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2018 年 11 月 26 日

“《资管新规》”时代境内家族信托的机遇与掣肘

近年来，随着国内高净值人群[1]不断增加，家族财富的管理、传承与保障需求日趋旺盛，家族信托业务这一滥觞于海外并在大部分西方被世界广泛运用的财富传承解决方案在国内得到了越来越多的关注，境内家族信托也逐渐兴起。

2018年4月27日，中国人民银行、中国银行保险监督管理委员会（下称“**中国银保监会**”）、中国证券监督管理委员会（下称“**中国证监会**”）、国家外汇管理局（下称“**国家外管局**”）联合下发《关于规范金融机构资产管理业务的指导意见》（银发〔2018〕106号，下称“**《资管新规》**”），对包含信托业务在内的金融机构资产管理业务提出了严格监管要求和较高的准入规定，信托业务亦因此面临业务转型的巨大机遇与挑战。

2018年8月17日，中国银保监会信托监督管理部向各级银监局信托监管相关处室下发《信托部关于加强规范资产管理业务过渡期内信托监管工作的通知》（信托函[2018]37号，下称“**银监37号文**”），首次对“家族信托”进行定义，并阐明了设立家族信托所需满足的条件与不得设立家族信托的排除情况。更重要的是，银监37号文进一步明确，家族信托与公益信托都不适用《资管新规》的相关规定，即银监37号文将家族信托与《资管新规》所辖的各类资产管理产品相区别，赋予家族信托特别的法律涵义。

因此，在此背景下，境内家族信托这一“蓝海业务”毫无疑问将成为广大信托公司业务发展方向。为了更好地研究与运用家族信托这一财富传承工具，我们对目前家族信托业务的政策利好和实践中业务开展的一些问题进行了探索，为我们的客户在本文中进行简要分析。

一、什么是家族信托？

虽然家族信托的概念已于国内盛行多年，且被信托机构、银行、保险等行业广泛提及，但事实上，银监37号文出台之前，国内尚未有一部法律、法规或其他规范性文件对何谓“家族信托”进行明确定义。2014年，原中国[2]银行监督管理委员会办公厅下发《关于信托公司风险监管的指导意见》（银监 办发[2014]99号），推动信托业务转型，其中，鼓励信托行业“探索家族财富管理，为客户量身定制资产管理方案”，但“家族信托”的法律概念却付诸阙如。

银监37号文首次对于家族信托进行了明确定义：**“家族信托是指信托公司接受单一个人或者家庭的委托，以家庭财富的保护、传承和管理为主要信托目的，提供财产规划、风险隔离、资产配置、子女教育、家族治理、公益（慈善）事业等定制化事务管理和金融服务的信托业务”。**

此外，银监37号文进一步明确了**设立家族信托所需满足的条件与排除情况**：即“家族信托财产金

[1]指个人金融资产和投资性房产等可投资资产在 600 万元以上的社会群体。

[2] 为本报告之目的，“中国”仅指中国大陆地区，不包括香港特别行政区

额或价值不低于1000万元，受益人应包括委托人在内的家庭成员，但委托人不得为惟一受益人。单纯以追求信托财产保值增值为主要信托目的、具有专户理财性质和资产管理属性的信托业务不属于家族信托”。根据上述规定，信托财产价值过低的信托产品、自益性信托产品以及以资产保值增值为目的的信托产品，即使受益人也包括家庭成员，也不能被认定为银监37号文项下的家族信托。但是，这是否意味着该等被排除在银监37号文项下的家族信托范围外的、信托财产金额低于人民币1000万的信托和自益性信托将被纳入《资管新规》的监管范围，仍尚未有定论，其尚待银监部门进一步界定。

二、“《资管新规》”时代家族信托的优势

鉴于银监37号文明确家族信托不受《资管新规》所限，相较于资产管理产品，家族信托将在以下方面体现出优势：

1. 不受不同类别资产管理产品投资标的与投资比例的限制

根据《资管新规》，资产管理产品按照投资性质的不同，分为固定收益类产品、权益类产品、商品及金融衍生品类产品和混合类产品，且每类产品的投资标的与投资比例应满足相关要求。金融机构在产品成立后至到期日前，不得擅自改变产品类型，如有改变，除高风险类型的产品超出比例范围投资较低风险资产外，其他改变应当先行取得投资者书面同意，并履行登记备案等法律法规以及金融监督管理部门规定的程序。也就是说，被纳入《资管新规》监管范围内的资产管理产品的类型变更，是需要履行前置审批义务的。

