外商投资要闻简讯

JUNHE

2017 年 3 月 24 日

国家发展和改革委员会、商务部发布《中西部地区外商投资优势产业目录（2017 年修订）》，新版目录于 2017 年 3 月 20 日起施行。

国家外汇管理局发布并实施《关于银行间债券市场境外机构投资者外汇风险管理有关问题的通知》，为外汇市场及债券市场对外开放，及银行间债券市场境外机构投资者管理外汇风险，提供有利措施。

全国人大常务委员会公布《中华人民共和国反不正当竞争法（修订草案）》，公开征求意见。

一、 实施《中西部地区外商投资优势产业目录（2017 年修订）》

国家发展和改革委员会、商务部对《中西部地区外商投资优势产业目录》（以下简称**“《中西部目录》”**）进行第四次修订，并于 2017 年 2 月 17 日发布，新版《中西部目录》于 2017 年 3 月 20 日起施行。

（一） 背景

《外商投资产业指导目录》与《中西部目录》系我国指导审批外商投资项目和外商投资企业适用有关政策的依据。对于确能发挥地区优势但不属于《外商投资产业指导目录》鼓励类的外商投资项目列入《中西部目录》，享受鼓励类外商投资项目优惠政策。与适用于全国范围的《外商投资产业指导目录》不同，《中西部目录》仅适用于中西部地区 22 个省、自治区、直辖市，每个地区都有各自的目录。

《中西部目录》于 2000 年 6 月 16 日施行后，分别于 2004 年、2008 年、2013 年被修订。2016 年国家发展和改革委员会会同商务部等部门对《中西部目录》再次进行修订，并于 2016 年 9 月 14 日公开向社会征求意见。

为了进一步积极利用外资，2017 年 1 月 12 日国务院公布了《关于扩大对外开放积极利用外资若干措施》，提出了进一步扩大对外开放、进一步创造公平竞争环境、进一步加强吸引外资工作三方面共二十项措施，其中包括支持中西部地区、东北地区承接外资产业转移，修订《中西部目录》，扩大中西部地区、东北地区鼓励外商投资产业范围。为落实国务院提出的上述措施，新版《中西部目录》于 2017 年 2 月 17 日发布

（二） 法律点评

新版《中西部目录》共 639 条，比 2013 年版《中西部目录》增加 139 条。其中，新增 173 条，删除 34 条，修改 84 条[2]。与 2013 年版《中西部目录》比较，本次修订主要体现以下特点：

一是支持高新技术产业发展。例如内蒙古自治

[2] http://www.gov.cn/zhengce/2017-02/17/content_5168815.htm

区、辽宁省、黑龙江省、安徽省、江西省、湖南省、重庆市、四川省的目录新增智能机器人研发与制造条目。

二是鼓励加快发展服务业。例如内蒙古自治区、河南省、湖北省、湖南省、广西自治区、海南省、重庆市、陕西省的目录新增动漫创作、制作（广播影视动漫制作业务限于合作）及衍生品开发（音像制品和电子出版物的出版、制作业务除外）条目。

三是强化基础设施和产业配套。例如山西省、内蒙古自治区、广西自治区、云南省、山西省的目录新增汽车加气站、充电设施建设和运营条目。在山西省、湖北省、湖南省、广西自治区、重庆市、云南省的目录新增物流业务相关的仓储设施建设和商贸服务条目。

本次修订与 2016 年公布的《中西部目录》的征求意见稿并不完全相同，值得注意的是，征求意见稿在广西自治区、重庆市、贵州省、云南省、海南省的目录中新增云计算、大数据、移动互联网等新一代信息技术开发、应用条目，但该新增条目最终未被本次修订接受。工业和信息化部自 2016 年 6 月 30 日起允许港澳服务提供者在内地设立合资企业，提供互联网数据中心业务（IDC），并规定港澳资股权比例不超过 50%。2016 年公布的《中西部目录》的征求意见稿新增云计算、大数据、移动互联网等新一代信息技术开发、应用条目，且没有股权比例限制，该新增条目为向港澳服务提供者以外的其他境外服务提供者开放互联网数据中心业务带来了曙光。征求意见稿中的该新增条目最终未能被本次修订接受也体现了我国目前在开放互联网数据中心业务领域仍比较谨慎。

