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Legal Avenues for Foreign Investors to Participate in China's NPL Market

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Following continuous decline of China's economy, the ratio of non-performing loans ("**NPL**") in commercial banks continues to grow. In February 2016, eight ministries and commissions including the People's Bank of China released 'Several Opinions on Financial Support to Maintain Steady Industrial Growth, Adjust Industrial Structure and Improve Industrial Efficiency' calling for increasing the efficiency and strengthening the process for disposing of NPL, offering new market opportunities to the business of NPL disposal. Furthermore, for foreign investors actively involved in disposal of Chinese NPL since 2001, it is undoubtedly another round of hot investment opportunities for them to share with the Chinese NPL market!

Foreign investors were first permitted to participate in disposal of Chinese NPL as early as October 2001 with the announcement of ***the Tentative Regulations on the Attraction of Foreign Capital by Financial Asset Management Corporations to the Restructuring and Disposal of Assets*** by the Ministry of Finance, the People's Bank of China and the former Ministry of Foreign Trade and Economic Cooperation, which established the foundation for the system by which foreign investors were able to engage in the disposal of Chinese NPL. In November 2001, a bidding group consisting of Salomon Smith Barney, KTH Fund and Zhong Jin Feng De under Morgan Stanley, Lehman Brothers and Citigroup purchased four NPL portfolios from China Huarong Asset Management Corporation ("Huarong") with a total book value of RMB 10.8 billion, which started a new chapter in foreign investors massively engaging in the disposal of Chinese NPL. Subsequently, following the introduction of relevant national policies, foreign investors fully participated in the disposal of Chinese NPL in various ways up until the NPL previously allocated to the Financial Asset Management Corporations (hereinafter collectively referred to as the "AMCs") as per the state economic policy were all disposed of, and then the investors gradually faded out in around 2005. At present, the banks' NPL has maintained a rapid growth since 2015, and the huge market has attracted the attention and interest of more and more international investment banks. By virtue of the emergence of a new round of hot opportunities for investing in NPL, we hereby summarize the major methods foreign investors have previously used to participate in the disposal of Chinese NPL, and put forward some innovative methods for foreign investors to invest in NPL disposal in the current economy environment. We offer these insights for both international investment banks that are preparing for or that are already actively

participating in the disposal of NPL, as well as for domestic institutions intending to partner with foreign investors in the disposal of NPL.

1. Outbound Investment by AMCs with NPL Portfolio

According to ***the Tentative Regulations on the Attraction of Foreign Capital by Financial Asset Management Corporations to the Restructuring and Disposal of Assets***, AMCs are the organizations to enlist foreign investors in the disposal of NPL. In the past, as commercial banks were not authorized by relevant laws and regulations to enlist foreign investors in the disposal of NPL, all foreign investors entered into the Chinese NPL market through participating in the restructuring and disposal of the NPL previously owned by AMCs.

