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Memorandum to: Our Clients and Friends

**Re: Certain Legal Issues on Dissolution and Liquidation
of Foreign Invested Enterprises**

With the deepening of global economic recession, an increasing number of foreign investors have started to restructure their assets and businesses in China and shut down or reorganize their poorly-performed PRC operating entities in order to cut costs and ease the negative impact of the worldwide downturn. According to applicable PRC laws and regulations, shutting down any duly incorporated foreign invested enterprise (an "FIE") in China is subject to legally prescribed dissolution, liquidation and deregistration procedures. Unlike the purely domestic PRC enterprises, an FIE should, before entering into the liquidation process, obtain the prior approval issued by the government authority originally approved its establishment or a ruling rendered by a competent PRC court, except for circumstances expressly provided by relevant laws under which an FIE may start liquidation directly.

Based on the currently effective PRC laws and regulations and our practical experience and for your general reference purpose only, we have prepared this memorandum to provide some brief analyses of a few commonly seen legal issues during the FIE dissolution and liquidation process. Limited by its length, our analysis does not intend to cover any specific procedure or necessary documentation applicable to the FIE dissolution and liquidation process though.

1. Applicable Laws, Regulations and Rules for FIE Dissolution and Liquidation

On January 15, 2008, the *Measures for Liquidation of Foreign Invested Enterprises* (the "Liquidation Measures"), a set of rules dedicated to dealing with FIE dissolution and liquidation matters for more than ten years, was repealed by the Chinese State Council. Since then, the dissolution and liquidation of FIEs has become subject to the *PRC Company Law* and other relevant laws and regulations governing FIEs. In order to further regulate the dissolution and liquidation of FIEs, the PRC Ministry of Commerce and the PRC State Administration for Industry and Commerce have respectively promulgated the *Guidance on Further Improving the Administration of Dissolution and Liquidation of Foreign Invested Enterprises* and the *Circular on Relevant Issues of Deregistration of Foreign Invested Enterprises*. Pursuant to the aforesaid rules, if the relevant laws and regulations governing FIEs have set forth special provisions on issues that have not been otherwise addressed by the *PRC Company*

Law, such special provisions should prevail.

Compared to the Liquidation Measures, the *PRC Company Law* has simplified procedures, limited the power of government authorities and therefore rendered more flexibility to FIEs and their shareholders in dissolution and liquidation processes.

2. Shareholder's Rights, Responsibilities and Legal Liabilities in FIE Dissolution and Liquidation Processes

In a voluntary liquidation, the liquidation committee of an FIE should be in principle composed of its shareholder(s) in the case of a limited liability company, or its directors or any other people as determined by the shareholders general meeting in the case of a company limited by shares. The formation of the liquidation committee should also be subject to the relevant provisions set forth in the articles of association of an FIE.

Generally speaking, during the FIE dissolution and liquidation processes, the shareholders of the FIE should have the right to determine whether to submit the application for dissolution, draft the employee placement and compensation plan, dismiss and replace unqualified liquidation committee members, review and approve rules of procedures for the liquidation committee, confirm the draft liquidation plan and the draft liquidation report, and institute legal proceedings against liquidation committee members who have caused losses to the FIE, among others. The shareholders also need to undertake their legal responsibilities, including without limitation, forming the liquidation committee within the prescribed time limit and safekeeping the material assets, books and important documents of the FIE. If the shareholders make their capital contributions to the FIE by installments, they should also timely pay up the relevant installments due and payable during the dissolution and liquidation of the FIE.

It is noteworthy that, the remaining capital contributions yet to be made by the shareholders (including overdue contribution and undue installments of contribution) should constitute part of the FIE's liquidation assets. If the FIE could not pay off its debts with its assets, its creditors should have the right to hold the FIE's shareholders not fulfilling their contribution obligations and other founding shareholders or sponsors severally and jointly liable for the FIE's debts to the extent of their respective unpaid contributions.

Moreover, if the shareholders or the effective controlling party of an FIE deliberately delay the performance of their legal obligations, abuse the limited liability of shareholder and the independent legal person status of the FIE to evade repayment obligations and harm the legitimate interests of creditors, they should undertake several and joint liability for the FIE's debts, which is similar to the concept of "piercing the corporate veil" in the common law jurisdiction.

