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HAN KUN LAW OFFICES

Newsletter

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Legal Updates

1. Comments on the Circular Regarding Mobile Game Publication Services Management (Authors: Estella CHEN,Yanbing ZHANG)

On June 2, 2016, the State Administration of Press, Publication, Radio, Film and Television of the People's Republic of China (hereinafter referred to as "**SAPPRFT**") issued the *Circular Regarding Mobile Game Publication Services Management* (hereinafter referred to as the "**Circular**"), which comprehensively refines provisions relating to mobile game publisher content reviews, publication applications, and applications for game publication numbers. This article will analyze and provide a summary of the main contents of the Circular.

Scope of application

The Circular regulates the content of mobile games that have two features: 1) operated on smart mobile terminals, including mobile phones; and 2) are available on information networks for the public to download or are played interactively online.

Thus, "mobile games" includes online interactive games and "single device" handheld games, and games operated on mobile terminals are not merely limited to mobile phones, but may also include tablets and other smart devices. Accordingly, providing network game download services or making games available for interactive use online is be deemed to be the provision of mobile game publishing and operating services.

Publishing application reviews

a. Review criteria

The Circular distinguishes between domestic games and games authorized by foreign copyright holders. Games authorized by foreign copyright holders continue to be subject to the *Circular on Further Standardizing Application Materials for the Publication of Foreign Copyright Holder-Authorized Internet Game Works and Electronic Game Publications* (the "Standardizing Circular") and the *Circular on the Launching of Real Name Verification Work for the Prevention of Network Game Addiction*. Domestic games are subject to two different methods of review based upon whether the game involves political, military, ethnic or religious content, and whether the game operates along a story plot.

The Circular stipulates detailed provisions with respect to the review of domestic casual and intellectual mobile games that do not relate to political, military, ethnic or religious subjects, and have no plot or a simple plot, such as tile-matching games, parkour games, flight games, board games, puzzle games, sports games, and music and dance games (hereinafter referred to as "**Casual**

Games").

The Circular does not stipulate detailed provisions with respect to the review of non-Casual Games, and only specifies for the continuing application of the Standardizing Circular and the *Circular on the Launching of Real Name Verification Work for the Prevention of Network Game Addiction*. Therefore, non-Casual Games may be subject to the same standards applicable to foreign copyright holder-authorized games.

b. Reviews of Casual Games

i. Applicants: the game publication service units (hereinafter referred to as "**Publishers**")

ii. Application review time: applications are to be submitted at least 20 business days in advance before the anticipated date of publication of the game (beta). It takes approximately 20 business days for the provincial publication administration and SAPPRFT to review an application.

iii. Application materials: "Domestic Mobile Game Works Application Form," and photocopies of the relevant certificates.

iv. Post-review obligations: Within 7 business days after a game is published online and operating, the Publisher shall report to the competent provincial administration for publication certain operating conditions, such as the time of publication and operation, the site available for download, the number of operators, the names of the main operators, and whether the game is open to in-game purchases. In the event that the publication is delayed 20 business days more than the anticipated publication date, the Publisher is to submit a written statement to explain the reasons.

c. Reviews of Non-Casual Games

Non-Casual Games are subject to review and approval standards stricter than those applicable to foreign copyright holder-authorized games, and the review of such games requires the submission of more complex application materials than for Casual Games. Application materials include those used for reviewing content and for the prevention of internet game addiction, such as an explanation of the functional settings for the game's anti-addiction system, certification materials for anti-addiction personal identity verification, 3 sets of accounts for senior, middle and junior administrators, respectively, for the purpose of reviewing content and 3 accounts for the game's anti-addiction testing system, and the game's full Chinese script and blocked words list. Since the Circular does not specify the schedule for the review of non-Casual Games, the schedule referred to in prior regulations shall continue to apply.

According to Article VI of the Circular, if an approved mobile game is substantially updated and given an expansion name to indicate such update, the game will be regarded as a new game and the Publisher must apply for review again based upon the category to which the game belongs.

