解释和规范。以下为《规定》中值得特别关注的几个亮点：

- (a) 首次确认企业之间借贷的合法性。企业间借贷长期以来被认定为是一种不规范的操作，直到近年来才在司法实践中被有限度地认可。本次《规定》的出台首次在正式法律文件中承认了企业间借贷在特定条件下的合法性及有效性，允许各类法人和其他组织之间为生产、经营需要订立民间借贷合同；但是如果民间借贷合同符合《合同法》规定的一般合同无效的情形，以及企业向金融机构取得信贷资金后又高利转贷给另一企业，或者向其他企业取得借款后又转贷给另一企业牟利的，在借款企业知道或应当知道的情况下，该等民间借贷合同无效。值得注意的是，《规定》所承认的企业间借贷合同仅限于为企业生产、经营之目的而订立的合同，而对于以投资为主营业务的投资机构而言，其是否可以通过民间借贷的方式取得相关资金，用于投资还有待进一步明确。

- (b) 明确网络借贷平台的责任。除非明示其为平台上各借贷交易提供担保，否则网络借贷平台不就该等借贷交易承担担保责任。前述规定看起来与人民银行等十部门于2015年7月28日发布的《关于促进互联网金融健康发展的指导意见》（“《意见》”）中有关网络借贷平台不得提供增信服务的规定似乎存在一定的矛盾。我们理解，与

《意见》强调网络平台的运营规范不同，《规定》更强调的是在相关交易中交易各方的权利和义务的划分和责任的承担，即网络借贷平台应原则上不得提供增信服务，但如果网络借贷平台违反前述规定，以提供担保为宣传招徕客户的，则按照《规定》，其应当对相关借贷交易承担担保责任。

(c) 确立新的利率标准。根据此前的司

法解释，民间借贷利率超过银行同类贷款利率4倍的，超出部分法院不予保护。《规定》在一定程度上进行了突破，即借贷双方约定的年利率不超过24%的，法院予以保护；约定年利率超过36%的，超过部分的利息约定无效，借款人可以请求返还超过年利率36%部分的利息；约定的年利率超过24%但未超过36%的，《规定》未明文规定，

但根据最高人民法院在相关新闻发布会上的解释，借款人可自愿进行支付，已经支付的不得请求返还。

《规定》为诸多民间借贷市场上的突出问题提供了答案，有助于建立民间借贷的良好市场秩序，促进民间借贷市场的健康发展。

## FOREIGN INVESTMENT / 外商投资

### **Relaxed Policies on Market Access and Administration of Foreign Investment in Real Estate Sector Jointly Released by Multiple Central Government Ministries** 多部委联合发文放松房地产外资准入政策

On August 19, 2015, the Ministry of Commerce, the Ministry of Housing and Urban-Rural Development and other 4 governmental authorities jointly promulgated the *Notice on Adjusting Policies on the Market Access and Administration of Foreign Investment in the Real Estate Market* (the "Notice"), adjusting several policies stated in the *Opinions on Regulating the Access to and Administration of Foreign Investment in the Real Estate Market*, which was implemented in 2006.

The Notice relaxed the requirements for real estate market access of foreign investment, mainly in terms of the following aspects: (a) removing special restrictions on the registered capital and total investment amount of foreign invested real estate enterprises in relation to other foreign invested enterprises (specifically, the

registered capital of a foreign invested real estate enterprise with a total investment amount of no less than USD10,000,000 is no longer required to be at least 50% of its total investment amount); (b) permitting foreign invested real estate enterprises to apply for domestic loans, overseas loans and to settle foreign exchanges before their registered capitals have been fully paid up; and (c) lifting the minimum one-year work/residence period requirement for foreign individual to purchase commodity housing for their self-use in China. As a clear signal from the Chinese government towards a relaxed administration of the once over-heated and strictly monitored real estate market, the Notice will hopefully boost China's real estate market a bit and help reduce capital outflows.