At the beginning of the first round of introducing foreign investment in the restructuring and disposal of NPL in 2001, AMCs were still exploring specific operating methods to utilize foreign investment, given that the only guiding principles were provided in ***the Tentative Regulations on the Attraction of Foreign Capital by Financial Asset Management Corporations to the Restructuring and Disposal of Assets***, and no supporting regulations were released by relevant authorities including the State Development and Reform Commission, foreign trade and economic cooperation departments and foreign exchange administration departments. The "Yanjiang Portfolio" project, where we provided legal services to China Orient Asset Management Corporation ("**Orient**") in 2001, was the pilot project officially approved by relevant authorities under the State Council to dispose of an NPL portfolio in the model of outbound investment. The fundamental transaction structure of the project was as follows: (i) A fund management LLC was established in the US, in which the Guangzhou office of Orient invested with the appraising value of an NPL portfolio with the book value equivalent to RMB 1.8 billion to subscribe corresponding equity interests in the fund management LLC, and the US investor invested with cash; (ii) Orient transferred its equity interests to overseas investors and received the transfer price; (iii) the aforementioned fund management LLC entrusted Lowe Bingham & Matthews - Pricewaterhouse Coopers to take charge of debt collection as its servicer; (iv) given that debt collection was not Lowe Bingham & Matthews - Pricewaterhouse Coopers' expertise, they cooperated with the Guangzhou office of Orient so that the Guangzhou office of Orient was responsible for debt collection in exchange for service fees. The "Yanjiang Portfolio" project was the first NPL disposal project which utilized foreign investment in China. It facilitated the establishment and optimization of China's foreign exchange administration system in the area of NPL, including registration methods for turning domestic debts to foreign debts, settlement procedures of income in foreign exchange, and filing registration procedures of foreign securities, etc. These procedures gradually took shape during the actual process of the project, and were reflected in ***the Notice on Foreign Exchange Administration with regard to Financial Asset Management Corporations Utilizing Foreign Investment in Disposal of Non-performing Asset*** (Hui Fa [2014] No. 119, which was annulled) issued by the State Administration of Foreign Exchange on December 17, 2004.

The above transaction also created a transaction model where an NPL Portfolio is used as capital contribution for outbound investment in order for the foreign capital to be utilized in NPL disposal. The basic transaction models are summarized as follows: on one hand, an AMC may invest in an overseas LLC at the appraised value of the NPL Portfolio, through which it subscribes equity interests in overseas LLC and thereafter sell such equity interests in exchange for the transfer price;

on the other hand, the AMC may act as a service provider for the NPL portfolio, providing debt collection services and obtaining relevant service fees.

2. Transfer of NPL Portfolios from AMCs to Foreign Investors

The difference between the second model and the previous one mentioned above, where AMCs carry out outbound investment with NPL portfolios, is that the AMCs directly sell the NPL Portfolios to foreign investors in exchange for cash instead of equity interests in overseas LLC. This is the most direct and widely-used way for foreign investors to participate in China's NPL disposal. Four major AMCs in China, namely Huangrong, Orient, China Cinda Asset Management Corporation, and China Great Wall Asset Management Corporation, conducted many transactions of this type with foreign investors. We previously represented AMCs as sellers, as well as international investment banks as buyers, in a number of direct sale transactions of large NPL Portfolios.

When selling NPL Portfolios to foreign investors, AMCs are required to obtain approval and implement disposal of NPL in accordance with the Regulations on AMCs, including ***the Administration Measures on Asset Disposal by Financial Asset Management Corporations (Revised)*** (Cai Jin [2008] No. 85) and other relevant regulations. AMCs also need to follow relevant Chinese laws and regulations on foreign debts.

Unlike selling NPL Portfolios to domestic investors, AMCs selling NPL Portfolios to foreign investors will lead to a change in creditors (i.e., from domestic creditors to foreign creditors) to whom the debts are owed by domestic institutions, and are therefore become regulated by the foreign exchange administration departments as well as the development and reform departments.

In our many years of experiences in providing legal services to AMCs and foreign investors respectively in such areas, we have observed a trend of gradual relaxation in legislation and government regulatory measures. Specifically: -

(1) State Administration of Foreign Exchange

The first regulation issued by the State Administration of Foreign Exchange relating to the utilization of foreign investment in NPL disposal is the abovementioned ***Notice on Foreign Exchange Administration with regard to Financial Asset Management Corporations Utilizing Foreign Investment in Disposal of Non-performing Asset*** (Hui Fa [2014] No. 119, which was annulled). According to this Notice, AMCs were required to obtain approval in terms of income and payment in foreign exchange and its settlement issue from the State Administration of Foreign Exchange when transferring NPL portfolios to foreign investors; the foreign investors who purchased or received NPL portfolios were required to complete the filing registration procedures with foreign exchange administration departments for transfer of NPL portfolios upon completion of the transaction. Foreign investors were also required to complete verification and approval procedures with the State Administration of Foreign Exchange where it converted its income gained from the disposal of NPL portfolios from RMB into foreign exchange and remitted it outside of China.