Game Publisher announcement and review obligations

The Circular stipulates that Publishers shall, on a dedicated webpage, specify the game's copyright holder, the publishing service units, the approval and publication numbers, and any other information approved by SAPPRFT. In addition, Publishers are to routinely review game updates.

Review obligations of joint Publishers

According to the Circular, joint operators are to review and confirm whether the game's approval procedures are full and complete, and whether relevant information is marked. Mobile games that have not been approved or for which the relevant information is not marked are not allowed to be jointly operated.

Review obligations of mobile terminal manufacturers and operators

The Circular provides that manufacturers and operators must examine and confirm whether mobile game approval procedures have been completed and whether relevant information is marked before preloading mobile games onto phones, tablets or other mobile terminals. Mobile games that have not been approved, for which the relevant information has not been marked, or that are pirated, are not allowed to be preloaded.

Submission deadlines for reviews

The Circular will be implemented from July 1 of this year. After that time, mobile games that have not been approved by SAPPRFT may not be published and operated online. With respect to mobile games that are already published and operating on a network before July 1, relevant approval procedures still need to be followed with the competent provincial administration for publication before October 1, 2016, otherwise, such games will not be eligible to continue operating online.

The Circular reflects the determination of SAPPRFT to standardize the mobile game market. Some provisions therein detail and repeat the old stipulations to make them more enforceable. For example, the provisbion with respect to the pre-publication review of network games is also referenced in Article 27 of *Provisions on Network Publication Service Management,* promulgated in February of this year, and the provision regarding the re-approval of updated games can also be found in the *Circular for Implementing the State Council's "Three Determinations" Stipulation and Relevant Interpretations of the State Commission Office for Public Sector Reform and Further Strengthening the Pre-approval of Network Games and the Review and Management of Imported Network Games*.

SAPPRFT makes it clear that games which fail to undergo the review and approval procedures shall be treated as illegal publications that may be ordered offline, and the operator may be subject to the

confiscation of illegal income or be subject to a penalty fine. In serious cases, the operator may be ordered to suspend business for rectification or be subject to license revocation.

In order to ensure the results of implementation, the Circular increases the review obligations of the joint operating platforms and mobile terminal manufacturers and operators. Although no punishment is provided for with respect to the foregoing persons due to a failure to perform the review obligations, it will still place pressure on them to take the initiative to review the serial number application status of games awaiting publication.

We hope that this article is of any assistance to you. If you have any questions, please feel free to contact us.

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2. Hui Fa [2016] Circular 16 - Further Reforming the Administration of Foreign Exchange Settlement Under Capital Accounts (Authors: Gloria XU, Yunzhi ZHAO)

On June 9, 2016, the State Administration of Foreign Exchange ("**SAFE**") promulgated the *Circular of the State Administration of Foreign Exchange Concerning Reform and Specifying of Policies for the Administration of Foreign Exchange Settlement under Capital Accounts* (Hui Fa [2016] Circular 16, the "**Circular**"). In comparison to the *Circular of the State Administration of Foreign Exchange Concerning Reform of the Administrative Approaches to Settlement of Foreign Exchange Capital of Foreign-Invested Enterprises* (Hui Fa [2015] Circular 19, the "**Circular 19**"), the Circular expands the applicable scope of entities and sources of capital for the discretionary settlement of foreign exchange and further clarifies the administrative principles for the use of settled RMB funds.

Compared to Circular 19, the Circular further reforms the administration of foreign exchange settlement under capital accounts in the following aspects:

Nationwide Application of Discretionary Foreign Exchange Settlement from Debt Financing by Domestic Enterprises

According to the Circular, domestic non-financial institutions ("**Domestic Enterprises**"), including both domestically-invested enterprises and foreign-invested enterprises ("**FIEs**"), may choose to settle their foreign exchange debt capital in RMB on a discretionary basis. Compared to Circular 19, the Circular expands the scope of discretionary settlement to include:

a. FIE registered capital,

b. repatriated funds obtained from overseas listings, and

c. foreign exchange debt capital of domestic enterprises (including domestically-invested enterprises and FIEs).

