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环球律师事务所
GLOBAL LAW OFFICE



legal services worldwide

香港联交所关于 VIE 结构的上市决策及最近更新

HKEx Listing Decision on VIE Structure and Its Latest Updates

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香港联交所关于 VIE 结构的上市决策（HKEx LISTING DECISION）（HKEx—LD43—3）

（以下简称“《VIE 上市决策》”）首次发布于 2005 年，随后总共经历过 5 次更新，最近一次的更新是在 2013 年 11 月，之前的 4 次更新分别在 2011 年 11 月、2012 年 8 月、11 月和 12 月。

本文主要介绍和分析了《VIE 上市决策》在上述 6 个方面的内容：审核原则、审核方法、适用范围、VIE 合约内容要求、披露要求、中国法律意见要求。

1. 《VIE 上市决策》的内容结构

《VIE 上市决策》的全部内容以下 6 个部分组成：摘要、事实摘要、考虑事宜、适用的《上市规则》或原则、分析、决议。其中最值得我们关注的部分可能在于决议部分。而该决议部分从最初 2005 年仅有的 1 条内容（第 15

The HKEx Listing Decision (HKEx—LD43—3) on VIE Structure (the “**VIE Listing Decision**”) was initially promulgated in 2005 and subsequently revised in November 2011, August, November and December 2012 respectively in addition to its latest revision made in November 2013.

This article aims to give the readers an overview of the VIE Listing Decision in respects of: (i) the approach adopted by the HKEx to approving a listing application, (ii) the approach adopted by the HKEx to examining a listing application, (iii) the limitations on the application of VIE structure, (iv) the requirements on the contents of VIE agreements, (v) the requirements on the disclosure of VIE structure and (vi) the requirements regarding the PRC legal opinion.

1. Content and Structure of VIE Listing Decision

The VIE Listing Decision consist of 6 parts: Summary, Summary of Facts, Issue Raised for Consideration, Applicable Listing Rules or Principle, Analysis, and Decision. The most important component is considered to be the

条)已经更新至目前的 6 条内容(第 15—20 条)。以下我们来逐一介绍和分析一下这几项内容。

2. 香港联交所对 VIE 结构上市申请的审核方针(第 15 条)

香港联交所自其于 2005 年首次发布《VIE 上市决策》以来,就一直秉承以“披露为本”的审核方针,并明确规定只要上市申请人在上市文件中适当披露 VIE 合约安排及相关风险,联交所就认为上市申请人及其业务是适宜上市的。虽然联交所有此审核方针,但实际上其在后面的几次更新中对 VIE 结构/协议的内容和所适用的范围还是作出了一定的限制和要求。

3. 香港联交所对 VIE 结构上市申请的审核方法(第 16—17 条)

香港联交所对于 VIE 结构上市申请所采取的审核方法主要有 2 点:(1)在全面考虑采用 VIE 结构的原因及上市决策的要求的情况下,对个案进行处理;以及(2)如果 VIE 结构涉及非外商投资限制类业务,上市科会将其交由上市委员会处理。

4. 香港联交所对 VIE 结构适用范围方面的要求(第 16 条)

香港联交在 VIE 结构的适用范围方面视上市申请人所处的行业是否为中国法律项下规定的外商投资限制类行业而有所不同。

一方面,对于非外商投资限制类业务,联交所似乎并未明确规定上市申请人不得采用 VIE 结构。联交所仅要求如果 VIE 结构涉及非外商投资限制类业务,上市科会将其交由上市委员会处理。

Decision part, which has been developed from one paragraph (Paragraph 15) to the current six paragraphs (Paragraphs 15-20).

2. Approach Adopted by HKEx to Approving a Listing Application (Paragraph 15)

Since the VIE Listing Decision's inception, the HKEx has never changed its “disclosure-based approach” to approving a listing application and determining that an applicant and its business would be suitable for listing if disclosure and the risks associated therewith of the VIE agreements are properly made in the listing documents. Although it adopted a “disclosure-based approach,” the HKEx thereafter in terms of fact still imposed certain restrictions and requirements on the content and application of the VIE structure/agreements.

3. Approach Adopted by HKEx to Examining a Listing Application (Paragraphs 16-17)

Two approaches are adopted by the HKEx to examining a listing application:(i) the listing application will be examined on a case-by-case basis after full consideration of the reasons for adopting the VIE structure and subject to the conditions in the listing decision; and (ii) if non-restricted businesses are involved, the Listing Division will normally refer the case to the Listing Committee.

4. Limitations Imposed by HKEx on the Application of VIE Structure (Paragraph 16)

The attitude of HKEx towards the use of VIE structure for a foreign restricted business is different from that towards the use of VIE structure for a non-restricted business under the PRC's laws.

On the one hand, for the non-restricted business, the HKEx does not explicitly prohibit the use of VIE structure. The HKEx only requires that the Listing Division should normally refer the case to the Listing Committee if the VIE structure is used for such non-restricted

另一方面，对于外商投资限制类业务，《VIE 上市决策》在其 2013 年 11 月的这次更新中增加了第 16A 条，进一步澄清并明确以下内容：（1）VIE 结构仅被允许用于外资在持股比例方面有限制的情形；（2）对于外资在其他方面的限制规则，香港联交所要求上市申请人须令联交所相信其已按照法律顾问的意见，在上市前，合理评估了所有需要适用的规则，并采取了一切合理步骤遵守该等规则（以下简称“第 16A 条”）。

中国对于外国投资者进行投资的“限制”主要体现在 3 个方面：（1）对外方持股比例的限制；（2）对外方投资形式的限制（如必须以中外合资或者中外合作形式进行投资）；以及（3）对外方在某些行业的投资中有资质方面的要求。

这里可能存在一个需要进一步厘清的问题，即如果中国的法律法规就某一行业对外方在资质方面存在限制，而对外方在持股比例方面没有限制（例如，外商投资广告业的规定要求外方须是以经营广告业务为主的企业，而对外方持股比例没有任何限制），那么依据第 16A 条，该行业能否使用 VIE 结构申请在香港上市呢？谨慎起见，我们建议客户应当在个案中就此问题结合具体的项目情况与香港联交所进行事前沟通。

5. 香港联交所对 VIE 合约内容方面的要求（第 18 条）

在 VIE 合约内容方面，为了更好的确保上市公司的利益，进而确保投资者的利益，《VIE 上市决策》在其 2011 年的更新中对 VIE 合约内容在授权委托书、争议解决、VIE 公司资产处置三个方面作出了具体的强制性要求，而在

business.