然而，由于每个家族均有其独特性和复杂性，且其资本原始积累方式、家庭人数与结构、风险偏好与资产配置要求很可能随着内外部条件的变化不时调整与改变，因此在家族信托架构设计、投资目标、投资标的、投资比例等方面均需保持一定的灵活性，便于受托人随时根据该信托的实际运行情况及时转换航道。

鉴于银监37号文项下约定家族信托并不受《资管新规》中关于不同类别资产管理产品投资标的与投资比例的限制，因此在改变投资标的与投资比例时拥有较大的自由度，且无需履行相关法律法规中规定的较为繁琐的前置程序，这将使得家族信托在充分满足委托人个性化定制需求的基础上，可以进一步提升整体投资效率。

2. 不受资产管理产品投资层级的限制

根据《资管新规》，资产管理产品可以再投资一层资产管理产品，但所投资的资产管理产品不得再投资公募证券投资基金以外的资产管理产品。

然而，由于家族信托固有的财富传承与保障属性，家族信托天然地会趋于选择风险较小、收益较为稳定的长线投资方式，这主要体现在受托人也会选择尽量多样化的资产配置方式以最大限度地减少非系统性风险，其中即包括通过多层投资的方式来实现分散风险的目的。

鉴于银监37号文项下的家族信托并不受《资管新规》中关于资产管理产品投资层级的限制，故而家族信托可以根据需求将资产管理产品以嵌套的方式纳入投资体系。值得注意的是，如果家族信托架构中某一层的投资标的为《资管新规》项下的资产管理产品，则该资产管理产品仍应适用上述《资管新规》的相关规定。

因此，从以上两个角度看，在自银监37号文发布实施以来的“《资管新规》”时代，境内家族信托受到了政策利好的鼓励，存在相当广阔的发展空间。

三、实操中家族信托存在的部分问题

虽然银监37号文给家族信托的发展带来了政策利好，但从我国涉及信托的现有法律框架来看，家庭信托仍面临配套法律缺位带来的诸多掣肘，例如：

1. 部分非货币形式的信托财产无法办理信托登记

就可能成为家族信托委托人的高净值人士而言，其所持有且有意愿委托给受托人成为家族信托范围内的资产并不仅限于货币资金，还可能包括各类非货币形式的财产或财产权，包括但不限于房产、车辆、古董、珠宝、贵金属以及股权、财产份额、股票、债券、票据、金融衍生品与各类资产管理产品份额等。

《中华人民共和国信托法》（下称**“《信托法》”**）第十条对信托财产登记制度进行了原则性规定，即“设立信托，对于信托财产，有关法律、行政法规规定应当办理登记手续的，应当依法办理信托登记。未依照前款规定办理信托登记的，应当补办登记手续；不补办的，该信托不产生效力”，这是一种严格的登记生效主义（从中国现行的法律、法规、行业规范所构成的整体框架来看，除上文所述的信托财产登记以外，信托业内还存在信托产品登记以及信托受益权登记，但这两种登记并非采取登记生效主义，而是旨在提供查询功能及发挥公示作用 ，其作用和地位与信托财产登记迥异，因此本文不予赘述）。然而，现行法律、法规中并未对信托财产登记的登记机关、登记手续、登记方式、登记程序等作出明确、细化的规定。在实践中，登记部门往往会以没有相关登记规则为由拒绝办理信托财产登记手续。例如，委托人到工商局进行以股权为信托财产标的的登记，或赴不动产管理机构进行以房产为信托财产标的的登记，有关政府部门往往以执法必须有法律条文规定为由，拒绝进行信托财产登记，然而一旦登记不成，根据《信托法》的上述规定，信托则未有效设立，因此不产生效力。这就使得信托公司在设计信托产品时一般以资金信托为主，因而为家族信托的设立、投资、实施与执行带来了一定的不确定性。