The Circular's application of discretionary settlement for foreign exchange debt capital reflects the People's Bank of China's ("PBOC") initiative from earlier this year to transform the administrative principles for external debt. In January and April of 2016, PBOC released guiding regulations that have changed the approval system from pre-approval to record-filing for cross-border enterprise financing, which was a significant change to the external debt regulatory system. Discretionary settlement of foreign exchange debt capital can be considered a foreign exchange-related supplement to the PBOC regulations.

Capital account foreign exchange receipts for which discretionary settlement was already permissible pursuant to relevant policies (including foreign exchange registered capital, foreign exchange debt capital and repatriated funds obtained from overseas listings, etc.), may be conducted at banks based on the Domestic Enterprise's actual operating needs (subject to restrictions provided for in other existing laws and regulations with respect to capital account foreign exchange receipt settlement).

Shortening the "Negative List" for Uses of Capital Account Foreign Exchange Receipts and Settled Foreign Exchange Funds

In comparison to Circular 19, the Circular does not make substantial changes to the operational requirements for discretionary settlement. Foreign exchange to be settled in RMB must still be deposited in an account for foreign exchange settlement pending payment, and use of the settled RMB is subject to the limitations provided in the Circular. Like Circular 19, the Circular continues to adopt a "Negative List" with respect to the use of capital account foreign exchange receipts and the settled RMB, which means that such funds shall only be used for purposes other than those listed in the Negative List.

The Negative List under the Circular is similar to that under Circular 19, with a few exceptions. The new list deletes certain previously prohibited uses, including "disbursing RMB entrusted loans to affiliated companies," "repaying inter-company loans (including third-party advances)" and "repaying RMB bank loans that have been re-lent to third parties," thereby even further liberalizing the use of capital account foreign exchange receipts and settled RMB funds.

Clarifying Principles for the Use of Capital Account Foreign Exchange Receipts and Foreign Exchange Settlement Funds

Even with Circular 19 in place, in practice, banks may still reject FIEs from domestically reinvesting RMB settled from foreign exchange registered capital on the grounds that the business scope of

such FIEs does not include "equity investment." This is because the Negative List under Circular 19 prohibits FIEs from, directly or indirectly, using RMB converted from registered capital for expenditures beyond business scope or expenditures prohibited by laws and regulations, and the banks therefore believe that FIEs may only use the converted RMB for domestic equity investment if the FIE's business scope includes equity investment. Thus, although Circular 19 provides operating principles for non-investment FIEs to make domestic equity investments, such operations still face substantial obstacles in practice.

Compared to Circular 19, the Circular also makes clear the principles for using capital account foreign exchange receipts and settled RMB funds, i.e., "foreign exchange receipts under capital accounts and the resulting settled RMB funds **can be used for payments under current accounts that are within [the enterprise's] business scope and payments under capital accounts that are permitted by laws and regulations.**" This suggests that current account payments are subject to an enterprise's business scope, while capital account payments are subject to the relevant laws and regulations. In sum, compared to Circular 19, the Circular may actually facilitate non-investment FIEs to make domestic equity investments with settled RMB funds from foreign exchange capital. That being said, how the Circular is interpreted and carried out will need to be further confirmed in practice.

Please see next page.