（三）关注要点

为了支持中西部地区、东北地区承接外资产业转移，国务院在《关于扩大对外开放积极利用外资若干措施》提出，对符合条件的西部地区鼓励类产业外商投资企业实行企业所得税优惠政策。向中西部地区、东北地区转移的外商投资企业享受国家支持产业转移与加工贸易的资金、土地等优惠政策。新版《中西部目录》实施后，国务院相关部委按照国务院的要求制定并公布吸引外商投资企业向中西部地区、东北地区转移的具体法律规定的进程值得关注。

二、 国家外汇管理局支持境外机构投资者参与国内外汇市场

2017 年 2 月 24 日，国家外汇管理局发布并实施《国家外汇管理局关于银行间债券市场境外机构投资者外汇风险管理有关问题的通知》（汇发[2017]5 号，以下简称“**《通知》**”），对境内金融机构为银行间债券市场境外机构投资者办理外汇衍生品业务的相关事项进行规定。

（一） 背景

2016 年 2 月 17 日，中国人民银行（以下简称“央行”）发布并实施《中国人民银行公告[2016]第 3 号》（以下简称“**《3 号文》**”），允许符合条件的境外机构投资者，透过委托具有国际结算业务能力的银行间市场结算代理人（以下简称“**结算代理人**”）进行交易和结算，可在银行间债券市场开展债券现券等经中国人民银行许可的交易。《3 号文》不仅放宽了此前对境外机构投资者主体范围的限制，也将市场准入由事前审批制变更为事后备案制。

2016 年 5 月 27 日，央行上海总部根据《3 号文》的规定，发布并实施《境外机构投资者投资银行间债券市场备案管理实施细则》，具体明确境外机构投资者投资银行间债券市场备案管理事宜。同

日，国家外汇管理局发布了《国家外汇管理局关于境外机构投资者投资银行间债券市场有关外汇管理问题的通知》（汇发[2016]12 号，以下简称“**《12 号文》**”），就外汇管理方面，明确对境外机构投资者实行登记管理的具体内容：（1）境外机构投资者应通过结算代理人办理外汇登记，开立专用外汇账户；（2）不对单家境外机构投资者投资额度进行限制，也不需到外汇局进行核准或审批；（3）专用外汇账户内的资金不得用于银行间债券市场投资以外的其他目的，并且汇出资金中的本外币比例应保持与汇入时情况基本一致，上下波动不超过 10%。

（二） 法律点评

《通知》首先明确其所称的境外机构投资者，范围为符合《3 号文》要求的下列三类机构投资者：（1）在中华人民共和国境外依法注册成立的商业银行、保险公司、证券公司、基金管理公司及其他资产管理机构等各类金融机构；（2）上述金融机构依法合规面向客户发行的投资产品；（3）养老基金、慈善基金、捐赠基金等中国人民银行认可的其他中长期机构投资者。据此，合格境外机构投资者（QFII）、人民币合格境外机构投资者（RQFII）及境外央行类机构（含国际金融组织、主权财富基金）并不属于适用《通知》的主体范围。

其次，结算代理人对境外机构投资者办理外汇衍生品业务应遵守实际需求交易原则。境外机构投资者的外汇衍生品交易，限于对冲以境外汇入资金投资境内银行间债券市场产生的外汇风险敞口，外汇衍生品敞口与作为交易基础的债券投资项下外汇风险敞口应具有合理的相关度。当银行间债券市场投资发生变化而导致外汇风险敞口变化时，境外机构投资者应在五个工作日内对相应持有的外汇衍生品敞口进行调整，确保符合实需交易原则。

《通知》也对境外机构投资者可自主选择办理的外汇衍生品业务类型有所规定，范围包括能够对冲投资银行间债券市场所产生外汇风险敞口的远期、外汇掉期、货币掉期和期权等。结算代理人则可以为境外机构投资者的外汇衍生品业务，灵活提供反向平仓、全额或差额结算等交易机制。并明确相关细节依照《银行办理结售汇业务管理办法实施细则》（汇发〔2014〕53 号）的规定执行。

（三） 关注要点

债券市场对外开放对推进人民币国际化具有重要意义，目前，直接引入境外机构投资者来华开户，是债券市场对外开放的主要方式。《通知》在 2016 年央行进一步扩大引入境外机构投资者范围，并对相关流程做出优化的基础上，进一步提出允许境外机构投资者利用境内外汇衍生品市场管理因投资银行间债券市场所产生外汇风险的便利措施，不仅可以更好的满足境外机构投资者的投资需求，也使境内结算代理人可以为境外机构投资者提供债券投资和外汇交易“一站式”的综合服务。