However ***the Notice of Relevant Issues on Foreign Exchange Administration of Disposal of Non-performing Asset by Financial Asset Management Corporations*** (Hui Fa [2015] No. 3) stipulates that the transaction price obtained by AMCs from the disposal of NPL may be directly deposited and settled in banks; as for income obtained by foreign investors from the disposal of NPL, foreign investors may directly purchase and remit foreign exchange in banks without going through procedures for verification, approval or

registering with State Administration of Foreign Exchange.

(2) National Development and Reform Commission

On April 1, 2007, the National Development and Reform Commission and the State Administration of Foreign Exchange issued ***the Circular regarding the Administration of the Filing Procedures for Transfer of Bad Debts from Domestic Financial Institutions to Foreign Investors*** (Fa Gai Wai Zi [2007] No. 254), in which domestic financial institutions transferring distressed debts were required to report such transfers to the National Development and Reform Commission after the transfer agreements for distressed debts were signed, and the National Development and Reform Commission would then issue a confirmation notice of filing within 20 working days of receiving all of the required materials for registration.

However, the above Circular was annulled on January 1, 2016, and replaced by ***the Circular of the National Development and Reform Commission on Promoting the Administrative Reform of the Record-filing and Registration System for the Issuance of Foreign Debts by Enterprises*** (Fa Gai Wai Zi [2015] No. 2044), in which the registration procedures for transferring distressed debts to foreign investors should be completed with the National Development and Reform Commission, and the National Development and Reform Commission will issue a confirmation notice of registration within 7 working days of receiving a complete application. Compared to previous procedures, current procedures are more streamlined and more efficient.

3. AMCs Establish Equity or Contractual Joint Ventures with Foreign Investors with NPL Portfolios as Contribution

There are two basic models for adopting this methods of utilizing foreign capital to dispose of NPL: (1) the AMC will contribute the NPL portfolio as its capital contribution or conditions for cooperation, and the foreign investors will use cash as its capital contribution; both parties will establish either an equity joint venture or a contractual joint venture to dispose of the NPL portfolio; and (2) the AMC will transfer a part of the interests of the NPL portfolio to foreign investors and the remaining interests are still held by the AMC; both parties will use their portion of interests from the NPL portfolio as their capital contribution or conditions for cooperation to jointly establish either an equity joint venture or a contractual joint venture which will enjoy all of the interests from the NPL portfolio and have the right to dispose of the NPL portfolio.

The Notice of the Ministry of Commerce on Strengthening the Approval Management of Foreign Investment of Disposal of Non-performing Asset (Shang Zi Zi [2005] No.37) clearly states that due to strong policy consideration, high sensitivity, and wide influence of the foreign investment in NPL areas, the Ministry of Commerce requires strict scrutiny in the approval procedure; and that the establishment of equity or contractual joint ventures shall be subject to approval of the Ministry of Commerce, and the administrative authority of commerce at local or national economic and technology development areas levels shall not have the authority to approve the establishment of such equity or contractual joint ventures themselves.

In practice, the Ministry of Commerce generally requires this type of foreign-invested joint ventures to only dispose of the NPL Portfolios which are used as capital contribution by their domestic and/or foreign shareholders and restricts them from continuing acquisition and management of other NPL portfolios. Accordingly, the terms of operation for these foreign-invested