8月19日，商务部在其网站上发布了

《住房城乡建设部等部门关于调整房地产市场外资准入和管理有关政策的通知》（“《通知》”），对2006年实施的《关于规范房地产市场外资准入和管理的意见》进行了调整。

根据《通知》，所有外商投资房地产企业的注册资本金均按一般外商投资企业的相关规定执行，不再要求投资总额超过1,000万美元的外商投资房地产企业注册资本金不得低于投资总额的50%。外商投资房地产企业办理境内贷款、境外贷款和外汇借款结汇也不再要求注册资本全部缴付。此外，在境内工作、学习不满一年的境外个人亦被允许购买自用商品房。《通知》的出台对于提振房地产市场，防范资本外流起到一定的积极作用，也意味着政府严控房地产市场的思路可能正在发生转变。

### **Beijing Issued Catalogue of Prohibited and Restricted Industries for New Projects** 北京发布新增产业禁止和限制目录

With a view to further regulating new projects in the form of a negative list, the Beijing Development and Reform Commission issued the 2015 version of the *Catalogue of Prohibited and Restricted Industries for New Projects in Beijing* (the "Catalogue") on August 24, 2015. The prohibited and restricted industries for new projects (including increasing production capacities of existing projects) include, among others, manufactory industries, wholesale and retail industries, accommodation and catering industries, real estate industries, education industries, transportation and storage industries. Moreover, much more stringent restrictions will be applied to Dongcheng District, Xicheng District, Chaoyang District, Haidian District, Fengtai District and Shijingshan District. It is noteworthy

that (a) no new general training organization which recruits students nationwide is allowed to be established in Beijing; (b) in Chaoyang District, Haidian District, Fengtai District and Shijingshan District, any new manufacturing company/project is prohibited, and within the fifth ring road of these 4 districts, any new comprehensive medical institution is not allowed to be established; and (c) in Dongcheng District and Xicheng District, the establishment of any new medical institution with beds and any increase of beds or expansion of existing medical institutions will not be approved. The Catalogue will be applied to domestic funded enterprises and foreign invested enterprises indiscriminately.

Due to the urgent need to upgrade its industrial structure, Beijing may adopt

even stricter industry regulation policies and more cities may follow Beijing's steps, a development with which we will follow up closely. Naturally, investors will also need to be more cautious in terms of the location and industries of their future proposed investments in China.

8月24日，北京市发改委发布《北京市新增产业的禁止和限制目录(2015年版)》（“《目录》”），以负面清单形式对新增产业进行精细化调控。《目录》在北京市范围内对制造业、批发和零售业、住宿和餐饮业、房地产业、教育、交通运输，仓储和邮政业等新增产业进行了禁止和限制，还针对城六区（东城区、西城区、朝阳区、海淀区、丰台区、石景山区）专门出台了更为严格的禁制和限制目录。《目录》中值得注意的限制性领域包括：(a)禁止在全市范围内新设面向全国招生的一般性培训机构；(b)朝阳、海淀、丰台、石景山四

区禁止新增任何制造业，五环以内禁止新建综合性医疗机构；以及(c)东城区、西城区不再批准建立设置床位的医疗机构，不再批准增加医疗机构床位总量和建设规模。《目录》同时适用于内资和

外资企业。

随着产业结构升级的迫切需求，未来北京可能制定更加严格的产业调控目录，也可能有更多省市采取负面清单的方式控制新增产业，我们将持续予以关注，

投资者在选择投资地点和投资行业时也应更加谨慎。

## CAPITAL MARKET / 资本市场

### Four Government Authorities Encouraged M&A, Cash Dividend Distribution and Share Redemption by Listed Companies

四部委鼓励上市公司兼并重组、现金分红及回购股份

Recently, CSRC and other three government authorities have jointly publicized the *Notice on Encouraging M&A, Cash Dividend Distribution and Share Redemption by Listed Companies* (the “Notice”), requiring competent authorities, under the principle of facilitating listed companies, to push forward M&A activities of listed companies, to encourage listed companies to make cash dividend and to support the listed companies to proceed with share redemption plans. The Notice indicates that the government would further cancel relevant administrative approval requirements and streamline approval procedures in connection with M&A of listed companies. In

addition, listed companies are encouraged to repurchase their shares at appropriate time via various methods such as issuing preferred shares or company bonds. Further, more preferential tax policies are planned to be adopted so that the cost of cash dividend for long-term shareholders could be reduced. The Notice has mirrored the government’s intention to deepen the reform of capital market and stabilize the Chinese securities market as well as the macro economy by the market forces through adding more flexibility to listed companies.