On the other hand, for the foreign restricted business, the VIE Listing Decision added a Sub-paragraph 16A in its latest November 2013 update to further clarify and confirm that: (i) the use of VIE structure is permitted only to address the foreign ownership restriction; and (ii) for requirements other than the foreign ownership restriction, the HKEx requires that applicants should demonstrate to the satisfaction of the HKEx that they have, upon advice from their legal advisers, reasonably assessed the requirements under all applicable rules and have taken all reasonable steps to comply with them before listing (the “Sub-paragraph 16A”).

In China, the “restrictions” imposed on the foreign investors are reflected in 3 aspects: (i) restrictions on the foreign shareholding percentage; (ii) restrictions on the foreign investment manners (e.g., in a required manner of Sino-foreign equity joint venture or Sino-foreign cooperation joint venture); and (iii) restrictions on the foreign investors’ industrial background/qualifications.

One question may arise from the above Sub-paragraph 16A – whether the VIE structure should be permissible under Sub-paragraph 16A in case that the PRC laws and regulations only impose restrictions on the foreign investors’ industry qualifications but not on the foreign shareholding percentage (e.g., the current rules regulating the foreign investment in advertising business in China require the foreign investor should be advertising enterprises, but require nothing on the foreign shareholding percentage). In this regard, it is advisable to consult with HKEx in advance on a case-by-case basis.

5. HKEx’s Requirements on the Content of the VIE Contracts (Paragraph 18)

For the content of the VIE agreements, requirements on the power of attorney, dispute settlement and disposal of VIE company assets were added into the VIE Listing Decision in its 2011 revision for the purpose of protecting the

2013 年 11 月的这次更新中，又新增了资金返还方面的要求，具体规定如下：

当法律允许上市申请人无须采用 VIE 结构经营业务时，上市申请人应尽快取消 VIE 合约安排。且 VIE 公司的登记股东必须承诺，在不抵触相关法律法规的前提下，在取消 VIE 合约安排时，VIE 公司的登记股东必须将其收到上市申请人在收购 VIE 公司的股份时所付出的任何对价交回上市申请人，且此承诺必须在上市文件中披露。

在本文中，VIE 公司系指境外上市主体通过 VIE 协议控制的境内运营实体。

6. 香港联交所对 VIE 结构披露方面的要求 (第 19—20 条)

香港联交所对于 VIE 结构披露方面的要求主要体现在内容披露和风险因素披露两个方面。其中在内容披露方面有一点值得关注，即《VIE 上市决策》在其 2012 年的更新中明确要求上市申请人应采取适当的安排以保障其在 VIE 公司登记股东身故、破产或离婚时的利益。

自“土豆网”事件揭示了 VIE 公司登记股东离婚事件对 VIE 结构的稳定性所造成的不利影响以来，如何合理地防范 VIE 结构在 VIE 公司登记股东身故、破产或离婚等情形发生时的风险，在中国的商业实践中一直是一个难题。但由于香港联交所明确要求的上市申请人需要就此进行合理的安排，所以对于有计划在香港上市的 VIE 结构来说，需要事先在此方面有所筹划。

interests of the listed company and the investors. Additionally, in this latest November 2013 revision, a new requirement on the repayment of consideration was added into the VIE Listing Decision and set out as below:

The applicant must unwind the VIE structure as soon as the law allows the business to be operated without them. The registered shareholders of the VIE company must undertake that, subject to the relevant laws and regulations, they must return to the applicant any consideration they receive in the event that the applicant acquires the shares of a VIE company when unwinding the VIE structure. The undertaking must be disclosed in the listing documents.

In this article, the “VIE company” refers to the onshore operation entity controlled by the offshore listed entity through VIE agreements.

6. Disclosure Requirement of HKEx on VIE Structure (Paragraphs 19-20)

For the disclosure of VIE structure, the HKEX requires the applicant to disclose the contents of the VIE agreement and the risks associated therewith. As for the content disclosure, attention should be paid to the following updates made in 2012, which specifically required that appropriate arrangements should be made to protect the applicant's interests in the event of death, bankruptcy or divorce of the VIE company's registered shareholders.

Since the “Divorce Event of Tudou.Com's Founder” revealed that the divorce of the registered shareholder may affect the stability of VIE structure, how to properly keep away the risks arising from the death, bankruptcy or divorce of the VIE company's registered shareholders has been a tough issue in the commercial world. This issue should be considered and addressed appropriately beforehand if the company has a plan to list in Hong Kong through VIE structure.

7. 香港联交所对中国法律意见方面的要求 (第 18A 条和第 19(k)条)

《VIE 上市决策》在 2013 年 11 月的这次更新中新增了两项关于中国法律意见的要求：

(一) 如果相关法律及法规明确规定不允许外国投资者使用 VIE 结构控制或运营限制外商投资的业务（如中国的网络游戏业务），则法律顾问对 VIE 合约的意见中必须包括一项正面确认，确定有关结构性合约的使用并不违反该等法律及法规，或确定有关 VIE 合同不会在该等法律和法规下被视为失效或无效。此法律意见须有适当监管机构作出的保证支持（如可能），以证实有关结构性合约的合法性；

(二) 如果 VIE 公司的运营在中国境内，则中国法律顾问须作出正面的确认，确定有关结构性合约不会在中国合同法下被视为“以合法形式掩盖非法目的”从而被认定为无效。

我们理解上述两条规定与云游控股（484.hk）、IGG（8002.hk）和博雅互动（434.hk）这三家中国网游企业通过 VIE 结构分别于 2013 年 10 月 03 日、10 月 18 日和 11 月 12 日先后在香港上市有一定的关联。

目前，中国明确规定不允许外国投资者使用 VIE 结构控制或运营外商投资限制类行业的法律及法规尚不多见，所以上述第一条法律意见在目前尚具有一定的局限性。但对于第二条法律意见，则对整个 VIE 行业具有一定的普适性。在香港联交所该条要求出台之前，中国法律顾问就 VIE 结构的合法性问题，通常的做法都是出具有保留的法律意见，即认为不排除中国政府后续会出台相关规定或者中国法院会作

7. Requirements of HKEx Regarding the PRC Legal Opinion (Sub-Paragraphs 18A and 19(k))

In the latest November 2013 update, two new requirements regarding the PRC legal opinion were added into the VIE Listing Decision, including:

1. where the relevant laws and regulations specifically disallow foreign investors from gaining control of or operating a foreign restricted business through the use of a VIE structure (e.g., on-line game business in the PRC), the legal adviser's opinion on the VIE agreements must include a positive confirmation that the use of the VIE structure does not constitute breach of those laws or regulations and that the VIE agreements will not be deemed invalid or ineffective under those laws and regulations. The legal opinion must be supported by appropriate regulatory assurance, where possible, to demonstrate the legality of the VIE contracts.

2. if the VIE company's operations are conducted in the PRC, a positive confirmation from the PRC legal advisers that the VIE agreements would not be deemed as "concealing illegal intentions with a lawful form" and void under the PRC contract law.