joint ventures is subject to the time needed for disposal of the NPL portfolios used as contribution, and the nature of these companies is usually sino-foreign contractual joint ventures. For example, in a case where we provided services for an asset management company jointly established by Orient and a foreign party, the term of operation for the asset management company in the form of contractual joint venture was only four years, which was the estimated period for disposal of the NPL portfolio contributed by both parties. Though the Ministry of Commerce has ever approved the establishment of foreign-invested asset management company in the form of equity joint venture, such as Huarong Rongde Asset Management Company Limited, which was established by Huarong, Deutsche Bank AG and other international financial investors jointly as the first asset management company in the form of sino-foreign equity joint venture with perpetual business operation term, if compared to those sino-foreign contractual joint ventures, the number of the sino-foreign equity joint ventures is very small. We understand that this is mainly because the equity joint ventures have capacities to continuously operate and acquire new NPL portfolios, unlike the contractual joint ventures that are restricted to dispose of the NPL portfolios contributed as cooperative conditions and/or capital contribution by shareholders only. This may lead to potential competition of these equity joint ventures with the four major state-owned AMCs. In practice, the establishment of sino-foreign equity joint ventures is under strict and cautious scrutiny by the examination and approval authority and therefore applications for establishment of sino-foreign equity joint ventures to some degree may not be pursuable.

Furthermore, in some projects, in order to maximize their advantages in disposing of NPL, the AMCs and foreign investors may simultaneously apply to establish foreign-invested service-provider company to provide debt collection services when incorporating the foreign-invested asset management company. In a case where we were assisting in the project of establishing a sino-foreign cooperative asset management company, the Chinese and foreign parties also established a sino-foreign equity joint venture as a service provider which provided not only debt clearing, debt reorganization and asset management services for the sino-foreign asset management company holding the NPL Portfolio, but also continued to provide other asset management and debt recover services within its scope of business. This type of service-provider company is not restricted to providing services to the specific foreign-invested asset management company regarding the NPL portfolios it holds, but may run as an independent and perpetual company and based on its approved scope of business extend its services to both domestic and foreign investors holding NPL portfolios in China in the areas including NPL clearing, debt reorganization and management services, which entitles it to a huge market and prosperous future. Certainly the establishment of foreign-invested enterprises conducting NPL disposal activities, including debt reorganization and debt recovery, shall be subject to the approval by the Ministry of Commerce. As per ***the Notice of the Ministry of Commerce on Strengthening the Approval Management of Foreign Investment of Disposal of Non-performing Asset***, the Ministry of Commerce in principle will not approve debt-collection companies or quasi-debt collection companies; when examining and approving the establishment of foreign-invested enterprises providing services of enterprise economic trusteeship, commercial agency, management consultancy, financial consultancy and asset consultancy, the Ministry of Commerce shall require these companies to guarantee in writing that they shall not provide NPL disposal activities including debt reorganization and debt recovery. Therefore, it may be hard to obtain from

the Ministry of Commerce the approval to establish this type of asset management services enterprise.

In the past, we have provided legal services assisting AMCs in establishing three sino-foreign contractual asset management companies and one foreign-invested services-provider company. However, after researching the public information registered with the administration for industrial and commerce of the four major AMCs, the total number of these types of sino-foreign contractual joint ventures and equity joint ventures successfully established is very low. Due to difficulty in obtaining the approval for establishment of foreign-invested asset management companies and services-provider companies, in practice, we did come across some foreign-invested enterprises with the approved scope of business of consultancy and investment services that are actually and primarily carrying out the business in acquiring and disposing of NPL without the approval from the Ministry of Commerce. We understand that based on the above-mentioned notice of the Ministry of Commerce, strictly speaking, the operation models of these companies have serious compliance issues.

4. Foreign Investors Establish Private Equity Investment Funds to Acquire NPL in China

According to ***the Interim Measures on Supervision and Administration of Private Equity Investment Fund*** implemented on June 30, 2014, private equity investment funds refer to the investment funds within China raising capital from investors via non-public methods; and investment of private equity investment fund assets refers to the sale and purchase of stocks, equities, bonds, futures, options and fund contributions and other investment objects agreed to in the investment contracts. Therefore, creditors' rights to NPL can be used as the object of investment in private equity investment fund assets.