3. Roles and Duties of the Liquidation Committee

After an FIE's early dissolution application is approved, its liquidation committee should serve as the governing body of the FIE in charge of liquidation works and act on behalf of the FIE within the authorization granted by the FIE's shareholders. In principle, the legal representative, directors and managerial personnel of the FIE who do not serve on the liquidation committee should cease to exercise their original authorities and should comply with the arrangements made by the liquidation committee. In order to protect the FIE from any potential losses or damages caused as a result of the unauthorized actions taken by certain uncooperative individuals, the shareholders and the liquidation

committee of the FIE should put into place some precautionary measures, such as timely taking over and properly keeping the company seal, the contract chop and the financial chop, changing the legal representative, and choosing good timing for the exit of certain directors and senior management team members.

During the liquidation process, the liquidation committee should report to the FIE's shareholders and be generally in charge of the following matters: (i) settle the FIE's creditor's rights and indebtedness; (ii) handle the FIE's outstanding businesses in connection with the liquidation; (iii) dispose of the FIE's assets; (iv) pay off the overdue taxes and taxes accrued during the liquidation process; (v) engage a qualified accounting firm to conduct liquidation audit; (vi) prepare the liquidation report and submit the same to the approval authority or people's court for approval upon confirmation by the FIE's shareholders; and (vii) participate in any civil proceedings involving the FIE on behalf of the FIE.

4. Employee Placement

A smooth and orderly dissolution and liquidation of an FIE is largely dependent on the proper placement of its employees, so it can be said that employment placement is the first important step of FIE dissolution and liquidation. Based on our relevant experience, FIEs need to pay special attention to the following aspects when dealing with the employee placement and compensation matters:

(a) Cooperation and Effective Communication with The Trade Union

An FIE which has established a trade union should fully recognize the role of its trade union during the employee placement process, and should actively communicate and consult with its trade union on the employee placement issues, take into consideration its suggestions and opinions, and try to obtain its understanding and support. Despite the fact that there is no express stipulation with respect to the role of the trade union in the employee placement process of an FIE under applicable PRC laws and regulations, some local authorities attach great importance to the attitude and opinions of the trade union in this connection. Take Shanghai as an example, Shanghai office of the Ministry of Commerce requires that the employee placement plan submitted by an FIE applying for early dissolution that has a trade union should be in principle duly signed and confirmed by the chairman of its trade union.

(b) Placement of Employees Seconded by Foreign Enterprise Service Agencies ("FESCO")

If an FIE in liquidation has employees seconded by FESCO (the "Seconded Employees"), it will need to make efforts to communicate and coordinate with FESCO during the placement process of such Seconded Employees.

The FIE should, after communication and coordination with FESCO and careful and thorough consideration, work out an appropriate placement plan for the Seconded Employees in accordance with the labor dispatch contract between the FIE and FESCO and the labor contract between FESCO and the Second Employees. The placement plans available to an FIE include, among others, (i) returning the Seconded Employees to FESCO (i.e., merely terminating the labor dispatch relationship between the FIE and FESCO); or (ii) entering into severance agreement with FESCO and the Seconded Employees (i.e., terminating the labor dispatch relationship between the FIE and FESCO as well as the employment relationship between FESCO and the Seconded Employees). Please note

that the specific compensation amount and related expenses payable by FIEs to the Seconded Employees or FESCO under different placement plans may vary depending on the nature of legal relationship involved therein.

(c) Economic Compensation for The Employees

FIEs should pay an amount no less than the statutory economic compensation to the employees (including the Seconded Employees) exiting due to such FIEs' dissolution and liquidation.

Note however that, compared with an economic layoff, in the case of early termination, FIEs generally do not need to make special compensation to female employees who are in their pregnancy, confinement or nursing period, unless such female employees are seconded by FESCO and disagree to terminate their employment relationship with FESCO. In addition, the statutory economic compensation accrued before and after January 1, 2008 (i.e., the effective date of the *PRC Labor Contract Law*) should be calculated separately according to two sets of slightly different methods and criteria. Apart from economic compensation, FIEs should also pay or fully make up to the exiting employees any unduly withheld salary, overtime pay, compensation for unused annual leaves, overdue social insurance premiums and etc.

(d) Calculation Or Buy-Out of Years of Service for Employees Relocated to A New Entity

In practice, certain FIEs under liquidation may relocate some of their employees to a new entity (in most cases, their China-based affiliates). If the employees to be transferred request that their years of service for the FIE in liquidation be counted into their years of service for the new entity, the FIE will generally not be obligated to make any economic compensation to such employees. Otherwise, the FIE should pay such employees an economic compensation not lower than the statutory amount so that their years of service in the FIE could be effectively cut off and will not be calculated into their years of service in the new entity.