然而，在《通知》的安排下，境外机构投资者仍仅能按实需原则，以客户身份参与银行结售汇市场，尚无法以流动性提供者的身份，参与银行间外汇市场。未来相关政策对境外机构投资者参与国内外汇市场的交易范围及模式，将如何进一步扩大及丰富，值得关注。

三、 再次就《中华人民共和国反不正当竞争法》修订草稿公开征求意见

2017 年 2 月 28 日，全国人民代表大会常务委员会公布《中华人民共和国反不正当竞争法（修订草案）》（以下简称“**《反不正当竞争法》（修订草案）**”），并公开征求意见。

（一） 背景

《反不正当竞争法》的立法目的是鼓励和保护公平竞争，制止不正当竞争行为，保护经营者和消费者的合法权益。该法自 1993 年 12 月 1 日起实施至今未经修订。

《反不正当竞争法》已逐步不适应我国经济及法律的发展。随着《中华人民共和国反垄断法》出台及《中华人民共和国商标法》、《中华人民共和国广告法》的修订，《反不正当竞争法》与上述法律有关法律条文出现交叉、重复的问题。因此国家工商行政管理总局会同国务院其他部门对《反不正当竞争法》进行了修订。2016 年 2 月 25 日，国务院法制办公室公布《反不正当竞争法（修订草案送审稿）》（以下简称**“《反不正当竞争法》（送审稿）”**）并公开征求意见。《反不正当竞争法》（送审稿）对《反不正当竞争法》进行了大幅度地修订，自公布后引起了广泛的关注。此次由全国人民代表大会常务委员会公布《反不正当竞争法》（修订草案），再次公开征求意见。

（二） 法律点评

《反不正当竞争法》（修订草案）对《反不正当竞争法》进行了大幅度地修订。

就不正当竞争行为而言，《反不正当竞争法》列举了十一类不正当竞争行为，《反不正当竞争法》（修订草案）则列举了八类不正当竞争行为，其中新增了一类、调整了四类、保留了两类、删除了四类。

《反不正当竞争法》（修订草案）基本吸收了原《反不正当竞争法》（送审稿）的规定，新增了利用技术手段在互联网领域影响用户选择、干扰其他经营者正常经营的四种不正当竞争行为，分别是：（1）未经同意，在其他经营者合法提供的网络产品或者服务中插入链接，强制进行目标跳转；（2）误导、欺骗、强迫用户修改、关闭、卸载他人合法提供的网络产品或者服务；（3）干扰或者破坏他人合法提供的网络产品或者服务的正常运行；（4）恶意对其他经营者合法提供的网络产品或者服务实施不兼容。

值得注意的是，《反不正当竞争法》（修订草案）并未吸收原《反不正当竞争法》（送审稿）新增的有关不具有市场支配地位但在交易中具有相对优势地位经营者的不公平交易行为的规范。该规范曾引起很大争议，很多人建议删除或缩小对具有相对优势地位经营者的不公平交易行为的规范。主要理由可见我们 2016 年 3 月《外商投资要闻简讯》之《<反不正当竞争法（修订草案送审稿）>引起广泛关注》。

《反不正当竞争法》（修订草案）调整了四类不正当竞争行为，分别是：

（1）采用不正当手段从事市场交易的行为

《反不正当竞争法》（修订草案）吸收了《最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释》及原《反不正当竞争法》（送审稿）的相关规定，并删除了与《中华人民共和国商标法》重合的假冒他人注册商标的行为。四种采用不正当手段从事市场交易的行为分别是：（i）擅自使用知名商品特有的名称、包装、装潢，或者使用与知名商品近似的名称、包装、装潢，造成和他人的知名商品相混淆，引人误认为是该知名商品；（ii）擅自使用他人的企业名称及其简称、字号，擅自使用他人的姓名、笔名、艺名，擅自使用社会组织的名称及其简称，引人误认为是他人的商品；（iii）擅自使用他人的域名主体部分、网站名称、

网页以及频道、节目、栏目的名称及标识等，引人误认为是他人的商品；（iv）将他人注册商标、未注册的驰名商标作为企业名称中的字号使用，误导公众。

（2）商业贿赂行为

《反不正当竞争法》（修订草案）对现商业贿赂的规定调整不大，主要增加了可能影响交易的第三方（是指可能利用职权对交易产生影响的单位和个人）作为商业贿赂的对象；及经营者的员工从事商业贿赂应当认定为经营者的行为，除非经营者有证据证明属于员工的个人行为的规定。