Currently, in the market there are products of private equity fund asset objects of which include NPL. For example, special opportunity fund of China Orient Qianhai Asset Management Limited Company under the Orient has completed the I period marketized fund-raising of 490 million in August 2015, and started its operation. Furthermore, in October 2015, Zhejiang Oriental Asset Management Limited Company established the first sunshine private equity fund of quasi-fixed-interest-rate investing in bank NPL and further issued four private equity funds focusing on disposal of NPL, with a total value of 100 million RMB. The current operating methods for private equity funds is usually a private equity fund product established for one NPL portfolio, with a term of one year and rights to extend another year and after two years, such fund shall be cleared whether or not all the distressed debts in the portfolio have been recovered.

As of this writing, we have not encountered any private equity fund products with investment objects of NPL and with participation of foreign investment, but since there is no restriction against foreign investment in establishing private equity investment funds and private equity fund management organizations, nor restriction on investing in NPL by private equity investment funds established by foreign investors set out in the relevant regulations of private equity investment funds of China, we are of the view that the foreign investors may consider investing in NPL in China through the establishment of private equity investment funds. With further reform and application of Will-depended Settlement System of Capital Project by the State Administration of Foreign Exchange, in the foreseeable future, foreign-invested private equity funds will have more involvement and presence in the NPL investment field.

Given the situation of NPL rates of Chinese

commercial banks steadily increasing and government authorities requiring the strengthening and improvement of participation and efficiency of NPL disposal, the NPL market has huge potential and it is foreseeable that foreign investors' participation in Chinese NPL disposal will continue to be encouraged. Still compared with previous rounds of NPL market, there are new features concerning China's current economic situation, legal environment and NPL market, which naturally require the relevant parties based on their previous experience to adopt different disposal methods of NPL depending on new situations in a flexible, innovative and efficient manner, and to achieve a win-win situation among the domestic holders of NPL, foreign investment and other related parties.

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君合专题研究报告

2016年7月6日

外资分享中国不良资产盛宴的法律途径

君合NPL法律评论系列之二

随着中国经济增速的下行，商业银行不良贷款率持续上升，2016年2月，中国人民银行等八部委联合发布《关于金融支持工业稳增长调结构增效益的若干意见》，提出加强和改进不良资产处置的力度和效率，这给不良资产的处置业务带来了新的市场机会。而对于在2001年前后就开始积极参与中国不良资产处置的境外投资者，这无疑又是一轮外资分享中国不良资产盛宴的新的投资机遇！

允许境外投资者参与中国不良资产处置的最早规定是2001年10月财政部、中国人民银行和原对外贸易经济合作部联合发布的《金融资产管理公司吸收外资参与资产重组与处置的暂行规定》，这为境外投资者参与中国不良资产的处置提供了制度依据。2001年11月，由摩根士丹利、雷曼兄弟、花旗集团旗下的所罗门美邦、KTH基金和中金丰德公司组成的投标团向中国华融资产管理公司（“华融”）购买了四个不良资产包，账面价值共计108亿元人民币，自此开启了外资大规模参与中国不良资产处置的序幕。之后，随着国家相关政策的陆续出台，境外投资者以多种方式全面参与了中国不良资产的处置，直至2005年左右政策性不良资产处置完毕后逐渐退出。目前来讲，银行不良资产从2015年开始增长迅速，巨大的市场已经吸引了越来越多的国际投资银行的目光。值此新一轮不良资产投资机遇到来之际，我们总结了境外投资者过往参与中国不良资产处置的主要方式，并提出了境外投资者在目前经济形势下投资不良资产的创新方式，以供目前尚在筹备或已经积极参与中国不良资产市场的国际投资银行、以及拟吸引境外投资者作为合作伙伴共同合作处置不良资产的境内机构借鉴。

一、金融资产管理公司以不良资产进行境外投资

根据《金融资产管理公司吸收外资参与资产重组与处置的暂行规定》，金融资产管理公司是吸收外资参与不良资产处置的主体。鉴于相关法律法规尚未授予商业银行吸收境外投资者处置不良资产的权限，在过往实践中，境外投资者均是通过参与金融资产管理公司所拥有的不良资产的重组与处置的方式介入中国不良资产市场。