此外，由于我国现行法律框架下的权属登记中并未包含信托财产登记这一形式，如委托人拟以房产、股权、股票、债券等非货币财产作为家族信托财产出资，仍需将该等财产转让给家族信托实体并完成过户，并向相关主管部门完成相应的财产权属变更登记手续。

因此，在实操中，为了解决上述委托人以非资金形式的财产或财产权设立信托无法办理信托财产登记的问题，委托人一般采用如下方式：先设立资金信托，再以该资金信托的信托财产购买前述财产或财产权并相应完成权属登记手续。但这种方式也存在一定的问题，即必须藉由过户行为来完成信托财产登记的行为，这一过程中不可避免产生税务负担。我国现行的税收制度迄今未明确信托状态下的税务处理，亦未明确为设立信托之目的而进行的“名义转让”行为可以不征税或享受税收优惠的待遇，因此在税务征管的实践中，基层税务机关出于避嫌考虑，对为设立信托之目的而进行的“名义转让”行为也一律课税，从而导致出现重复征税问题。

综上，除上述过户登记机关不明确和高额的税费障碍外，股权信托还面临着公司其他股东主张优先购买权如何处理的法律障碍，这使得股权信托更加困难。

2. 以上市公司股权作为信托财产存在限制

如果委托人所持的财产包括上市公司股票，为了设立家族信托，委托人可能需要将其持有的上市公司股权转让至受托人名下，此时，需要区分委托人身份（例如上市公司的发起人、实际控制人、控股股东、持股5%以上的股东、其他股东或董监高）、持有的上市公司股权性质、投入家族信托的上市公司股权比例、转让上市公司股份的时点等不同情况，考虑其对上市公司所产生的不同影响和法律限制，具体而言：

（1） 与委托人身份相关的限售要求

在我国法律框架下，委托人因其在上市公司中的身份（如上市公司的发起人、实际控制人、控股股东、持股5%以上的股东、其他股东或董监高等），

而需遵守《中华人民共和国公司法》、《中国人民共和国证券法》、《上市公司股东、董监高减持股份的若干规定》等法律法规中规定的股份限售义务，包括但不限于时间限制、比例限制、方式限制与可转让股份种类限制等，例如：控股股东、实际控制人所持有的上市公司股票的锁定期为36个月；在刊登招股说明书之日前12个月内增资扩股进入的股东，该等增资部分的股份应锁定36个月。

受限于上述条款，委托人在向家族信托注入上市公司股权时需把握好时间节点，并需按照规定的方式、数量与比例进行，这将可能对家族信托的设立时间与信托财产的规模产生影响，并可能进一步影响一段时间内该家族信托的投资策略与受益权实现方式。因此对于涉及上市公司股权的家族信托安排，委托人可以与律师就家族信托的背景、设立诉求和其他考量进行充分沟通，律师可以协助委托人制订家族信托设立和股权注入的方案（包括时间点、比例和方式等）和设计顶层架构，以期最大程度降低上市公司股权注入家族信托对上市公司的影响，并妥善保障家族信托的受益权。

（2）监管机构关注上市公司实际控制人是否发生变更

在家族信托的委托人为上市公司实际控制人的情况下，如注入家族信托的上市公司股权达到一定比例，则监管机构将会关注该上市公司的实际控制人是否随之发生变更。

一般而言，委托人在设立家族信托时可采取包括但不限于如下措施，以保持上市公司的实际控制人的连续性：

a) 在委托人向家族信托转让上市公司股权时，在转让协议中明确约定转让标的仅为上市公司股权的收益权，该等股权的表决权及其他股东权利仍由委托人持有[3]；及/或

b) 家族信托的受托人、受益人与委托人签署一致行动人协议，以使得家族信托在涉及上市公司经营、管理、决策事项上与委托人的意思保持一致性。

但是，由于委托人及家庭成员的诉求和解决方案往往比较复杂，因此，在草拟上述措施相关的文本时要有前瞻性，对各有关主体的权利义务的设定要清晰，对潜在的风险要有对应的预防措施。