We understand the above two requirements may have some connections with the listing of Forgame (484.hk), IGG (8002.hk) and Boyaa (434.hk), each of which is an online game company listed in Hong Kong respectively on 3 October, 18 October and 12 November of 2013.

Under the current legislation in China, it is rare to find a VIE structure which is explicitly prohibited in a foreign restricted business, thus the application of item (1) above is rather limited. However, item (2) above may be applied generally in the VIE-involved listings. Prior to this paragraph being issued by the HKEx, the PRC legal advisers would customarily render their legal opinions with qualifications in respect of the legality of the VIE agreements and opined that the possibility of the VIE agreements to be

出相关判决认定 VIE 合约无效的可能性。

deemed as invalid by the further regulation promulgated by the PRC government, or judged as invalid by PRC court cannot be excluded.

根据云游控股（484.hk）、IGG（8002.hk）和博雅互动（434.hk）三家企业的招股说明书所载，这三家企业的中国法律顾问都按照了香港联交所的上述要求出具了相应的法律意见。

According to the prospectus of Forgame (484.hk), IGG (8002.hk) and Boyaa (434.hk), all PRC legal advisors issued their legal opinions in accordance with the above requirements of HKEx respectively.

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沃尔玛收回 1 号店第三方平台业务事件评析——兼论上海自贸区负面清单对我国外商投资增值电信业务的影响

Did Walmart Take Back Yihaodian's Third-party Platform Business Using New Foreign Investment Options Available in the (Shanghai) Pilot Free Trade Zone? —Review on the Impact the Negative List of China (Shanghai) Pilot Free Trade Zone may have on Foreign Investment in China's Value-added Telecommunication Services

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2012 年 8 月，沃尔玛公司通过股权收购实现了其对 1 号店的控股，同时根据商务部的反垄断审查决定剥离了 1 号店的第三方平台业务。但据相关报道¹，随后沃尔玛公司借上海自贸区允许外资控股第三方平台业务的机会，于 2013 年 11 月通过在上海自贸区设立合资公司的方式实现了其从事 1 号店第三方平台业务的初始目标。

In August 2012, the U.S. retail giant Wal-Mart Stores, Inc. ("Walmart") was approved to acquire a controlling stake in Yihaodian, one of China's largest online supermarkets under the condition that it divest itself of Yihaodian's third-party platform business in order to comply with anti-trust decisions made by the Ministry of Commerce of China ("MOFCOM"). However, it was recently reported that², since new policies promulgated by the China (Shanghai) Pilot Free Trade Zone ("Shanghai FTZ") have allowed foreign investors to hold more than 50% equity interest in third-party platform businesses, Walmart therefore established a joint venture company in Shanghai FTZ in November 2013, and has achieved its initial target of engaging in Yihaodian's third-party platform business.

¹请参见新浪网报道《1 号店打破剥离窘境：借自贸区收回平台业务》：<http://tech.sina.com.cn/i/2013-12-11/06078994834.shtml>;

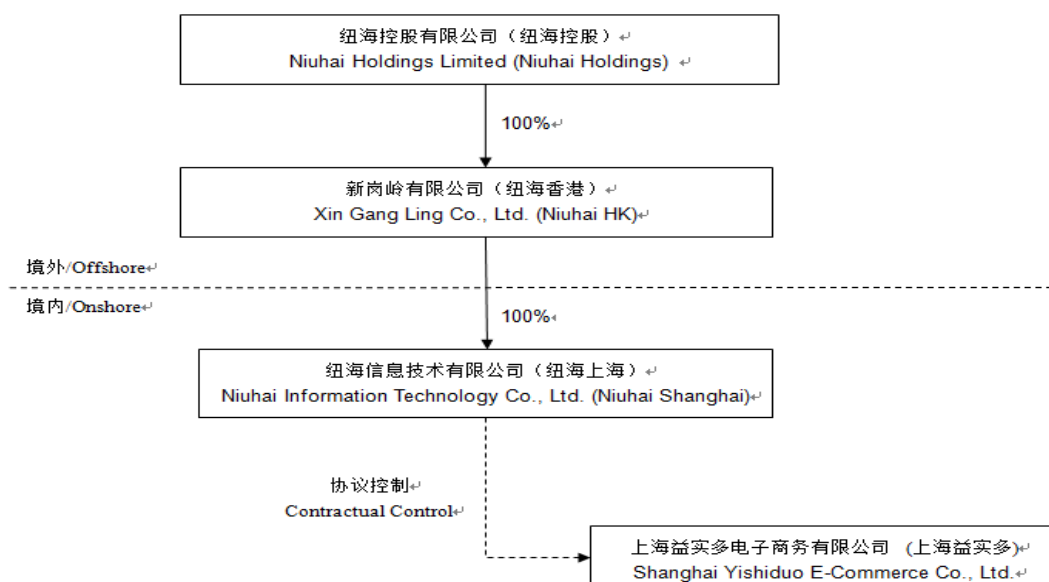
² Please refer to *Yihaodian breaches divestiture dilemma: recovering platform business through Shanghai FTZ* reported by Sina.

沃尔玛公司确实借上海自贸区允许外资控股第三方平台业务的机会实现了其对 1 号店第三方平台业务的控制吗？本文拟就相关问题进行简要分析³。

在分析这个问题之前，让我们先回顾和梳理一下沃尔玛公司收购 1 号店事件的始末。

一、事件始末

根据相关资料显示⁵，在沃尔玛公司投资 1 号店时，1 号店的公司结构可能为如下图所示的 VIE 结构：



Did Walmart actually acquire control of Yihaodian's third-party platform business by taking advantage of such break-through provision that foreign investors are allowed to hold more than 50% equity interest in third-party platform businesses in the Shanghai FTZ? This article will take a look at this question.⁴

Before looking into this question, let's first take a look at an overview of the acquisition deal between Walmart and Yihaodian.

I. The Whole Story

Based on relevant materials⁶, at the time of Walmart's investment in Yihaodian, the corporate structure of Yihaodian might have been a VIE structure shown as below:

³ 本文分析的基础材料均来源于互联网等公开渠道。我们无法判断该等信息的真实可靠性。如果这些信息有误，本文的分析结论亦可能不同。

⁴ The basic information for this article is collected from websites and other public channels. We cannot predict the truth and reliability of such information. If there is any mistake of such information, the conclusion of this article might be different.