在2001年第一轮启动吸收外资参与不良资产重组与处置之初，尽管《金融资产管理公司吸收外资参与资产重组与处置的暂行规定》对此提供了原则性制度依据，但包括国家发展与改革委员会、外经贸主管部门、外汇管理部门在内的各相关主管部门尚未制定相关配套规定，故金融资产管理公司如何利用外资处置不良资产的具体操作路径尚处于摸索阶段。笔者在2001年为中国东方资产管理公司（以下简称“**东方**”）提供法律服务的“沿江包”

项目即是经国务院有关部门正式批准的将不良资产组合投资境外的试点项目。该项目的基本交易框架为：东方广州办事处以其所拥有的账面价值约人民币18亿元的贷款债权为基础作价投入，美国投资者以现金投入，共同在美国成立基金管理公司，东方因此取得该公司的相应股权；东方将股权转让给境外投资机构，获得转让对价；基金管理公司委托香港罗宾咸永道会计师事务所作为服务商负责上述债权的清收；因债权清收并非罗宾咸永道的专长，故其又与东方广州办事处进行合作，由后者提供服务协助债权清收工作，并向后者支付相应的服务费。“沿江包”项目是国内第一个利用外资处置资产包的项目，它推动了我国不良资产领域的外汇管理制度的建立和完善，包括债权由内债转变为外债的登记方式、外汇收入的结汇手续、对外担保的备案登记等制度都是在该项目的实践操作中逐渐形成的，并最终体现在2004年12月17日国家外汇管理局发布的《关于金融资产管理公司利用外资处置不良资产有关外汇管理的通知》中（汇发[2004]119号，现已废止）。

上述交易还创造了一个通过以不良资产包进行境外投资，从而利用外资处置不良资产的交易模式，基本交易模式可以概括为：金融资产管理公司将不良资产包作价，作为出资投入至境外公司，相应取得境外公司的股权，再将该股权出售获得转让对价；另一方面，金融资产管理公司可以作为不良资产包的服务商，提供债权清收服务，收取相应的服务费。

二、金融资产管理公司将不良资产打包转让给境外投资者

此模式与上文所讲第一种金融资产管理公司以不良资产进行境外投资模式不同的是，金融资产管理公司通过将不良资产打包出售卖断给境外投资者，获得的对价是现金，而非境外公司的股权。这是最直接也是运用最为广泛的境外投资者参与我国不良资产处置的方式。华融、东方、中国信达资产管理公司、和中国长城资产管理公司四大资产管理公司都曾与境外投资者进行过此类交易。笔者也曾经分别代表金融资产管理公司作为卖方、以及代表国际投行作为买方，完成了多个大型不良资产包的直接打包转让交易。

金融资产管理公司将不良资产打包出售给境外投资者，需要遵循《金融资产管理公司条例》、《金融资产管理公司资产处置管理办法（修订）》（财金[2008]85号）等规定进行处置审批和实施，并需要执行我国外债相关的法律和有关法规。

与金融资产管理公司将不良资产打包出售给境内投资者相比，向境外投资者出售不良资产包导致债务由境内机构对内负债变为对外负债，因此受到外汇管理部门及发展和改革部门的监管。在我们多年来为金融资产管理公司及境外投资者在该领域提供法律服务的过程中，观察到相关立法规定及政府监管措施逐渐宽松的变化，具体体现为：

1、 国家外汇管理局

国家外汇管理局首个有关利用外资处置不良资产的监管规定系前文提及的《关于金融资产管理公司利用外资处置不良资产有关外汇管理的通知》（汇发[2004]119号，现已废止）。根据该通知，金融资产管理公司对外转让不良资产应就外汇收支及汇兑问题报国家外汇管理局批准，购买或受让不良资产的境外投资者则应在交易完成后到外汇管理部门办理不良资产转让的备案登记手续。境外投资者购汇汇出其因处置不良资产所获得的收益也需要到外汇管理部门办理核准手续。