为了区别商业贿赂和经营者之间的利益折让，原《反不正当竞争法》（送审稿）采用概念加列举的方式明确商业贿赂概念及典型的商业贿赂行为，但《反不正当竞争法》（修订草案）删除了这部分内容。

（3）侵犯商业秘密行为

《反不正当竞争法》（修订草案）在侵犯商业秘密的相关规定中，明确规定了视为侵犯商业秘密的行为，将商业秘密的权利人的员工（前员工）、明知或应知商业秘密来源于非法途径的第三人、国家机关工作人员、律师、注册会计师等专业人员均作为保守商业秘密的义务人。

值得注意的是，原《反不正当竞争法》（送审稿）提出的商业秘密案件采取举证责任倒置，即商业秘密权利人能够证明他人使用的信息与其商业秘密实质相同以及他人有获取其商业秘密条件的，他人应当对其使用的信息具有合法来源承担举证责任，《反不正当竞争法》（修订草案）未予以接受。

（4）有奖销售行为

《反不正当竞争法》（修订草案）删除了现规定中利用有奖销售的手段推销质次价高的商品的行为，增加了所设奖的种类、兑奖条件、奖金金额或者奖品等有奖销售信息不明确，影响兑奖的行为，并将抽奖式有奖销售的最高奖金额由现行的五千元调整至两万元。

原《反不正当竞争法》（送审稿）将有奖促销分为抽奖式有奖销售和附赠式有奖销售，并对这两种销售方式进行定义，但《反不正当竞争法》（修订草案）并未如此分类。

《反不正当竞争法》（修订草案）保留了诋毁竞争对手商业信誉、商品声誉的行为；搭售行为。

《反不正当竞争法》（修订草案）删除了四类与《中华人民共和国反垄断法》、《中华人民共和国价格法》、《中华人民共和国招标投标法》重合的不正当竞争行为，分别是公用企业限制竞争行为；低于成本价销售行为；行政性垄断行为；招标、投标中的串通行为。值得注意的是，《反不正当竞争法》（修订草案）保留了原《反不正当竞争法》（送审稿）删除的搭售行为。

就监督检查而言，《反不正当竞争法》（修订草案）完善了执法机关的监督检查权限和职责，赋予执法机关查封扣押权等行政强制措施，同时增加了当事人配合调查的义务。

就法律责任而言，为了加重对违法行为的处罚力度，《反不正当竞争法》（修订草案）不仅加重了罚款金额还增加了处罚的方式。《反不正当竞争法》（修订草案）将现罚款的上限由二十万元提高至三百万元。考虑到经营者可能不足以同时支付民事赔偿责任和缴纳罚款，《反不正当竞争法》（修订草案）规定经营者优先承担民事赔偿责任。对于将他人注册商标、未注册的驰名商标作为企业名称中的字号使用，误导公众的经营者，《反不正当竞争法》（修

订草案）规定由监督检查部门责令在一个月内申请名称变更登记，逾期未提出变更登记申请的，由监督检查部门处以罚款，并由原企业登记机关将其名称从企业信用信息公示系统中删除，以统一社会信用代码代替其名称，并将其列入经营异常名录。情节严重的，吊销营业执照。

（三） 关注要点

《反不正当竞争法》（修订草案）与现行《反不正当竞争法》规定相比有很大的修改，但与《反不正当竞争法》（送审稿）相比稍显保守。比较遗憾的是《反不正当竞争法》（修订草案）未能被吸收《反不正当竞争法》（送审稿）提出的商业贿赂概念及典型的商业贿赂行为、商业秘密案件采取举证责任倒置、有奖销售种类的定义等规定。《反不正当竞争法》（修订草案）将于 2017 年 3 月 25 日截止征求意见，《反不正当竞争法》的进一步修订及实施值得关注。

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Foreign Investment Bulletin

JUNHE

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The National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOC") issued the Catalogue of Priority Industries for Foreign Investment in the Central and Western Region (Revised in 2017) ("CW Catalogue"), to take effect on March 20, 2017.

The State Administration of Foreign Exchange ("SAFE") issued and implemented the Circular on the Relevant Issues Concerning the Foreign Exchange Risk Management of Foreign Institutional Investors in the Interbank Bond Market, which benefits the further opening up of the foreign exchange ("FX") market and the bond market to international investors and FX risk management for foreign institutional investors in the interbank bond market.