⁵ 包括《商务部公告 2012 年第 49 号——关于附加限制性条件批准沃尔玛公司收购纽海控股 33.6% 股权经营者集中反垄断审查决定的公告》；

⁶ Including *Announcement No. 49 [2012] of the Ministry of Commerce – Announcement on the Decision of Conditional Approval of Wal-Mart Stores Inc.'s Acquisition of 33.6% Equity Interest in Niu Hai Holdings upon Antitrust Review of the Concentration of Business Operators.*

为本文叙述方便之目的，上述结构中所示之公司及其业务（作为一个整体）被称为“1 号店”。在上述结构中，（1）纽海控股有限公司（以下简称“纽海控股”）为 1 号店的境外融资平台，沃尔玛投资 1 号店即投资于该公司；（2）上海益实多电子商务有限公司（以下简称“上海益实多”）为 1 号店的境内运营实体，其实际持有并运营 1 号店网络平台；以及（3）纽海信息技术有限公司（以下简称“纽海上海”）为一家外商独资企业，其通过 VIE 协议实际控制上海益实多。

增持。 2011 年 11 月，沃尔玛公司决定将其所持有的 1 号店 17.7% 的股份增持至 51.3%，从而触发了中国反垄断审查的门槛。彼时，1 号店通过其网络平台 www.yihaodian.com 所从事的业务主要有两类：一是利用自身网络平台直接从事商品销售（即直销业务，不属于增值电信业务），二是利用自身网络平台为其他交易方提供网络服务（即第三方平台业务，属于增值电信业务）。商务部经反垄断审查后，批准了沃尔玛公司的该次增持，但基于反垄断政策和外商投资产业政策方面的考虑，同时要求 1 号店剥离其第三方平台业务，并要求沃尔玛公司不得通过 VIE 结构从事该第三方平台业务。

剥离。 随后，为履行商务部的上述要求，一方面，1 号店将其原有网络平台 www.yihaodian.com 从上海益实多名下转至了纽海上海名下。另一方面，1 号店剥离了其第三方平台业务，并将该业务从上海益实多名下转至了一家名为上海传绩电子商务有限公司（以下简称“上海传绩”）的公司，并通过该公司名下网络平台 www.1mall.com 运营原第三

For the purpose of this article, the companies shown in the above structure and their businesses will be collectively referred to as “Yihaodian.” In the above structure: (1) Niu Hai Holdings Limited (hereinafter referred to as “Niu Hai Holdings”) is the offshore financing vehicle of Yihaodian, which was the one invested into by Walmart; (2) Shanghai Yishiduo E-Commerce Co., Ltd. (hereinafter referred to as “Shanghai Yishiduo”) is the domestic operation company of Yihaodian, which holds and operates the online platforms of Yihaodian; and (3) Niu Hai Information Technology Co., Ltd. (hereinafter referred to as “Niu Hai Shanghai”) is a wholly foreign owned enterprise, which actually controls Shanghai Yishiduo through VIE agreements.

Control. In November 2011, Walmart decided to increase its stake in Yihaodian from 17.7% to 51.3%, which triggered the antitrust review in China. At that time, Yihaodian mainly engaged in two categories of business through its online platform www.yihaodian.com: the first was direct engagement in sale of goods via its own online platform (i.e. direct sale business, which does not fall into value-added telecommunication services); and the second was to provide online services for other transaction parties via its own online platform (i.e. third-party platform business, which falls into value-added telecommunication services). After their antitrust review, MOFCOM approved Walmart's acquisition, but imposed restrictive conditions from the perspectives of both anti-trust and foreign investment policies, and required that Yihaodian divest itself of the third-party platform business while also prohibiting Walmart from engaging in this third-party platform business through VIE structure.

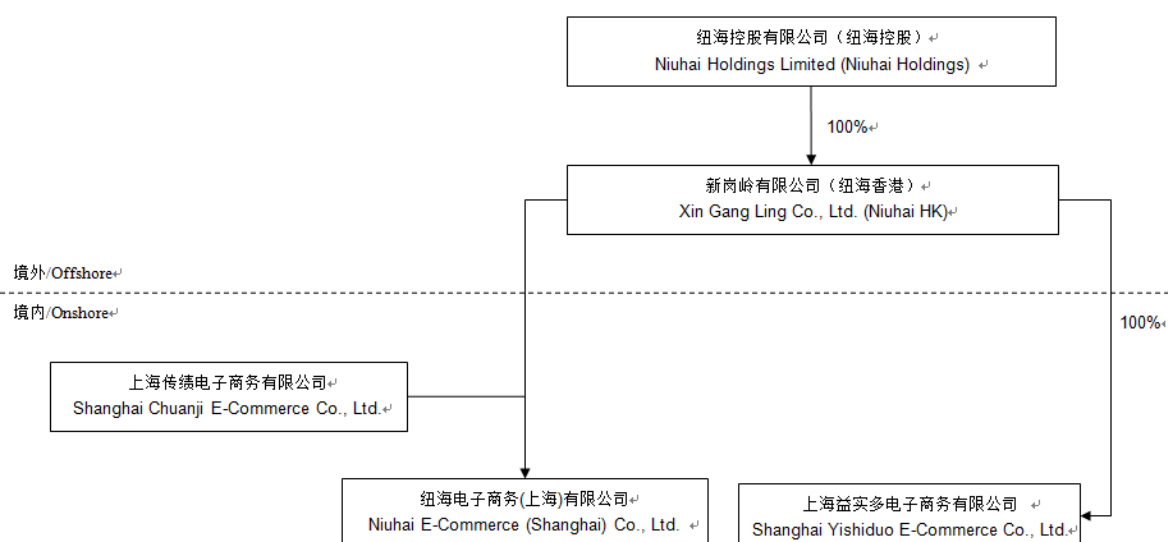
Divestiture. Thereafter, in order to comply with the above requirements made by MOFCOM, Yihaodian on the one hand transferred its original online platform www.yihaodian.com from Shanghai Yishiduo to Niu Hai Shanghai. On the other hand, Yihaodian divested its third-party platform business and transferred this business from Shanghai Yishiduo to Shanghai Chuanji E-Commerce Co., Ltd. (hereinafter referred to as

方平台业务。但目前，尚无公开资料显示上海传绩的股东结构，所以我们也无法得知上海传绩与 1 号店之间的关系。据报道，这次剥离对 1 号店的实际经营产生了一定的不利影响。

整合。虽然经过了上述剥离，但沃尔玛并未就此放手 1 号店的第三方平台业务。2013 年 11 月 14 日，沃尔玛公司通过纽海香港与上海传绩在上海自贸区新设了纽海电子商务(上海)有限公司（以下简称“纽海电商”），并将第三方平台业务的网络平台 www.1mall.com 与直销业务的网络平台 www.yihaodian.com 同时转至了纽海电商名下的网络平台 www.yhd.com。至此，沃尔玛公司实现了 1 号店在同一网络平台下第三方平台业务与直销业务的整合。整合后，1 号店的公司结构可能如下图所示：

“Shanghai Chuanji”), and used Shanghai Chuanji’s online platform www.1mall.com to continue operating the third-party platform business. Presently, there is no public information indicating the shareholder structure of Shanghai Chuanji, so we cannot identify whether there are any connections between Shanghai Chuanji and Yihaodian. According to relevant media coverage, this divesture has caused certain adverse effects on Yihaodian’s business and operation.