5. Tax Repayment Related to Tax Holidays Already Enjoyed by FIEs

When an FIE is under liquidation, its liquidation committee needs to identify whether the FIE is required to pay back taxes exempted and/or reduced under tax holidays it has already enjoyed. For example, for FIEs having enjoyed fixed-term tax holidays such as "two years tax exemption followed by three years 50% tax reduction", if they have operated for less than ten years upon liquidation, such FIEs should make up for taxes so exempted and/or reduced. For FIEs having enjoyed imported machinery related tax incentives, if they enter into liquidation procedures prior to the expiry of the customs supervision period and dispose of such machinery within China, they need to make up for relevant taxes on the basis of the values of such machinery after deduction of age-life depreciation.

6. Disposal of Assets

If the liquidation committee of an FIE disposes of the liquidation assets based on their book values (especially in the case of real estates and equity interests), such values should not be significantly lower than the fair market value thereof. Otherwise, the competent tax authority will have the power to adjust the tax payment obligation applicable to such FIE, which may cause the FIE to make up

for the taxes accrued on the difference between the book value and the fair market value.

During the dissolution and liquidation processes, shareholders and liquidation committees of FIEs also need to figure out appropriate ways to handle the FIEs' important intangible assets, including without limitation, intellectual property rights (in particular, trademarks, trade names and know-how transferred or authorized to FIEs for use by their offshore parent companies), client resources and goodwill in an effort to produce some positive impact on the liquidation of the FIEs.

In addition, subject to the principle of commercial presence, it will be in the best interest of foreign investors that the FIEs' remaining assets after liquidation are in cash form, so it is advisable that the liquidation committees accept cash assets rather than in-kind assets as considerations when disposing of the FIEs' assets.

7. When An FIE Is Found Insolvent During Liquidation

In principle, if an FIE is found to be insolvent after the liquidation of assets and preparation of a balance sheet and an inventory of property, the liquidation committee should apply to the competent PRC people's court for declaration of bankruptcy. Nevertheless, if the liquidation committee could reach a unanimous settlement with all creditors of the FIE regarding the debt repayment plan, the FIE normally may continue its liquidation process without initiating the bankruptcy proceedings.

* * *

The above is our brief summary and analysis of several legal issues on dissolution and liquidation of FIEs. Please note that, due to the limited scope of this memorandum, we could not cover all major issues regarding FIE dissolution and liquidation. Further, the relevant PRC government authorities are expected to promulgate more implementing rules or regulations to address the existing or potential issues arising from the FIE dissolution and liquidation processes, while local Chinese government authorities may impose different requirements based on their understanding of laws and practice when it comes to certain specific issues. Based on the foregoing, this memorandum can only be used for your general reference and shall not be relied on as any formal legal opinion in any respect. If there is any discrepancy between our discussions herein and any rule or official interpretation to be issued by the relevant PRC government authorities, such new rule or interpretation shall prevail.

If you have any questions about this memo, please do not hesitate to contact us.

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有关外商投资企业解散和清算的若干法律问题简析

随着全球经济危机的加剧,越来越多的外国投资者开始对其在中国投资的资产和业务进行重组,关闭或整合其在境内表现不佳的运营实体,以缩减开支、应对危机。根据中国相关法律法规,关闭在中国合法登记注册的经营性实体须经过法定程序,即完成外商投资企业的解散、清算和注销。不同于没有外资成分的中国内资企业,除在相关法律明确规定的几种特定情形下可以直接进入清算程序外,一家外商投资企业一般需经原审批机关批准其解散或人民法院裁定其解散后,方能进入清算程序。

根据相关法律法规并结合本所律师在外商投资企业解散和清算法律服务方面的实践经验,我们整理和制作了本备忘录,就外商投资企业解散和清算过程中值得注意的几个主要法律问题进行了简要介绍和分析,供阁下参考。限于篇幅,有关外商投资企业解散和清算的具体程序以及需要准备的文件等内容,本备忘录将不予赘述。

1. 外商投资企业解散、清算的法律适用

曾专门用于解决外商投资企业清算问题的《外商投资企业清算办法》(“《清算办法》”),在执行了十余年后由国务院于2008年1月15日废止。此后,外商投资企业的解散和清算主要依照《公司法》和其他有关外商投资的法律法规的规定来进行。为做好《清算办法》被废止后外商投资企业的解散和清算工作,中国商务部制定了《关于依法做好外商投资企业解散和清算工作的指导意见》,工商总局也会同商务部印发了《关于外商投资企业解散注销登记管理有关问题的通知》。主管部门在该等指导意见和通知中明确,对于《公司法》未做详细规定但有关外商投资的法律法规有特别规定的,应适用相关特别规定。