近日，证监会等四部委联合发布《关于鼓励上市公司兼并重组、现金分红及回

购股份的通知》（“通知”），强调各部门应以便利企业为原则，通过多种方式推动上市公司并购重组，鼓励上市公司现金分红，支持上市公司回购股份。

《通知》提出，将扩大取消上市公司兼并重组的相关审批范围，优化审核流程；鼓励上市公司在适当时机通过发行优先股、债券等多种方式回购公司股份；完善长期持有上市公司股票的税收政策以降低上市公司现金分红成本。

《通知》赋予了上市公司更多的自由度，为上市公司通过多种市场手段提升自身价值、维护投资者利益提供了政策支持，有助于充分发挥市场对证券市场和经济的调节功能。

## PE&VC / 私募股权及创业投资

### Ministry of Finance Introduced New Rules on Exempting Obligations to Allocate State-Owned Shares by State-Owned VC Entities

财政部出台豁免国有股转持义务的新规

As the State Council has abolished the prior approval requirement for exempting state-owned venture investment institutions and state-owned venture investment guiding funds (the aforesaid entities, collectively, “state-owned venture enterprises”) from the obligation to allocate a portion of the state-owned shares to the National Social Security Fund at the time of IPO of the investee companies (the “Exemption”), to further administrate and supervise the Exemption after the abolishment of the prior approval requirement, the Ministry of Finance released the *Notice on Administration Issues After Abolishment of Administrative Approvals of Exempting State-owned Venture Investment Institutions and State-owned Venture Investment Guidance Funds From State-owned Share Transfer Obligations* (the “Notice”) on August 11, 2015, clarifying the conditions and procedures of the Exemption after the abolishment of the relevant administrative approval, and

strengthening the post-event supervision and administration.

The conditions of the Exemption provided in the Notice are essentially the same as those implemented before the abolishment of the underlying administrative approval, mainly including: (a) the business scope of a state-owned venture enterprise shall conform to the *Interim Measures for the Administration of Startup Investment Enterprises* and the *Interim Measures for Private Equity Fund*, and its business name shall include “venture investment”; (b) the state-owned venture enterprise shall complete registrations with competent government authorities and operate in compliance with all applicable laws; and (c) the investment targets of the state-owned venture enterprise shall be unlisted medium-sized and small enterprises. Any state-owned venture enterprise believes that itself meets the abovementioned conditions shall make a public announcement via a designated internet platform for no less

than 20 working days. The Ministry of Finance will inspect the state-owned venture enterprises receiving no objections during the announcement period on a random basis, and any state-owned venture enterprise found cheating will be blacklisted publicly and be reported to other government authorities for further penalties.

鉴于国务院于今年2月取消了国有创业投资机构和国有创业投资引导基金（合称“国有创投企业”）豁免国有股转持义务（“豁免”）的事前审批要求，对于取消事前审批后相关事项的事后管理，财政部特于8月11日发布了《关于取消豁免国有创业投资机构和国有创业投资引导基金国有股转持义务审批事项后有关管理工作的通知》（“通知”），进一步明确了取消事前审批后，适用的豁免条件、符合条件的认定和监督程序。

根据《通知》，豁免条件与审批取消前的豁免条件基本相同，即：(a) 国有创投企业经营范围应符合《创业投资企业管理暂行办法》和《私募投资基金监督管理暂行办法》之规定，且企业名称中注有“创业投资”字样；(b) 国有创投

企业依法完成登记备案且规范运行;  
**(c)** 国有创投企业的投资对象为未上市的中小企业。国有创投企业自行认定符

合豁免条件的，应通过网络平台向公众进行不少于20个工作日的公示，财政部将对公示无异议的国有创投企业进行抽

查，被发现弄虚作假的国有创投企业将被列入黑名单进行公告并交相关监管机构处理。

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