Integration. Despite the above divesture, Walmart did not give up on Yihaodian’s third-party platform business. On November 14, 2013, through co-investment with Shanghai Chuanji, Walmart established a joint venture company named Niu Hai E-Commerce (Shanghai) Co., Ltd. (hereinafter referred to as “Niu Hai E-Commerce”) through Niu Hai HK in the Shanghai FTZ, which eventually combined the online platform for the third-party platform business (www.1mall.com) and online platform for direct sale business (www.yihaodian.com) into a new online platform operated by Niu Hai E-Commerce (www.yhd.com). Thus, Walmart completed the integration of Yihaodian’s third-party platform business and direct sale business under one online platform. After the integration, the chart below may illustrate the corporate structure of Yihaodian:



二、事件评析

上海自贸区新政。 媒体普遍报道沃尔玛公司此次收回 1 号店第三方平台业务可能与上海自贸区于 2013 年 9 月 29 日发布的其有关外商投资准入的“负面清单”有关。该负面清单其中规定有：“投资经营类电子商务的外方投资比例不得超过 55%，投资经营其他在线数据处理与交易处理业务的外方投资比例不得超过 50%。”

我国现行政策。 上面提及的“投资经营类电子商务”以及“其他在线数据处理与交易处理业务”在中国都是归属于增值电信业务。而在中国加入世贸组织之前，增值电信业务一直为外商投资禁止类业务，直至《外商投资产业指导目录（2002）》规定：“增值电信服务自 2001 年 12 月 11 日起允许外商投资，外资比例不超过 30%；不迟于 2002 年 12 月 11 日允许外资比例不超过 49%；不迟于 2003 年 12 月 11 日允许外资比例达 50%。”自此之后，直至最新的《外商投资产业指导目录（2011）》都未放开外资在增值电信领域持股比例不超过 50% 的限制。

媒体解读。 由于新设的合资公司纽海电商成立时间为 2013 年 11 月 14 日，恰好在上海自贸区负面清单出台之日（2013 年 9 月 29 日）后的两个月内，且纽海电商又恰好成立于上海自贸区内，所以媒体普遍认为是沃尔玛公司借上海自贸区放开“投资经营类电子商务”之机收回并控股了 1 号店原有的第三方平台业务。

II. Analysis

Shanghai FTZ's New Policy. It was widely reported in the media that there may be some connections between Walmart's recovery of Yihaodian's third-party platform business and the “Negative List” issued by Shanghai FTZ for foreign investment policy on September 29, 2013, which provides that: “[t]he proportion for foreign investors investing in commercial E-commerce business shall not exceed 55%, the proportion for foreign investors investing in other online data and transaction processing service shall not exceed 50% (“Shanghai FTZ New Policy”).”

China's Existing Policy. In China, the business of “investment in E-commerce” and “other online data and transaction processing service” as mentioned above belongs to value-added telecommunication services. But before China became a member of the WTO, the foreign investment in the value-added telecommunication business had always been prohibited, until the promulgation of *Catalogue of Industries for Guiding Foreign Investment (2002)*, which provides that: “the foreign investment in value-added telecommunication services will have been allowed as of December 11, 2001 and the proportion of foreign investors shall not exceed 30%; no later than December 11, 2002, the proportion will be allowed to no more than 49%; no later than December 11, 2003, the proportion will be allowed to reach 50%.” Since then and until the latest *Catalogue of Industries for Guiding Foreign Investment (2011)*, the restriction on the proportion for foreign investment in value-added telecommunication services has not been altered to exceed 50%.

Media Report. Media outlets made the assumption that since the establishment of Niu Hai E-Commerce, the new joint venture company, was within two months from the issuance date (September 29, 2013) of the Negative List of Shanghai FTZ (it was established on November 14, 2013), and since Niu Hai E-Commerce was located in the

我们的理解。 但是根据相关资料显示，沃尔玛公司在纽海电商中所持有的比例仅为 50%，并未根据上海自贸区的新政突破我国现行不允许外资持股比例超过 50% 的限制，所以我们理解可能并不能就此认定沃尔玛此次收回 1 号店第三方平台业务与上海自贸区放开外资不得控股“经营性电子商务”的限制之间有直接的联系。同时，在上海自贸区政策放开的情况下，对于沃尔玛公司为何仅在合资公司中持股 50%，具体原因我们尚不得而知，可能是出于反垄断方面的考虑，即如果沃尔玛持股超过了 50%，则可能又会触发反垄断审查的门槛，也可能是出于其他方面的原因。

三、上海自贸区负面清单对外商投资增值电信业务的影响

（一）对外资战略投资并控股境内相关增值电信业务企业的影响

虽然目前上海自贸区尚未完全放开增值电信业务领域不允许外资控股的限制，仅是放开了一小部分，如信息服务业务中的应用商店业务、在线数据处理与交易处理业务中的投资经营类电子商务业务等⁷，但沃尔玛公司收购 1 号店事件或许给其他外国投资者战略投资并控股境内相关增值电信业务企业提供了一条可以借鉴的途径，即外国投资者可以通过与目标企业在上海自贸区设立合资公司，然后把目标公司业务转至合资公司的方式实现战略投资之目的。

Shanghai FTZ, then they were probably correct in reporting that Walmart took back Yihaodian's third-party platform business due to the breakthrough that Shanghai FTZ has allowed foreign investment to control the E-commerce business.

Our Understanding. It's indicated by relevant materials that the shareholding of Walmart in Niu Hai E-Commerce is only 50%, which does not exceed the current 50% restriction; therefore, we are not necessarily convinced that one can reasonably conclude that Walmart's recovery of Yihaodian's third-party platform business has a direct relationship with Shanghai FTZ New Policy. Also, we are not sure about the reasons why Walmart's equity ratio in the joint venture company is only 50% under circumstances that the Shanghai FTZ has already allowed more shareholding. Although we can only speculate here, it might be due to the antitrust concern (e.g., if Walmart holds more than 50%, an antitrust review may be triggered), or it might be due to other reasons.