Major Differences between Circular 16 and Circular 19

	Circular 19	Circular 16
Application Scope	FIE capital funds	Foreign exchange registered capital, foreign debt capital and repatriated funds obtained from overseas listings of domestic enterprises
Use of Foreign Exchange and Converted RMB	a. shall not, directly or indirectly, use for expenditures beyond its business scope or expenditures prohibited by laws and regulations of the State; b. shall not, directly or indirectly, use for investments in securities, unless otherwise prescribed by laws and regulations; c. shall not, directly or indirectly, use for disbursing RMB entrusted loans (unless it is within its business scope), repaying inter-company loans (including third-party advances) and repaying RMB bank loans that have been re-lent to third parties; d. shall not use for expenses related to the purchase of real estate not for self-use, unless by a foreign-invested real estate enterprise;	a. the foregoing capital and funds can be used for payments under current accounts that are within its business scope and payments under capital accounts that are permitted by laws and regulations; b. shall not, directly or indirectly, use for expenditures beyond its business scope or expenditures prohibited by laws and regulations of the State; c. shall not, directly or indirectly, use for investments in securities, or in other wealth management products other than the banks' principal guarantee products, unless otherwise prescribed by laws and regulations. d. shall not use for extending loans to the non-affiliated enterprise, except as expressly permitted in its business scope. e. shall not use for expenses related to the construction or purchase of real estate not for self-use, unless by a real estate enterprise. f. shall not exceed the agreed scope of usage specified in the agreement between the Domestic Enterprise and other parties. Unless as otherwise stipulated, such agreement shall not conflict with the Circular.
Monthly Limit of Petty Cash (Payment of petty cash does not require proving documents)	The cumulative monthly payment of petty cash (including from discretionary settlement and from payment settlements) of a single enterprise shall not exceed an equivalent of USD 100,000.	The cumulative monthly payment of petty cash (including from discretionary settlements and payment settlements) of a single enterprise shall not exceed an equivalent of USD 200,000.

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3. Comments on the New Rules for the Registration of Infant Formula Milk Powder Formulas (Authors: David TANG, Min ZHU)

Article 81 of the Food Safety Law of the PRC (the "**Food Safety Law**"), revised in 2015, stipulates that the product formulas for infant formula milk powder shall be registered with the food and drug administration under the State Council. As a subsequent supporting regulation, the China Food and Drug Administrative (the "**CFDA**") promulgated the *Administrative Measures for the Registration of Infant Formula Milk Powder Formulas* (the "**Measures**") on June 6, 2016, which shall come into force as of October 1, 2016. We consider the following points to be worthy of attention:

Establishing application thresholds, and equal requirements for domestic and imported products

The Measures apply to the administration of the formula registration of the infant formula milk powder (the "**infant milk powder**") produced, sold and imported to within the territory of the PRC, and applicants must be domestic producers intending to produce and sell the infant milk powder within the territory of the PRC, or offshore producers intending to export the infant milk powder to the PRC. As a consequence, a CFDA-issued formula registration certificate is needed when importing infant milk powder into the PRC.

Meanwhile, the Measures require applicants, which may also be producers, to have the capacity to engage in R&D, produce and test infant milk powder, comply with good production practice requirements for powdered infant formula foods, implement hazard analysis and critical control point systems, and conduct inspections of outgoing infant milk powder batch by batch according to the relevant laws, regulations and national food safety standards for infant milk powder. Without meeting such conditions, producers cannot apply to register infant milk powder formulas.

Limitations on formula quantities to avoid market disorder

The Measures stipulate that each producer shall, in principle, have no more than 9 product formulas under 3 formula series (each series includes 1, 2 and 3 stages), and require different formulas for the same age group to have obvious differences, which must be proven by scientific verification, in order to avoid market disorder caused by an overabundance of formulas.

In addition, the Measures allow wholly-owned subsidiaries within a corporate group, where such subsidiaries already have registered infant milk powder formulas and production licenses, to use the formulas registered by other wholly-owned subsidiaries within the same corporate group. However, according to the Food Safety Law, a producer may not use the same formula to produce different brands of infant milk powder. Thus, where a wholly-owned subsidiary produces infant milk powder products using the formula and brand of another wholly-owned subsidiary within a corporate group, the producer subsidiary may not produce the product by using its own brand and the same formula

at the same time, and vice versa. Such regulations reduce waste of administrative resources caused by duplicative applications, and also facilitate internal business arrangements within corporate groups, particularly multinational corporate groups.

Regulating labels and instructions to avoid false and exaggerated promotions

The Measures stipulate that labels and instructions which reference infant milk powder formulations must be consistent with their registered formulas. Our understanding is that not only infant milk powder products, but also other products that may use infant milk power formulas, must comply with this requirement in order to prevent production and sales enterprises from using infant formula foods or other products to evade the higher regulatory requirements for the registration of infant milk powder formulas.