国家外汇管理局于2015年1月9日发布的《关于金融资产管理公司对外处置不良资产外汇管理有关问题的通知》（汇发[2015]3号）则规定：金融资产管理公司对外处置不良资产获得的对价款直接到银行办理入账及结汇手续；境外投资者处置其所受让的境内不良资产所取得的收益亦直接到银行办理对外购付汇手续，无需再向外汇管理部门申请办理批准、核准和备案手续。

2、 国家发展和改革委员会

2007年4月1日，国家发展和改革委员会和国家外汇管理局发布《关于规范境内金融机构对外转让不良债权备案管理的通知》（发改外资[2007]254号），要求转让不良债权的境内金融机构应在对外

转让不良债权协议签订后向国家发展和改革委员会申报转让事宜，该委在收到完整备案材料后20个工作日内出具备案确认书。

但上述通知于2016年1月1日被废止，取而代之的是境内金融机构根据《国家发展改革委关于推进企业发行外债备案登记管理改革的通知》（发改外资[2015]2044号）就对外转让不良债权向国家发展和改革委员会申请办理备案登记手续，该委在受理申请后的7个工作日内办理备案登记证明，申请程序较之前更为简化快捷。

三、金融资产管理公司以不良资产作为出资与境外投资者组建合资或合作公司

采用此种方式利用外资处置不良资产的基本操作模式有两种：一是金融资产管理公司以不良资产包作价出资或者不作价作为合作条件提供，境外投资者以现金出资，双方共同组建合资或合作公司处置不良资产；另一种是，金融资产管理公司将不良资产组合的部分权益转让给境外投资者，剩余的部分权益仍由金融资产管理公司持有，双方以其各自持有的不良资产组合的权益作为出资或合作条件，共同合作组建合资或合作公司，从而使得合资/合作公司享有不良资产组合的完整权益，并有权对该不良资产包进行处置。

《商务部办公厅关于加强外商投资处置不良资产审批管理的通知》（商资字[2005]37号）明确指出，上述投资方式的政策性强、敏感度高、涉及面广，故商务部要求在审批时从严掌握，合资、合作公司的设立均须报请商务部批准，各级地方商务主管部门和国家级经济技术开发区不得擅自批准设立。

实践中，商务部一般要求此类外商投资企业仅可以处置中外双方作为出资的不良资产包，不可再继续收购、经营其它不良资产，相应地，外商投资企业的存续时间一般也以其处置完毕作为出资的不良资产所需时间为限，且企业性质多为中外合作企业。例如，在笔者提供法律服务的东方和外方共同设立中外合作企业某资产管理公司项目中，该资产管理公司的经营期限仅为四年，该四年即是对处置完毕中外双方投入的不良资产所需时间的预估。

当然，商务部也批准过中外合资性质的资产管理公司的设立，华融和德意志银行等境外投资者共同成立的华融融德资产管理公司即为我国首家可以持续经营的中外合资资产管理公司。与中外合作的资产管理公司相比，中外合资的资产管理公司数量更少，我们理解，这主要是由于中外合资企业的股东按出资比例对企业享有股权，而中外合作企业一般由合作方提供合作条件针对项目进行合作，这意味着中外合资企业可以持续经营，理论上可以不断收购不良资产（包），从而可能会与四大国有资产管理公司构成竞争关系。因此，实践中审批部门对中外合资资产管理公司的设立谨慎控制，具有不可复制性。