III. Impact of the Negative List of Shanghai FTZ on Foreign Investment in Value-added Telecommunication Services

A. Impact on Foreign Strategic Investment in Domestic Enterprises Engaged in Value-added Telecommunication Services

Although, Shanghai FTZ has not entirely lifted the restriction limiting foreign investors to no more than 50% equity interest in the companies engaged in value-added telecommunication services, and the restrictions have only eased in certain parts of this industry (e.g., app stores business of information service, commercial E-commerce business of online data and transaction processing services⁸); however, the media frenzy surrounding the event of Walmart's acquisition of Yihaodian might give other foreign

⁷请参见由上海市人民政府于 2013 年 9 月 29 日颁布的《中国（上海）自由贸易试验区外商投资准入特别管理措施（负面清单）（2013 年）》；

⁸ Please refer to *Special Administrative Measures (Negative List) on Foreign Investment Access to the China (Shanghai) Pilot Free Trade Zone (2013)* promulgated by Shanghai Municipal People's Government on September 29, 2013;

strategic investors who expect to invest and hold more than 50% equity interest in domestic enterprises engaged in value-added telecommunication services and idea about how to accomplish this goal (e.g., a foreign investor can establish a joint venture company with the target company in Shanghai FTZ and transfer the business conducted by the target company to the joint venture company, so that to achieve its strategic investment in the target company).

(二) 对 VIE 结构的影响

在中国此前长达十几年的时间里，外国投资者投资于中国增值电信业务的方式主要是通过搭建 VIE 结构的方式，其主要原因包括：（1）增值电信业务不允许外资控股；（2）在实践中，外商投资企业很难申领到《增值电信业务经营许可证》；（3）从事增值电信业务的公司很难通过境内渠道融资（包括贷款/私募/上市）等。

虽然上海自贸区就第三方平台业务或者其他一些增值电信业务已经允许外资控股，同时据称沃尔玛公司在上海自贸区新设的合资企业也已经申领到了工信部颁发的《增值电信业务经营许可证》（合字 B1.B2-20130004）⁹，但是我们可能需要注意到（1）沃尔玛公司新设的合资企业纽海电商的《增值电信业务经营许可证》的颁发机构仍为工信部，而实践中工信部很少对外商投资企业颁发《增值电信业务经营许可证》，以及（2）沃尔玛公司在纽海电商中的持股比例仍未突破 50% 的限制，所以对于后续是否所有符合条件的外商投资企业都能申领到工信部的《增值电信业务经营许可证》

B. Impact on VIE Structure

For more than ten years, the VIE structure has always been a principal investment manner for the foreign investors to invest in China's value-added telecommunication services, mainly for the following reasons: (i) foreign investors are not allowed to hold more than 50% equity interest in value-added telecommunication services; (2) in practice, foreign invested enterprises experience difficulties obtaining the required Value-added Telecommunications Business License; (3) companies engaged in value-added telecommunication services experience difficulties obtaining financing through domestic channels (e.g., loans/private equity/IPO).

Even though Shanghai FTZ has allowed foreign investors to hold more than 50% equity interest in third-party platform businesses or some other value-added telecommunication services, and it is said that the joint venture company established by Walmart in Shanghai FTZ has obtained the Value-added Telecommunications Business License (No. He Zi B1.B2-20130004)¹⁰ which was issued by the Ministry of Industry and Information Technology of the PRC ("MIIT"), the following issues must be carefully noted: (1) in practice, MIIT rarely issues the Value-added Telecommunications Business License to foreign invested companies, despite the fact that MIIT issued the License to Niu Hai E-Commerce,

⁹请参见由工业和信息化部电信研究院电信与信息服务咨询中心于 2013 年 12 月 6 日公布的《领取〈中华人民共和国增值电信业务经营许可证〉通知-第 19、20 批》；

¹⁰ Please refer to *Notice of Receipt of Value-added Telecommunications Business Licenses of the PRC – No. 19 and 20 Batch* released by Telecommunication and Information Service Center of Telecommunication Research Institute of Ministry of Industry and Information Technology;

证》，目前还不能就此轻松地乐观估计。

就目前看来，上海自贸区负面清单部分放开外商投资增值电信业务的限制所能带来的影响尚不足以打破 VIE 结构在增值电信业务领域的主导地位——沃尔玛公司投资 1 号店的结构可以视为“直投结构”，相较于 VIE 投资结构，可能 VIE 结构在目前看来更能满足增值电信企业境外上市融资的需求。

四、结语

2014 年 1 月 6 日，工信部和上海市人民政府联合发布了《关于中国（上海）自由贸易试验区进一步对外开放增值电信业务的意见》，其中工信部明确在上海自贸区内试点进一步对外开放增值电信业务，暂停实施《外商投资电信企业管理规定》相关内容，加快制定试点管理办法，调整相关管理制度。上海自贸区在外商投资增值电信业务领域的改革方面已经先行了一步，而这一步对我国外商投资增值电信业务领域又会产生多大的影响，我们还需对此保持持续的关注。

and (2) the equity ratio of Walmart in Niu Hai E-Commerce still does not break the cap of 50%, therefore, it cannot be assured that all of such qualified foreign invested enterprises can obtain the Value-added Telecommunications Business License from the MIIT in the future.

It now seems that the impact of the Negative List of Shanghai FTZ which partly liberalizes foreign investment in value-added telecommunication services is not sufficient to break the dominant position of VIE structure in value-added telecommunication services area—the structure used by Walmart in its investment in Yihaodian can be deemed as a “direct investment structure,” which, compared with VIE structure, is not yet good enough to meet value-added telecommunication enterprises’ demand to list on overseas markets to get financing.

IV. Conclusion

MIIT and Shanghai Municipal People’s jointly promulgated *Opinions about Further Open Value-added Telecommunication Services in the China (Shanghai) Pilot Free Trade Zone* on January 6, 2014, confirm that value-added telecommunication services will be further opened in Shanghai FTZ. Meanwhile, the implementation of the *Provisions on the Administration of Foreign-invested Telecom Enterprises* will be suspended, and pilot administration rules will be made in their place. While it is true that Shanghai FTZ has made a step forward in the reform of foreign investment in the value-added telecommunication services area it is not yet clear how much impact this step will have on foreign investment in this area, so we will keep an eye on it.

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劳动法专递 —— 《劳务派遣暂行规定》

Labor Law Update—The Interim Provisions on Labor Dispatching Activities

* 环球劳动法业务部

By Labor Law Department of Global Law



继 2013 年 7 月 1 日开始实施的劳动合同法修正案对原劳动合同法中劳务派遣规定做了四项修改后，人力资源社会保障部于 2013 年 12 月 20 日经第 21 次部务会议审议通过了《劳务派遣暂行规定》（以下称“《暂行规定》”），该规定将于 2014 年 3 月 1 日起开始施行。

劳务派遣是劳动合同法实施过程中遇到的一个特殊的问题。在劳动合同法颁布实施后，劳务派遣单位数量猛增，最终导致劳务派遣的用工方式被过分滥用，有的用工单位甚至把劳务派遣作为用工主渠道。劳动合同法立法者的本意旨在保护劳动者的权益，而这些不规范的劳务派遣用工却导致被派遣劳动者的合法权益得不到有效保障。

Subsequent to the promulgation and effectiveness of our amendments to the Labor Contract Law of the People's Republic of China (Hereunder referred to as “Labor Contract Law”) on July 1, 2013, the Ministry of Human Resources and Social Security adopted the Interim Provisions on Labor Dispatching Activities (Hereunder referred to as “Interim Provisions”) on December 20, 2013, and which shall come into effect on March 1, 2014.