The Standing Committee of the National People's Congress ("NPCSC") issued the Anti-Unfair Competition Law of the People's Republic of China (Revised Draft), for public opinion.

1. Implementation of the Catalogue of Priority Industries for Foreign Investment in the Central and Western Region (Revised in 2017)

It is the fourth time that the NDRC and the MOC have revised the Catalogue of Priority Industries for Foreign Investment in the Central and Western Region, the latest version of which was issued on February 17, 2017 and implemented on March 20, 2017.

1.1 Background

The Catalogue for the Guidance of Foreign Investment Industries and the CW Catalogue provide a basis and guidance for adopting the relevant policies for approving foreign investment projects and foreign invested enterprises in China. For foreign investment projects, which do not belong to the encouraged category of the Catalogue for the Guidance of Foreign Investment Industries, but do explore the potential in the Central and Western regions of China, these projects will be included in the CW catalogue and will enjoy the preferential treatment for the encouraged foreign investment projects. Different from the Catalogue for the Guidance of Foreign Investment Industries, which is applicable nationwide, the CW Catalogue only applies to the 22 provinces, autonomous regions and municipalities in the Central and Western region, which all have their own individual catalogues.

After its promulgation on June 16, 2000, the CW Catalogue was revised in 2004, 2008 and

2013. In 2016, the NDRC and the MOC along with other departments revised the CW Catalogue and published it for public opinion on September 14, 2016.

For the active use of foreign capital, on January 12, 2017, the State Council issued the Circular on Several Measures concerning the Expansion of Opening-up and the Active Use of Foreign Capital, which put forward 20 measures for three different aspects, include further open-up to foreign investors, further improvement of the fair competition environment and further attract foreign investment. These measures include the support of the central, western and northeast regions to accept the transfer of foreign investment industries, the revision of the CW Catalogue, and the expansion of the encouraged foreign investment industries scope for central and western and northeast regions. For the implementation of the above measures, the latest version of the CW Catalogue was issued on February 17, 2017.

1.2 Legal Review

The latest CW catalogue includes 639 provisions; 139 additional provisions compared to the CW Catalogue (2013 revised). 173 provisions were newly added; 34 provisions were deleted; and 84 provisions were revised[1]. Compared with the CW Catalogue (2013 revised), the latest CW Catalogue mainly contains the following features:

a. Supporting the development of high applicable technology industries: e.g. research related to and the manufacture of intelligent robots were added to the catalogues of the Inner Mongolia Autonomous Region, Liaoning Province, Heilongjiang Province, Anhui Province, Jiangxi Province, Hunan Province, Chongqing Municipality and Sichuan Province.

b. Encouraging the fast development of the service industry: e.g. the creation and production of comics and animations (cooperation only for broadcast and television comics and animations) and related products (except for the publication and production of radio and video products and electronic publications) were added to the catalogues of the Inner Mongolia Autonomous Region, Henan Province, Hubei Province, Hunan Province, Guangxi Autonomous Region, Hainan Province, Chongqing Municipality and Shanxi Province.

c. Improving infrastructure and industry supports: e.g. gas station and charging facility construction and operation were added to the catalogues of Shanxi Province, Inner Mongolia Autonomous Region, Guangxi Autonomous Region, Yunnan Province and Shanxi Province; and storage facility construction and trade services related to logistics services were added to the catalogues of Shanxi Province, Hubei Province, Hunan Province, Guangxi Autonomous

[1] http://www.gov.cn/zhengce/2017-02/17/content_5168815.htm

Region, Chongqing Municipality and Yunnan Province.

The latest CW catalogue is different from the draft published for public opinion in 2016 (the "2016 Draft") in several aspects. It is worth noting that the 2016 Draft added search, development and application of cloud computing, big data, mobile internet and other new information technology to the catalogues of Guangxi Autonomous Region, Chongqing Municipality, Guizhou Province, Yunnan Province and Hainan Province, which is not reflected in the latest CW catalogue. Since June 30, 2016, the Ministry of Industry and Information Technology ("MIIT") began to allow service providers from Hong Kong and Macau to establish joint ventures in mainland China and provide internet data centre services (IDC); and required that the service providers from Hong Kong and Macau shall not hold more than 50% of the shares of the joint venture. The 2016 Draft added search, development and application of cloud computing, big data, mobile internet and other new information technology and there was no shareholding, which brings light to the foreign service providers, other than those from Hong Kong and Macau, to provide internet data centre services in mainland China. Since the latest CW catalogue does not include such an amendment, it indicates that China still adopts a cautious attitude towards opening up internet data centre services to foreign investors.