（3）受托人将其持有的上市公司股权设立家族信托可能引发的披露义务

受托人将其持有的上市公司股权作为信托财产设立家族信托，使得家族信托持有一定比例的上市公司的股权，则需履行必要的披露义务。根据《上市公司收购管理办法（2014修订）》的相关规定，如家族信托持有或拟持有的上市公司股权达到或超过该上市公司已发行股票的一定比例的，则应按要求在规定时间内编制相应格式的权益变动报告书向中国证监会、相应的证券交易所提交，通知该上市公司，并予以公告。如后续家族信托持有的该上市公司股权发生增加或减少达到该上市公司已发行股票的一定比例的，亦应按前述要求履行报告、公告义务。前述权益报告变动书中的内容包括但不限于：

a) 家族信托的基本情况；

b) 持股目的，以及家族信托是否拟在未来12个月内继续增加其在上市公司中拥有的权益；

c) 上市公司的名称、股票的种类、数量、比例；

d) 家族信托持有的上市公司股权达到或超过该上市公司已发行股票的一定比例或后续家族信托持有的该上市公司股权发生增加或减少

[3] 虽然我们目前尚未查找到为设立境内家族信托而仅转让股份收益权的公开案例，但是市场上存在上市公司控股股东为融资之目的转让其所持有的股份收益权给贷款方的案例（例如《华仪电气股份有限公司关于控股股东转让部分股票收益权及股权质押的公告》），由此可见证监会并未禁止股份有限公司的股东在不转让投票权的情况下单独转让股份的收益权。

达到该上市公司已发行股票的一定比例的发生时间及方式；

e) 第d）项中所列权益变动事实发生之日前6个月内家族信托通过证券交易所的证券交易买卖该上市公司股票的简要情况；

f) 中国证监会、证券交易所要求披露的其他内容。

另外，若家族信托为该上市公司第一大股东或实际控制人，家族信托还需进一步披露如下信息：

a) 家族信托的结构情况；

b) 家族信托取得该上市公司相关股份的价格、所需资金额、资金来源，或者其他支付安排；

c) 家族信托与该上市公司是否存在同业竞争或者潜在的同业竞争，是否存在持续关联交易；如存在，是否已做出相应的安排避免同业竞争，并保持该上市公司的独立性；

d) 未来12个月内对该上市公司资产、业务、人员、组织结构、公司章程等进行调整的后续计划；

e) 前24个月内家族信托与该上市公司之间的重大交易；

f) 不存在利用对上市公司的收购损害被收购公司及其股东的合法权益的情形，不存在违反法律、行政法规规定及中国证监会的要求收购上市公司的情形；

g) 提供法律法规要求的、与该权益变动相关的备查文件。

此外，根据《公开发行证券的公司信息披露内容与格式准则第2号--年度报告的内容与格式（2017年修订）》的规定，上市公司应当披露实际控制人的情况，并披露上市公司与实际控制人之间的产权和控制关系，包括以信托方式形成实际控制的情况。如实际控制人通过信托或其他资产管理方式控制公司，应当披露信托合同或者其他资产管理安排的主要内容，包括信托或其他资产管理的具体方式，信托管理权限（包括公司股份表决权的行使等），涉及的股份数量及占公司已发行股份的比例，信托或资产管理费用，信托资产处理安排，合同签订的时间、期限及变更、终止的条件，以及其他特别条款等。

家族信托的私密性一直是高净值人群的关注重点之一。但是，如上所述，由于我国现行法律法规对上市公司的信息披露要求尤为严格，这将成为委托人以其持有的上市公司股权作为信托财产的一项隐形障碍。

四、结论和建言

综上，目前我国家族信托尚处于发展初期。随着高净值人士数量的日益增长，建立完善的、专门的家族信托法律制度刻不容缓。我们预计，保障家庭财富传承的家族信托相关的专门法律在不久的将来会被纳入立法议程。银监37号文的出台无疑是一个利好的信号，这表明家族信托已进入监管机构的视野。基于以上背景，我们对现有家族信托法律制度的完善有如下的建议：

1. 在《中华人民共和国信托法》之外，就民事信托单独立法。虽然银监37号文明确家族信托不纳入《资管新规》的管辖范围，从一定程度上凸显了监管机构在实践中逐步将民事信托与商事信托加以区别的理念，但毕竟这仅仅是一部部门规章。目前民事信托的上位法仍然是《中华人民共和国信托法》，而该法律未能区分民事信托和商事信托，并且其架构和条文偏重于商事信托。家族信托的法律依据应为民事信托法律规范，而不应直接引用商事信托规范。事实上，由于民事信托法律的缺位，银行、信托公司、保险公司等机构用商事信托的思维和模式去发展家族信托，从而致使家族信托野蛮生长；而监管者监管时所依据的法律与家族信托的目的、诉求不相匹配，导致家族信托的发展被制约。因此，将民事信托单独立法，具有其必要性和必然性。