Labor dispatch has been a unique problem in the enforcement of Labor Contract Law. Once the Labor Contract Law came into effect, there was a marked increase in businesses specializing in labor dispatch, and eventually became excessive. Some employers even began to use labor dispatch services as their primary means of employment. In the view of the Chinese officials who ultimately designed the Labor Contract Law to provide more protection for employees, this abuse of labor dispatch arrangements has had the ultimate effect of damaging the legitimate rights of the dispatched workers.

《暂行规定》表明中国政府试图通过明确劳务派遣单位、用工单位和被派遣劳动者三方的权利义务来缩减劳务派遣用工的情形，从而限制劳务派遣的滥用，维护被派遣劳动者的合法权益，促进企业构建和谐稳定的劳动关系。

要点 1：明确用人单位劳务派遣用工的比例上限以及过渡期安排

《暂行规定》限制用工单位使用的被派遣劳动者数量不得超过其用工总量的 10%。用工总量为用工单位订立劳动合同人数与使用的被派遣劳动者人数之和。同时，《暂行规定》给予了用工单位 2 年过渡期，即用工单位在《暂行规定》实施前使用被派遣劳动者数量超过其用工总量 10% 的，可以在《暂行规定》施行之日起 2 年内逐步降至规定比例。但同时要求，在未达到规定比例之前，不得新用被派遣劳动者。

要点 2：明确劳务派遣中设置辅助性岗位应当履行的程序

《暂行规定》规定了用工单位决定使用被派遣劳动者的辅助性岗位的，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定，并在用工单位内公示。这项新程序旨在给每天工作的员工话语权，让其评价该辅助性岗位是否适合劳务派遣。

The Interim Provisions represent an effort by the PRC government to address the apparent abuse of labor dispatch arrangements by narrowing the circumstances under which labor dispatch arrangements can be used, by specifying the rights and regulations of labor dispatching entities, employers, dispatched workers, and by protecting the legitimate rights of dispatched workers and promoting the employers to establish the harmonious and stable labor relationship.

Key point 1: Specify the cap of dispatched workers' percentage and the interim period arrangement

The Interim Provision restrict the number of dispatched workers used by an employer shall not exceed 10% of the number of its total employees. The number of total employees shall refer to the sum of the number of employees who have signed labor contracts with the employer and the number of dispatched workers used by the contracts. Meanwhile, the Interim Provisions give a 2-year interim period for employers whose current percentage of dispatched workers exceed 10% of the number of its total employees before Interim Provisions come into effect, provided that i) they gradually lower the proportion of their dispatched employees to the stipulated 10% within 2 years upon the promulgation of Interim Provisions, and ii) they do not add new dispatched workers prior to achieving the regulated proportion.

Key point 2: Specify the procedure of establishing the auxiliary positions

The Interim Provisions specifies that proposals for auxiliary employment positions, which are primary employment positions in which dispatched workers may be engaged, must first be submitted to the worker's congress or to all employees for discussion and adoption, and then made public. The aim of this new procedure is to give employees who are involved in the day-to-day work of the employer's business some input on whether such auxiliary position would actually be an appropriate position for dispatched labor.

要点 3：三性岗位和比例限制的例外情形

一些特殊的用工被排除在《暂行规定》之外。外国企业常驻代表机构和外国金融机构驻华代表机构等使用被派遣劳动者的，以及船员用人单位以劳务派遣形式使用国际远洋海员的，不受临时性、辅助性、替代性岗位和劳务派遣用工比例的限制。

要点 4：明确将被派遣劳动者同工同酬的权利扩大与直接雇佣员工享有的福利待遇

《暂行规定》将《劳动合同法》赋予被派遣劳动者同工同酬权利的要求明确扩大福利待遇权益方面。亦即，用工单位应当向被派遣劳动者提供与直接雇佣员工相同的福利待遇。

要点 5：进一步明确跨地区劳务派遣的社会保险缴纳

劳务派遣单位跨地区派遣劳动者的，应当在用工单位所在地为被派遣劳动者参加社会保险，按照用工单位所在地的规定缴纳社会保险费，被派遣劳动者按照国家规定享受社会保险待遇。

劳务派遣单位在用工单位所在地设立分支机构的，由分支机构为被派遣劳动者办理参保手续，缴纳社会保险费。

Key point 3: Exemptions from temporary, auxiliary or back-up positions and the percentage restriction

Some specific types of employment situations are exempted from the force of the Interim Provisions. Resident representative offices of foreign enterprises, China-based foreign diplomatic representative agencies, representative offices of foreign financial institutions in China, and employers who use International ocean-going seamen by labor dispatch are not bound by the requirements on using dispatched workers only for temporary, auxiliary or back-up positions and the percentage of dispatched workers when using dispatched workers.

Key point 4: Extension of the dispatching workers' legitimate rights of equal pay for equal work to include compensation and benefits which are normally enjoyed by directly hired employees

The Interim Provisions require that the legitimate rights of equal pay for equal work to dispatched workers' are extended to compensation and benefits; namely, dispatched workers are entitled to the relevant compensation and benefit of their job positions as if they were directly hired workers.

Key point 5: Further clarity on the handling of social insurance for Cross-regional Labor dispatching

Where a labor dispatching entity dispatches workers to regions outside its place of registration, the dispatched workers' social insurance shall be enrolled in the domiciles of the relevant employers and the dispatched workers shall also be entitled to social insurance.

Where a labor dispatching entity has set up a branch or subsidiary in the domicile of an employer, the branch or subsidiary shall enroll the workers in social insurance, and pay the insurance fee.