1.3 Next Step

To support the central, western and northeast regions to accept the transfer of foreign investment industries, the State Council issued the Circular on Several Measures concerning the Expansion of Opening-up and the Active Use of Foreign Capital, which adopts a preferential enterprise tax policy for qualified foreign invested enterprises of encouraged category in the western region. Foreign invested enterprises, which transfer to the central, western and northeast regions, will enjoy preferential policies on capital and land, and the State's support on industry transfer and processing trade. After the implementation of the latest CW catalogue, the relevant ministries and departments of the State Council will draw up and issue relevant detailed rules and regulations as required by the State Council to attract foreign invested enterprises to transfer to the central, western and northeast regions.

2. SAFE supports foreign institutional investors to participate in the domestic FX market

On February 24, 2017, SAFE issued and implemented the Circular of the State Administration of Foreign Exchange on Relevant Issues concerning the Foreign Exchange Risk Management of Foreign Institutional Investors in the Interbank Bond Market ("the Circular"). The Circular further regulates the matters related to the FX derivative services provided by domestic financial institutions for foreign institutional investors participating in the interbank bond market ("FIIs").

2.1 Background

On February 17, 2016, the People's Bank of China ("PBOC") issued and implemented the Circular on Further Improving the Investments by Foreign Institutional Investors in the Interbank Bond Market ("No. 3 Circular"), which allows the FIIs, who meet certain requirements, to invest in the interbank bond market through authorizing a capable settlement agent in the interbank bond market ("Settlement Agent") and to conduct bond trading per PBOC's permission. The No. 3 Circular not only enlarges the scope of eligible FIIs, but also replaces the pre-approval requirement for market access with post-filing.

On May 27, 2016, the Shanghai Headquarters of the PBOC issued and implemented the Implementing Rules of Record-filing Administration of Investments of Foreign Institutional Investors in the Interbank Bond Market, which specifies the Record-filing details for FIIs to invest in the interbank bond market, according to the No. 3 Circular. On the same date, SAFE issued the Circular of the State Administration of Foreign Exchange on Foreign Exchange Questions Relating to Investments of Foreign Institutional Investors in the Interbank Bond Market ("No. 12 Circular"). Regarding the FIIs' FX registration administration, the No. 12 Circular specifies the following: (1) FIIs shall apply for FX registration via Settlement Agents and open a special FX account; (2) individual FII is not subject to any investment quota as well as approval from SAFE; (3) funds in the special FX account of a FII shall not be used for any purpose other than investment in the interbank bond market and the ratio of domestic and foreign currency for inward and outward remittance shall be roughly the same, with a permitted fluctuation of no more than 10%.

2.2 Legal Review

The Circular firstly defines that the eligible FIIs consist of the following three categories of institutional investors, thereby satisfying the requirements in the No. 3 Circular: (1) financial institutions such as commercial banks, insurance companies, securities companies, fund management companies and other asset management institutions lawfully registered and incorporated outside the People's Republic of China; (2) investment products lawfully launched by such financial institutions; and (3) other long- and medium-term institutional investors recognized by the PBOC, such as pension funds, charity funds and endowment funds. As such, QFII, RQFII, foreign central banks (including international financial organizations and sovereign wealth funds) are not FIIs for the purpose of the Circular.

Secondly, the Circular stipulates that the Settlement Agents shall follow the principle of actual transaction needs when handling the FX derivatives business for FIIs. The FX derivatives transactions of FIIs shall be only used for hedging the FX risk exposure incurred due to the remittance of overseas capital for investment in the interbank bond market. The FX derivatives exposure shall have a reasonable correlation with the FX risk exposure under the bond investment as the basis of transactions. Where the changes of

investment in the interbank bond market leads to changes in FX risk exposure, FIIs shall accordingly adjust the exposure of FX derivatives held by them within five working days, to comply with the principle of actual transaction needs.

The Circular also stipulates the types of FX derivatives that the FIIs may choose of their own will, which includes forwards, FX swaps, currency swaps and options to hedge the FX risk exposures for investment in the interbank bond market. The Settlement Agents may flexibly provide transaction mechanisms such as reverse position closing and gross or balance settlement for the FX derivatives services of FIIs. All relevant transactions shall be subject to the Implementing Rules for the Administrative Measures for the Foreign Exchange Settlement and Sale Business of Banks (Hui Fa [2014] No.53).

