

China Finance Bulletin

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Welcome to this month's issue of White & Case's China Finance Bulletin. The bulletin offers you regular updates on the PRC finance sector ensuring you stay up to date with the latest legal, regulatory and practice developments.

CBRC Further Limits Transfers of Loan Assets

On December 3, 2010, the China Banking Regulatory Commission (**CBRC**) issued the *Circular Regarding the Further Regulation of Credit Assets Transfer by Bank Financial Institutions* (中国银监会关于进一步规范银行业金融机构信贷资产转让业务的通知) ("**Circular 102**"), which came into effect immediately.

Circular 102 imposes a series of stringent requirements on transfers of loan assets by banks and financial institutions. Taken as a whole, Circular 102 creates a significant impediment to the buying and selling of loan assets by banks and financial institutions in the secondary loan market. Also, several aspects of Circular 102 directly contradict existing national laws that are of higher authority in theory, so in complying with Circular 102, banks and financial institutions would face regulatory uncertainty.

Highlighted below are key provisions of Circular 102:

- Previously, under the *PRC Contract Law*, a creditor is allowed to transfer its rights under a loan agreement without the prior consent of the debtor unless the loan agreement specifically provides otherwise and a creditor is only required to provide prior written notice to the debtor. Under Circular 102, no transfer of a loan asset can be made without the borrower's prior consent unless the loan agreement specifically provides that no such consent is required.
- Any kind of repurchase agreement in relation to a transfer of a loan asset is prohibited by Circular 102.
- When transferring a loan asset, the original lender must transfer all principal and future interest without retaining a portion of the interest income.
- If the loan asset being transferred is a syndicated loan, all members of the syndicate (other than the transferring syndicate member) have a first right of refusal and the transferring syndicate member can only transfer its portion of the loan (the "**Transferred Portion**") to non-syndicate members if all other syndicate members have declined to purchase the Transferred Portion and do not object to the transfer itself.

- To complete the transfer of a loan asset, the purchaser (i.e. the new lender) must sign a new agreement with the borrower, obtain the guarantor's consent (if applicable) and amend the security registration. This aspect of Circular 102 contradicts the *PRC Security Law*, which provides that a creditor can transfer its rights to other potential creditors without the consent of the guarantor and the guarantor would continue to be bound by the guarantee contract within the scope of the original guarantee, unless the guarantee contract provides otherwise.
- Banks and financial institutions must file quarterly reports with CBRC detailing all transfers of loan assets.

For more information on Circular 102, please visit the following Chinese language link:

<http://www.cbrc.gov.cn/chinese/home/jsp/docView.jsp?docID=20101221747F40F6A7E79BBCCFFFE4C40F7E67B00>

MOFCOM Calls for Stricter Compliance with Procedural Requirements on Foreign Investments in Real Estate Industry

On November 22, 2010, the Ministry of Commerce (**MOFCOM**) issued a *Circular Regarding Strengthening the Administration of Approval and Filing for Foreign Investment in the Real Estate Sector* (商务部办公厅关于加强外商投资房地产业审批备案管理的 通知) ("**Circular 1542**"), which came into effect on its issuance date.

Circular 1542 has not introduced any new regulations but rather, it represents MOFCOM's reiteration of the importance for regulatory approval authorities to strictly enforce existing rules in regulating foreign capital inflows into the Chinese real estate industry.

Highlighted below are the key provisions of Circular 1542:

- The competent local departments of commerce ("**Local MOFCOM**") must reinforce the approval procedures of real estate projects involving foreign currency inflows. For example, when examining the filing materials, the Local MOFCOM should verify the completeness of land-related documents, including but not limited to the land grant contract, the land use right certificate and other documents certifying the acquisition of the land use right. Where no tender, auction or listing procedure is required for granting the land use right, the documents evidencing the compliance with relevant laws and regulations should be provided by the foreign investor to the Local MOFCOM.
- Foreign investors are not allowed to set up real estate companies in China for the purpose of buying and selling multiple real estate projects. In other words, the existing rules requiring foreign investors to set up a project-specific real estate company must be followed.
- Local MOFCOM will not approve foreign investors' applications for setting up investment holding companies focused on real estate development and operations businesses.

For more information on Circular 1542, please visit the following Chinese language link:

<http://www.mofcom.gov.cn/aarticle/b/f/201012/20101207323165.html?601717077=2722795570>

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- Tier One in China Banking & Finance (Foreign Firms)—*Asia Pacific Legal 500, 2011*
- Tier One in China Banking & Finance (Foreign Firms)—*Chambers Asia, 2009*
- Tier One in Global Banking & Finance—*Chambers Global, 2008*
- Ranked Number One in Global Bank Finance 2007—*Mergermarket Tables*

Our noted areas of expertise include acquisition finance, bank advisory, credit transactions, derivatives, leasing and other asset-backed activity, and structured finance. In China and globally, our experienced team is intimately familiar with every aspect of deal structure, negotiation and documentation, and we aim to give precisely the right level and type of support at each stage of the deal—starting with strategic advice on alternative structures through negotiation and documentation, keeping your deal on track.

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- Top 10 US Firm—*American Lawyer 2010*
- Top 10 Global Firm—*American Lawyer 2009*
- Won Five Firm of the Year Awards—*Asian Counsel 2009*
- Top International Arbitration Firm—*Global Arbitration Review 2009*
- Corporate/M&A Team of the Quarter (Q3)—*Financial News 2009*
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- Winner of the Legal Innovation for Financial Services Award—*Financial Times 2009*