要点 6：明确在对被派遣劳动者的工伤认定和职业病诊断、鉴定过程中用工单位和劳务派遣单位的各自的协助义务

《暂行规定》明确了被派遣劳动者在用工单位因工作遭受事故伤害的，劳务派遣单位应当依法申请工伤认定，用工单位应当协助工伤认定的调查核实工作。劳务派遣单位承担工伤保险责任，但可以与用工单位约定补偿办法。

备注：上述补偿是否为用工单位应承担的法定义务以及该等补偿责任的范围尚不明确，有待在有关立法或司法实践中进一步澄清。

被派遣劳动者在申请进行职业病诊断、鉴定时，用工单位应当负责处理职业病诊断、鉴定事宜，并如实提供职业病诊断、鉴定所需材料。

要点 7：明确用工单位可退回被派遣劳动者的情形

《暂行规定》明确，在下述三类情形时，用工单位可以将被派遣劳动者退回劳务派遣单位

- (1) 生《劳动合同法》第40条规定的情势变更以及第41条规定的经济性减员；
- (2) 用工单位被依法宣告破产、吊销营业执照、责令关闭、撤销、决定提前解散或者经营期限届满不再继续经营；或者
- (3) 劳务派遣协议期满终止。

Key point 6: Clarification of the obligations of an employer to assist the labor dispatching entity with work-related injuries, occupational disease diagnosis, identification procedure of dispatched workers

The Interim Provisions specify that where a dispatched worker suffers from work-related injuries while working for the relevant employer, the labor dispatching entity concerned shall be the applicant for handling the recognition of work-related injuries, and the employer must assist the investigation and handling. The labor dispatch entity shall bear the corresponding compensation liability; however it is entitled to negotiate with the relevant employer for the compensation.

Note: The issues of whether the compensation mentioned hereof is the lawful obligation and the limitation of compensation liability of the employer still need further legislation or clarification in juridical practice.

The employer shall be responsible for the handling of occupational disease diagnosis, identification issues when dispatched workers apply for the occupational disease diagnosis and the employer shall provide the documents needed for the diagnosis and identification.

Key point 7: Clarifications on the circumstances under which an employer may return dispatched workers

Interim Provisions specifies that under any of the following circumstances, an employer may return a dispatched worker to the dispatching entity:

- (1) Due to the change of circumstances prescribed in Article 40 or the economic redundancy in Article 41 of the Labor Contract Law;
- (2) Due to the employer's declaration of bankruptcy, business license revocation, an order to close down, cancellation or early dissolution, or because the operation period expires; or
- (3) Due to that the labor dispatching agreement

被派遣劳动者有《劳动合同法》第 42 条规定的患职业病或因工负伤被确认丧失劳动能力、患病在医疗期或女职工在三期内等情形时，在派遣期限届满前，用工单位不得依据上述《劳动合同法》的第 40 条和第 41 条之相关规定将被派遣劳动者退回劳务派遣单位；派遣期限届满的，应当延续至相应情形消失时方可退回。

要点 8：明确被派遣劳动者有权解除劳动合同的情形及其安置

被派遣劳动者提前 30 日以书面形式或在试用期内提前 3 日通知劳务派遣单位，可以解除劳动合同。

在被派遣劳动者符合上述被用工单位退回之条件而被退回的情形下，若劳务派遣单位重新派遣时维持或者提高劳动合同约定条件，被派遣劳动者不同意的，劳务派遣单位可以解除劳动合同；若劳务派遣单位重新派遣时降低劳动合同约定条件，被派遣劳动者不同意的，劳务派遣单位不得解除劳动合同。但被派遣劳动者提出解除劳动合同的除外。

has expired

The employer is not entitled to return the dispatched worker to the dispatching entity according to Article 40 and Article 41 of Labor Contract Law before the dispatching period expires if he or she falls under the circumstances of being diagnosed for occupational disease , being injured at work and the worker is confirmed to have totally or partially lost the ability to work, being in the period of medical treatment for illness or the worker is during the pregnant, puerperal or breast-feeding stage in Article 42 of the Labor Contract Law; And the worker could only be returned after those situations have been resolved and the dispatching period has expired.

Key point 8: Clarification of the circumstances of the dispatched worker's labor contract termination, and his or her proper placement

A dispatched worker may terminate the labor contract by giving a written notice to the relevant labor dispatching entity 30 days in advance. During the probation period, a dispatched worker may terminate the labor contract by notifying the relevant labor dispatching entity 3 days in advance.

Some new provisions address the rights of a labor dispatching entity in situations where the manner in which a dispatched worker is to be used by the employer has changed after the dispatched employee has been returned and is to be re-dispatched for a similar position. Under circumstances where a dispatched worker has been returned and the labor dispatching entity maintains or raises the terms of the relevant labor contract when re-dispatching the dispatched worker to a new employer, the labor dispatching entity is entitled to terminate the labor contract if the dispatched worker objects to the new assignment. Under circumstances where a dispatched worker has been returned and the labor dispatching entity lowers the terms of the relevant labor contract with a new employer, the labor dispatching entity may not terminate the labor contract on the grounds that the dispatched worker objects to the new assignment unless the dispatched worker

劳务派遣单位被依法宣告破产、吊销营业执照、责令关闭、撤销、决定提前解散或者经营期限届满不再继续经营的，劳动合同终止。用工单位应当与劳务派遣单位协商妥善安置被派遣劳动者。但是，上述安置是否为用工单位应承担的法定义务以及应如何安置尚不明确。

要点 9：明确劳务派遣单位在某些情形需支付被派遣劳动者经济补偿金

发生以下情形，劳务派遣单位应当依法向被派遣劳动者支付经济补偿金：

- (1) 根据《劳动合同法》第46条规定用人单位应向劳动者支付经济补偿金(比如：用人单位单方解除劳动合同，用人单位情势变更造成劳动合同无法履行等)；
- (2) 根据《暂行规定》，在退回被派遣劳动者时无法与之达成一致意见或劳务派遣单位被依法宣告破产、吊销营业执照、责令关闭、撤销、决定提前解散或者经营期限届满不再继续经营而导致劳动合同终止或解除。

propose to terminate the contract.

Where a labor dispatching entity is declared bankrupt, has its business license revoked, is ordered to close down, is cancelled, decides to conduct early dissolution or because the operation period expires, the original labor contracts concluded thereby shall be terminated. The employer and the labor dispatching entity shall negotiate for the proper placement of dispatched workers. However, please note that further legislation and clarification is still necessary in resolving the issues of whether the proper placement of dispatched workers then becomes the lawful obligation of the employer, and how to properly place the dispatched workers under those facts since the interim Provisions are still unclear on this point.

Key point 9: Clarification of the circumstances under which the dispatching entities shall pay financial compensation to the dispatched workers

The dispatching entity shall pay financial compensation to the dispatched workers under following circumstances.

- (1) According to article 46 of Labor Contract Law, dispatched worker terminate the labor contract due to employer's unilateral mistake, due to the change of circumstances of employer etc.;
- (2) According to the Interim Provisions, the contracts terminate due to that the labor dispatching entity and the labor dispatching workers could not reach agreement on the return decision or the due to that a labor dispatching entity is declared bankrupt, has its business license revoked, is ordered to close down, is cancelled, decides to conduct early dissolution or because the operation period expires.

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