2.3 Next Step

The Opening-up of the Bond market is an important step for RMB internationalization. For the time being, attracting foreign institutional investors to open accounts in China is the major form of opening-up the Bond market. Based on the relevant improvements made by the PBOC in 2016, the supporting measures proposed by the Circular allowing the FIIs to hedge the FX risk exposure by using the FX derivatives will not only better satisfy the investment need from the FIIs, but also enable domestic Settlement Agents to provide one-stop services in bond investments and FX transactions.

However, under the Circular, FIIs can only participate in the FX settlement and sale market, as a customer following the actual transaction needs principle, rather than a liquidity provider. It is worth noting how the transaction scope and model in the near future will be affected by the policies regarding the FII's participation in the interbank bond market.

3 The Revised Draft of the Anti-Unfair Competition Law is published again for public opinion

On February 28, 2017, the NPSCS issued the Anti-Unfair Competition Law of the People's Republic of China (Revised Draft) ("Revised Draft"), for public opinion.

3.1 Background

The purpose of the promulgation of the Anti-Unfair Competition Law is to encourage and protect fair competition and restrain unfair competition behaviors, to protect the legal rights and interests of the business operators and the consumers. This law has not been amended since its implementation on December 1, 1993.

However, throughout the years, the Anti-Unfair Competition Law has become outdated, considering the current economic and legal development in China. Due to the promulgation of the Anti-Monopoly Law of the People's Republic of China, the revision of the Trademark Law of the People's Republic of China and the Advertisement Law of the People's Republic of China, there are many overlaps between the above laws and the Anti-Unfair Competition Law. Therefore the

State Administrative of Industry and Commerce along with other departments of the State Council revised the Anti-Unfair Competition Law. In February 2016, the Legislative Affairs Office of the State Council released the Anti-Unfair Competition Law (Revised Draft Submitted for Review) for public comments ("Draft for Review"). The Draft for Review has attracted extensive attention because it proposed to substantially revise the Anti-Unfair Competition Law.. The NPCRC issued the Revised Draft recently to seek further public opinion.

3.2 Legal Review

The Revised Draft also proposes to revise the Anti-Unfair Competition Law quite substantially.

The Anti-Unfair Competition Law has listed 11 types of unfair-competition behavior while the Revised Draft proposes eight types, among which one was newly added, four were revised, two remained the same and four were deleted. The details are as follows:

The Revised Draft, based on the Draft for Review, further includes four types of unfair-competition behavior related to using technical methods to influence consumers' choice and disturb the daily business operation of other business operators on the internet. These four types of unfair-competition behaviors are (1) inserting hyperlinks in the internet products or services legally provided by other business operators to compel target jump, without consent or authorization from the relevant business operators; (2) misleading, deceiving or forcing the customers to amend, close or uninstall internet products or services legally provided by other business operators; (3) disturbing or corrupting the daily operation of the internet products or services legally provided by other business operators; and (4) adopting incompatible measures to the internet products or services legally provided by other business operators maliciously.

It is worth noting that the Revised Draft does not include the provisions regarding the unfair trading behaviors of business operators with comparative advantageous position but without market dominant role proposed in the Draft for Review. These provisions have attracted a great deal of controversy and many people have suggested deleting or minimizing the restrictions on the unfair trading behaviors of business operators with a comparative advantageous position. For detailed comments, please find our article 'The Anti-Unfair Competition Law (Revised Draft Submitted for Review) Draws Extensive Public Attention' in the Foreign Investment Bulletin (March 2016).

The Revised Draft has revised four types of unfair-competition behavior as follows:

a. Adopting Unfair Measures to Carry out Market Trade

The Revised Draft takes in the provisions in the Interpretation of the Supreme People's Court on Several Issues about the Application of Law in the Trial of Civil Cases Involving Unfair Competition and the Draft for Review and deleted the provision regarding counterfeit registered trademarks overlapping with the Trademark Law of the People's Republic of

China. There are four types of unfair measures to carry out market trade: (i) without consent, use the names, packages or decorations unique to well-known commodities, or use the names, packages or decorations similar to well-known commodities, to cause confusion and make the consumers mistake the relevant commodities for well-known commodities; (2) without consent, use the names, short names or characters of other enterprises; use the names, pen names or stage names of other persons; or use the names or short names for social organizations to make the consumers mistake the relevant commodities for commodities of these persons or enterprises; (iii) without consent, use the main part of domain names, website names, webpages, or names or signs of channels, shows or columns of other parties to make the consumers mistake the relevant commodities for commodities of these parties; and (iv) use the registered trademarks or unregistered well-known trademarks of other parties as characters of the enterprise names to mislead the public.

b. Commercial Bribery Behavior

The Revised Draft has made minor amendments on the provisions of commercial bribery and added third parties which may influence trade (i.e. the organizations and individuals which may influence trade by using their office power) as objects for commercial bribery; and added a provision that the commercial bribery behavior of an employee of a business operator shall be deemed as the behavior of these business operators.