此外，在部分项目中，金融资产管理公司和境外投资者为发挥各自在处置不良资产方面的优势，在成立外商投资的资产管理公司的同时还会成立为其提供资产管理服务的外商投资服务商公司。例如，在笔者曾经协助设立的某中外合作资产管理公司项目中，中外双方就同时成立了一家中外合资企业作为服务商，该企业除了为持有不良资产包的中外合作资产管理公司提供债务清收、债务重组、资产管理等服务外，还可以在经营范围内从事其它资产管理、债务追偿代理等服务。此类服务商公司并不以专门为某个资产包的处置业务为限，经营具有持续性，可以在其经营范围内为境内、外投资者提供不良资产清收、重组及管理服务，具有广阔的市场及业务前景。当然，根据《商务部办公厅关于加强外商投资处置不良资产审批管理的通知》，设立外商投资企业从事债务重组、债权追偿等不良资产处置活动亦需获得商务部批准，且商务部门不得批准设立外商投资讨债公司和变相讨债公司，在审批企业经济委托、商务代理、管理咨询、财务咨询、资产咨询类外商投资企业时，应要求企业做出不得从事债务重组、债权追偿等不良资产处置经营活动的书面承诺。因此，设立此类提供资产管理服务的企业获得商务部批准的难度较大。

笔者曾经先后协助金融资产管理公司设立过三家中外合作资产管理公司、以及一家外商投资服务商公司。但通过查询四大资产管理公司的工商登记资料显示，其成功设立的此类中外合作/合资资

产管理公司的总体数量非常有限。在设立外商投资的资产管理公司及服务商公司审批方面存在难度的背景之下，实践中确实存在有一些咨询、投资类外商投资企业在未获得商务部批准的情况下，以收购、处置不良资产作为其主要实际经营业务。我们理解，根据商务部的上述通知，该等公司的此种经营模式严格说来在合规性方面存在问题。

四、境外投资者在中国境内设立私募投资基金收购不良资产

根据2014年6月30日开始实施的《私募投资基金监督管理暂行办法》，私募投资基金是指在中华人民共和国境内，以非公开方式向投资者募集资金设立的投资基金，私募投资基金财产的投资包括买卖股票、股权、债券、期货、期权、基金份额及投资合同约定的其他投资标的。因此，不良资产债权可以作为私募投资基金财产的投资标的。

目前市场上已经出现以不良资产为投资标的的私募基金产品。例如，东方旗下的东方前海资产管理有限公司的特殊机会基金，已于2015年8月完成I期4.9亿元基金的市场化募集，并正式开始运营。还有浙江东融资产管理有限公司在2015年10月成立了市场上首只投资银行不良资产的类固收阳光私募基金，并陆续发行四只聚焦不良资产处置的私募基金，总额达到约1亿元人民币。目前的私募基金的操作方式一般是一个资产包对应成立一只私募基金产品，产品期限一般是一年到期后可以再延展一年，两年到期后无论资金回收情况均需清盘。

尽管截止本文发表之日我们尚未见到有外资参与的、以不良资产为投资标的私募基金产品，但鉴于我国私募投资基金的相关规定并未对境外投资者设立私募投资基金以及私募基金管理机构做出任何限制，亦未对外资设立之私募投资基金投资不良资产作出任何限制，因此，我们认为境外投资者可以考虑以设立私募投资基金的形式投资于中国的不良资产。随着国家外汇管理局就资本项目意愿结汇制的进一步改革和推广，预计在不久的将来，外商投资私募基金在不良资产投资领域应会有更为积极的参与和表现。

随着我国商业银行不良贷款率的持续上升，本轮不良资产市场潜力巨大，而在政府要求加强和改进不良资产处置的力度和效率的背景下，可以预见，境外投资者的参与作为过往我国不良资产处置的有效方式之一，应当是被继续鼓励的。当然，与上一轮不良资产市场相比，我国现阶段的经济形势、法律环境以及不良资产市场均呈现出新的特点，这在客观上要求交易相关方需要在总结过往经验的基础上，结合新的背景与形势，灵活、创新、高效地运用不同的不良资产处置方式，以最终实现境内不良资产持有方、境外投资者及其它利益相关方的共赢。

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