2. 全面建立信托财产登记制度。将非货币形式的信托财产的信托登记纳入权属登记范围，将此作为一种和所有权、担保物权并立的登记内容，以明确信托财产的独立性，将与家族信托设立相关的财产转让行为与商事交易行为相区别，从而为家族信托的发展奠定法律基础。

3. 给予家族信托明确的税收待遇。目前，国内家族信托在信托设立、信托财产转让、信托财产增值、受益人获得增值财产收益等环节并不享有特别税收待遇。在英美法下，家族信托的一项功能是规避高昂的遗产税负。虽然我国目前尚未开展遗产税的征收，但随着我国社会经济的发展，遗产税的开征势在必行。家族信托的税收和遗产税存在此消彼长的关系，如果对家族信托征税过高且高于遗产税，将损害受益人的收益，与家族财富传承的初衷相悖；如果对家族信托不征税或征税微薄，则家族信托可能变成逃避遗产税的工具，从而架空遗产税的立法目的。只有将两者结合起来通盘考虑，制定出一个整体合理适中的税收政策，才能发挥家族信托这一工具的积极作用，维护社会稳定和公平。

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JUNHE
SPECIAL REPORT

JUNHE

November 26, 2018

Opportunities and Impediments for Domestic Family Trusts in the Era of the New Asset Management Rules

Recent years have witnessed marked growth in the number of high net worth individuals[1] (HNWIs) in China and an associated increase in demand for advice on the management, inheritance and security of family wealth. The use of family trusts, a solution for intra-family wealth transfer that originated overseas and that has been widely adopted throughout much of the western world, is receiving increasing attention in mainland China, and the domestic family trust business has started to take off.

On April 27, 2018, the People's Bank of China (PBOC), the China Banking and Insurance Regulatory Commission (CBIRC), the China Security Regulatory Commission (CSRC) and the State Administration of Foreign Exchange (SAFE) jointly released the *Guiding Opinions on Regulating the Asset Management Business of Financial Institutions* (Yin Fa [2018] No.106) (the "New Asset Management Rules"), which provide tighter supervision requirements and higher access standards for the asset management activities (including trusts) of financial institutions, and in so doing present both opportunities and challenges in the development of trusts. Subsequently on August 17, 2018, the Trust Companies Supervision Department of the CBIRC issued the *Notice of the Trust Companies Supervision Department on the Enhancement of Regulating Supervision on the Trust Business during the Period for the Transition of Asset Management Business* (Xin Tuo Han [2018] No. 37, CBIRC Notice 37) ("Notice 37") to the relevant trust supervision offices within the lower level banking regulatory authorities. For the first time in mainland China, Notice 37 officially defines a family trust, provides the criteria for setting up a family trust and specifies the activities that fall outside the statutory forms of family trust. Most significantly, Notice 37 clarifies that the New Asset Management Rules do not apply to family trusts and charitable trusts. In doing so, a clear line is drawn between family trusts and the types of asset management plans and products that are governed by the New Asset Management Rules, indicating the special conditions that apply to family trusts.

Domestic family trusts, as a "Blue Ocean Business", present a business development opportunity for trust companies. To better understand the formation and operation of family trusts and the relevant legal issues, we have undertaken research on the current trust law framework, examined several practical issues from a policy and business perspective and prepared a brief analysis here for our clients' general reference.

I. What is a Family Trust?

While a popular mechanism in mainland China for several years, and a term commonly referenced by trust institutions, banks and insurance

[1] High net worth individuals generally refers people with assets such as financial investment and investment real properties worth more than RMB 6 million.

companies, prior to the promulgation of Notice 37, "family trusts" have never actually been officially defined by any laws, regulations or other normative documents of the People's Republic of China (the PRC)[2]. For example in April 2014, the then China Banking Regulatory Commission issued its *Guiding Opinions on the Risk Management of the Trust Companies* (Yin Jian Ban Fa [2014] No.99) in which it encouraged the trust business sector to "explore management practice and provide customized asset management solutions", but it did not include a legal definition of a family trust.