In order to differentiate commercial bribery and profit discounts between business operators, the defining methods of using concepts and examples adopted by the Draft for Review to clarify the concept of commercial bribery and list out typical commercial bribery behaviors, has been deleted from the Revised Draft.

c. Infringement of Business Secrets

The Revised Draft, based on the provisions of the infringement of business secrets, further clarifies the concept of the acts which shall be viewed as an infringement of business secrets, and of the person bearing the relevant confidentiality obligation, which includes employees and former employees of the right holder of the commercial secrets, third parties who know or ought to know that the commercial secrets are from illegal sources, officials from the State bodies, and other professionals, such as lawyers and registered accountants.

It is worth noting that the Draft for Review adopted the reverse burden of proof for business secret cases, i.e. if the right holders of the business secrets are able to prove that the information used by other parties is substantially the same as their business secrets and these parties are able to obtain the relevant business secrets, the other parties shall bear the burden of proof to provide evidence that they obtained the relevant information from legal sources, which is not adopted in the Revised Draft.

d. Premium Sales Behaviors

The Draft for Review deleted premium sales behaviors to promote low-quality goods with

high price from the prohibited premium sales behaviors which are included in the currently-effective Anti-Unfair Competition Law; added behaviors which may affect the cashing of awards due to unclear information regarding the types of the awards, cashing conditions, awarded amounts or prizes of premium sales; and adjusted the maximum amount of lottery premium sales from 5,000 to 20,000.

The Draft for Review classified the premium sales into two categories: lottery premium sales and gift premium sales, and defined these two categories, which is not adopted by the Revised Draft.

The Revised Draft keeps provisions on discrediting competitors' commercial good standing and reputation, and tying.

The Revised Draft deleted four types of unfair-competition behaviors which overlap with the relevant provisions of the Anti-monopoly Law of the People's Republic of China, the Pricing Law of the People's Republic of China and the Bidding and Bid Law of the People's Republic of China, which are restrictive competition measures adopted by public utility enterprises, sales of goods at a price below their cost, administrative monopoly behaviors and collusive behaviors during the tendering and bidding process. It is worth noting that the Revised Draft keeps the provision related to tying behaviors, which was deleted in the Draft for Review.

Regarding supervision and inspection, the Revised Draft improves the relevant provisions on the powers and duties of supervision and inspection by an enforcement agency; grants the power to the enforcement agency to adopt compulsory administrative measures such as seal-up and seizure and includes the duties of the concerned parties to cooperate during inspection.

Regarding legal duties, in order to strengthen the punishment of illegal behavior, the Revised Draft increases both the penalty amount and the methods of punishment. The Revised Draft has increased the upper limit of the penalty amount from 200,000 to 3,000,000. Considering the fact that the business operators may be unable to pay for both the civil compensation and penalty, the Revised Draft prioritizes the payment of civil compensation by the business operators. For business operators using registered trademarks or unregistered well-known trademarks of other parties as characters of the enterprise names to mislead the public, the Revised Draft states that the supervision and inspection bodies shall order these business operators to apply for registration of a change of company name within one month; if they fail to apply within the time limit, the business operators are subject to a fine by the supervision and inspection bodies. Additionally, its name will be deleted by the original enterprise registration body and from the enterprise credit information publicity system and be replaced by its unified social credit code and then placed on a list of abnormal business operations. In the case of a serious digression, the business licenses of the relevant business operators shall be revoked.

3.3 Next Step

Compared with the currently effective Anti-unfair Competition Law, the Revised Draft has improved greatly. But compared with the changes made in the Draft for Review, the Revised Draft is rather conservative. It is rather disappointing that the Revised Draft does not include the provisions regarding the concept of commercial bribery and typical commercial bribery behaviors, the adoption of the reverse burden of proof for business secret cases and definitions of different types of premium sales. The Revised Draft is open for public opinion until March 25, 2017. How the Anti-Unfair Competition Law will be revised and how it will be implemented are worth our attention.

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