较之适用《清算办法》,主要依据《公司法》来解散、清算外商投资企业,不仅在程序上得到简化,审批机关的干预也受到限制,从而加强了外商投资企业及其股东对企业解散、清算过程的自主度。

2. 股东在解散、清算过程中的权利、义务和相关法律责任

一家准备自行清算的外商投资企业如为有限责任公司,原则上应由其股东组成清算组,如为股份有限公司,则由其董事或股东大会确定的人员组成清算组。具体组成由公司章程规定。

通常情况下,对于外商投资企业的解散和清算,股东有权决定是否提交解散申请,拟订员工的安置和补偿方案,撤换不合格的清算组成员,批准清算组制定的议事规则,确认清算组拟订的清算方案和报告等,并有权对给外商投资企业造成损失的清算组成员提起赔偿之诉。但同时,股东也需要履行包括在法定期限内成立清算组进行清算,妥善保管外商投资企业的主要财产、账册和重要文件等在内的法定职责。股东如系分期缴纳出资,则其出资部分在

外商投资企业解散和清算过程中到期的，应注意及时缴纳。

需要注意的是，股东未缴纳的出资（包括到期应缴而未缴的出资，以及分期出资中期限尚未届满的出资）属于外商投资企业清算财产的一部分。当外商投资企业的财产不足以清偿债务时，债权人有权主张未缴齐出资的股东以及外商投资企业设立时的其他股东或发起人在未缴出资的范围内对外商投资企业的债务承担连带清偿责任。

此外，外商投资企业的股东或实际控制人在解散和清算过程中如果怠于履行其法定职责，滥用法律关于股东有限责任或外商投资企业法人独立地位的规定，逃避债务、损害债权人利益的，须对外商投资企业的债务承担连带责任，类似西方公司法律制度中的“刺破公司面纱”。

3. 清算组的地位和职责

外商投资企业解散后，清算组依法成为外商投资企业在清算过程中的代表人和执行机关，在股东授权的范围内，对内执行清算事务，对外代表清算中的外商投资企业。原则上，未成为清算组成员的外商投资企业的法定代表人、董事和管理层人员等，在外商投资企业解散和清算的过程中应服从清算组的安排，而不应再享有原来的职权。为防止个别人员不配合清算，擅自实施不当行为，给外商投资企业造成损失，外商投资企业的股东和清算组可以考虑采取一些必要的防范措施，如及时接管并妥善保管企业公章、合同和财务专用章，更换企业法定代表人，适时安排某些董事和管理层人员离职等。

在清算过程中，清算组应向股东汇报工作，主要负责清理外商投资企业的债权债务，处理与清算有关的外商投资企业未了结的业务，处置外商投资企业的清算资产，清缴外商投资企业所欠税款及清算过程中产生的税款，聘请合格的会计师事务所进行清算审计，并在清算结束后制作清算报告，经股东确认后提交审批机关或人民法院核准。如涉及诉讼，清算组应代表外商投资企业参与。

4. 员工安置问题

员工安置可以说是外商投资企业解散和清算的第一个重要关口，员工能否得到妥善安置在很大程度上决定着外商投资企业的解散、清算工作能否有序进行、顺利完成。根据我们的经验，在处理员工安置及补偿问题时，有以下几点值得外商投资企业特别注意：

(a) 充分重视工会在员工安置过程中的作用

外商投资企业如果设有工会，应充分重视工会在员工安置过程中的作用，依合法程序，积极就员工安置问题与工会沟通和协商，听取工会的意见，争取工会的理解和支持。尽管法律没有明确规定，但我们注意到，一些地方主管部门十分重视工会在员工安置问题上的态度和意

见。以上海为例，上海市商务委员会要求外商投资企业在申请解散时提交一份详细的员工安置方案，对于设有工会的外商投资企业，其拟订的员工安置方案原则上须经工会主席签字确认。

(b) 妥善处理通过对外劳动服务公司（“外服公司”）聘用的员工

如果外商投资企业有通过外服公司以劳务派遣的方式聘请的员工（为方便起见，简称“派遣工”），则在对该等员工进行安置的过程中，应注意与外服公司做好沟通和协调工作。

在处理派遣工时，外商投资企业除依据其与外服公司签订的劳务派遣合同外，还应注意派遣工与外服公司签订的劳动合同的约定，在与外服公司做好沟通和协调的基础上，权衡利弊，选择妥当的方式。比如外商投资企业拟提前解散的，可以考虑将派遣工退回外服公司（即仅解除外商投资企业与外服公司之间的劳务派遣关系），或者与外服公司及派遣工共同签订三方协议（即在解除外商投资企业与外服公司劳务派遣关系的同时，解除派遣工与外服公司之间的劳动关系）。需要注意的是，在不同的处理方案下，因涉及的法律关系不同，外商投资企业需要向派遣工或外服公司支付的补偿金和费用等也是有差别的。