In addition, subject to the related regulatory principles and provisions stated in the new *Advertising Law of the PRC,* which came into force on September 1, 2015, the Measures require truthful and clear expressions as to the place of origin or country of the raw materials, instead of ambiguous expressions such as "imported milk", "ecological pastures," and "imported raw materials." Meanwhile, the labels and instructions shall not contain the following information:

a. the capability to treat or prevent disease;

b. expressly or impliedly indicating health benefits;

c. expressly or impliedly indicating intellectual or immunological enhancement, protection of intestinal function, or descriptions of other capabilities;

d. emphasizing the non-use or being free of materials that must not to be included in formulations pursuant to food safety standards by using words such as "not added", "does not contain", "free of…" or other such expressions;

e. content that is false, exaggerated, which violates scientific principles, or is absolute;

f. claims that are inconsistent with the registered content. The last requirement can be seen as a general provision for the CFDA to regulate other forms of promotion that may appear in the further.

Regulating registration applications and strengthening self-regulation

As stipulated in the Measures, where an applicant conceals relevant facts or provides false materials or samples when applying to register infant milk powder formulas, the CFDA will issue a warning to the applicant and make an announcement to the public, and the applicant will not be allowed to file an application for registration of infant milk powder formulas for a period of 1 year. Where an applicant obtains a formula registration certificate for infant milk powder by fraud, bribery or other illegal means, or by concealing facts or providing false materials, the CFDA will revoke the

certificate and impose a fine of CNY 10,000 to 30,000, and the applicant will not be allowed to apply for registration of infant milk powder formulas for a period of 3 years. Thus, regardless of whether the application process is complete, applicants that have engaged in illegal conduct during the application process will be imposed with punishment, and the punishment will be more serious if it is later discovered that a certificate has been obtained by illegal means, which is comparable to the treatment of the self-inspection and inspection of pharmaceutical clinical trial data, in order to reinforce applicant self-regulation.

Furthermore, in accordance with the Measures, where an applicant fails to file an application for re-registration, where a formula registration certificate has been forged, altered, resold, leased, lent or transferred, or where a production or sales enterprise breaches the labeling and instruction requirements stipulated in the Measures, the food and drug administration at the county level or above will order the applicant to make remedies, issue a warning and impose fine, or impose punishment in accordance with the Food Safety Law.

Supervision through both formula registrations and production licensing

According to the *Circular of the General Office on Forwarding Opinions of the State Food and Drug Administration and Other Departments on Further Strengthening the Safety Quality of Infant Formula Milk Powder* issued on June 16, 2013, the supervision of infant milk powder shall be strict and refer to the administrative measures for pharmaceuticals. The Measures are issued as another milestone in the area of food supervision, as they introduce a stringent supervisory system of product registration and production licensing, that has been implemented in the supervision of pharmaceuticals and medical devices.

According to the Measures, formula registration certificates are valid for five years, and applicants shall file an application for renewal within six months of the expiration date. Applications for renewal will be rejected where a producer does not produce products based on a registered formula for 5 years following the registration, or where a producer fails to maintain R&D, production and inspection capability on the registration date. Such provisions show the CFDA's continuous attention to the industrial efficiency of registered formulas and producers' related R&D and production capabilities. In the meantime, the CFDA requires food and drug administrations at the provincial level to further strengthen production license management and daily production supervision, which complement the infant milk powder formula registration regulations to protect the safety of infant milk powder by ensuring the science and safety of formulas, as well as production compliance, dependability of production techniques and controllability of production processes.

As of the issuance of this article, there is no information regarding when producers can apply to register infant milk powder formulas, and no supporting documents have been issued to coordinate with the official implementation of the Measures, such as the required materials for registration applications, regulations for the on-site inspection of manufacturing enterprises and other secondary

documents. Hence, questions including how to identify the "obvious differences," how to conduct on-site inspections, especially offshore inspections, need to be further clarified. The CFDA is requiring its departments to accelerate the drafting and publication of related documents and detailed rules to launch the application process as soon as possible. We will continually monitor changes in the relevant laws and regulations.

Important Announcement

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