(c) 依法向被遣散的员工支付经济补偿金等费用

对于因外商投资企业解散、清算而被遣散的员工（包括上文提到的派遣工），外商投资企业应向其支付不低于法定最低标准的经济补偿金。

需要注意的是，与裁员等情形不同，外商投资企业在提前解散时原则上不需要对处于孕期、产期或哺乳期的女员工作出特别安排和补偿，除非该等女员工系外服公司的派遣工，并且不同意与外服公司解除劳动关系。另外，法定经济补偿金的计算应以2008年1月1日《劳动合同法》的实施为界，分为前后两段，适用略有不同的计算方法和标准。除经济补偿金外，如被遣散的员工有被拖欠的工资、加班费，应休而未休的年假的补偿金，应缴而未缴的社会保险费用等，外商投资企业在清算过程中均应依法支付和补缴。

(d) 如安排被遣散的员工到新的用人单位继续工作，应注意员工工龄的计算或买断

实践中，一些被解散的外商投资企业可能需要将部分员工安排到新的用人单位（通常为其境内的关联机构）继续工作。在处理该类员工的工龄问题时应注意，如果员工希望将其在被解散外商投资企业的工龄合并计入新的用人单位，则被解散的外商投资企业毋需向其支付经济补偿金。但如果员工要求被解散的外商投资企业买断其在该企业的工龄，则被解散的外商投资企业应按照不低于法定经济补偿金的标准，买断其工龄。该等员工到新的用人单位后，工龄也将重新开始计算。

5. 税收优惠的处理问题

当外商投资企业提前解散时，清算组应特别注意，该外商投资企业是否存在需要就其已享受的税收优惠补缴相应税款的情形。例如，依法享受了“两免三减半”等定期减免税优惠的外商投资企业，在清算时如果经营期限不满10年，就应补缴其此前被减免的税款。又如享受了进口设备减免税待遇的外商投资企业，如果在进口设备监管期届满之前进行清算并在境内处置相关进口设备的，原则上需按设备的使用年限折旧后予以补税。

6. 资产处置

清算组在处置清算资产时应注意，如果其按照清算资产的“账面价值”进行处置，而该“账面价值”明显低于清算资产的“市场公允价值”（不动产和股权等资产最易发生此类问题），主管税务机关有权对明显低于市场公允价值的资产处置价格进行调整，并要求外商投资企业按照市场公允价值补缴相应的税款。

对于知识产权、客户资源、对外信用等曾在外商投资企业的日常经营活动中发挥过重要作用的无形资产，在解散和清算过程中除应注意保护外（由境外母公司转让或授权给境内外商投资企业使用的商标、商号和专有技术等应尤其注意），股东和清算组还应考虑如何妥善、合理地处置，以期对清算的盈亏结果产生正面的影响。

此外，外国投资者因受到“商业存在”的限制，其取得的清算后剩余资产最好为现金形式。因此，清算组在处置外商投资企业的资产时应注意，最好只接受现金对价。

7. 在清算过程中发现“资不抵债”如何处理

清算组在清理外商投资企业的财产、编制资产负债表和财产清单后，发现外商投资企业的财产不足以清偿债务的，原则上应依法向人民法院申请宣告破产。但清算组如果能够与外商投资企业的全体债权人就债务清偿达成一致方案，则外商投资企业通常可以避免进入破产程序、继续完成清算程序。

* * *

以上为我们根据中国现行法律法规以及本所律师的实务经验，对有关外商投资企业解散和清算的几个主要法律问题所作的简要介绍和分析。请注意，因我们的经验和本备忘录的篇幅有限，我们不可能在此穷尽有关外商投资企业解散和清算的所有法律问题。另外，在外商投资企业解散和清算的法律适用发生较大变化后，中国的相关主管机关可能会进一步制订法律规范，以解决外商投资企业在解散和清算过程中遇到的新老问题。最后，中国各地的具体实践不尽相同，当地主

管部门在处理具体事项时也可能提出不同的要求，故本备忘录提供的介绍和分析仅供阁下一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。如果本备忘录的内容与有权机关颁布的法律法规或提出的任何官方具体要求有不一致之处，应以该等法律法规或要求为准。

如阁下对于本备忘录述及之内容有任何疑问，敬请随时与敝所联系。

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