In Notice 37, a "family trust" is defined as a "**trust business carried out by a trust institute that is entrusted by an individual or a family to provide customized management and the financial services of estate planning, risk isolation, asset allocation, children's education, family governance, charitable undertakings, etc., with the trust purpose of the protection, inheritance and administration of family wealth.**"

Notice 37 further provides that a family trust shall: (i) Have trust property of more than RMB 10 million in amount or in value; and (ii) Designate family member/s including the settlor, as the beneficiary/beneficiaries (though the settlor shall not be the sole beneficiary).

Notice 37 emphasizes that a trust that has the sole purpose of preserving or increasing the value of the trust property and that possesses the characteristics of separately managed account or asset management shall not be deemed as a family trust.

In summary, any trust with a trust property value lower than the minimum requirement, or that is established for self-benefit or value-preservation falls outside the scope of the definition of a family trust under Notice 37, even if the beneficiaries of such trust are family members. However, until the CBIRC further clarifies on this issue, it remains uncertain whether a trust that is excluded from the definition of family trust will then be subject to the jurisdiction of the New Asset Management Rules.

II. Advantages of Family Trusts in the Era of the New Asset Management Rules

Notwithstanding such uncertainties, Notice 37 has liberated family trusts from the jurisdiction of the New Asset Management Rules. Compared with other asset management products governed by the New Asset Management Rules, a family trust has the following advantages.

1. No restriction on investment target or investment proportion

According to the New Asset Management Rules, on the basis of their features, asset management products, can be classified into fixed-income products, equity products, commercial and financial derivative products, and comprehensive products. There are specific requirements on the investment targets or investment proportions for each product category. A financial institution cannot arbitrarily change the type of product during the term of the product without prior written consent from the investor(s) and registration or record-filing or any other formalities as required by laws, regulations or financial supervision, and by regulatory departments shall be performed afterwards, unless such change applies to a high-risk product where the manager invests in low-risk assets in excess of the original designated proportion.

Given their varying capital accumulation modes, the composition of beneficiaries and risk preferences, family trusts may be both unique and complex, and are likely to require a degree of flexibility to make timely adjustments or modifications, and to respond to any changes to internal and external factors. When setting up a family trust, the settlor may wish to shift course at various points, in respect of matters including the

[2] For the purposes of this report alone, the PRC refers solely to mainland China and does not include Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan

structural design, investment purpose and target, investment proportion, etc.

As family trusts are not bound by the restrictions on investment target and investment proportion of the New Asset Management Rules, they have more leeway to unilaterally change investment targets and to adjust their investment proportions without becoming entangled with the statutory formalities demanded by the various administrative authorities. In this way, family trusts can customize their investment portfolios to satisfy the settlor's needs and to maximize investment efficiency.

2. No restriction on investment layers

According to the New Asset Management Rules, an asset management product can invest in only one additional layer of asset management product and the target asset management product may not participate in further investment other than investing in publicly-offered securities investment funds.

By contrast, a family trust, with its dual purposes of security and wealth preservation, is more likely to adopt a long-term investment approach and to build a portfolio offering low-risk, stable returns. To this end, the settlor will often select a diversified asset allocation structure, including a multi-layer investment structure, to minimize and spread any non-systemic risks.

Since, under Notice 37, they are not bound by the New Asset Management Rules restrictions on investment layering, family trusts can nest layers of asset management products into an integrated investment portfolio. That being said, if one of the layers in the family trust investment structure is an asset management product governed by the New Asset Management Rules, such product is still likely to be subject to relevant asset management rules above.

In summary, within the era of the New Asset Management Rules, the publication of Notice 37 has meant that domestic family trusts are subject to a comparatively relaxed set of rules.

III. Some Problems in the Practice of Family Trust

While Notice 37 enables the development of family trusts, the absence of certain clear legal guidance on family trusts under the current trust law framework may impede the further development of family trust. Here are some particular aspects of such impediments.

1. Absence of trust property registration for non-monetary trust property

It is common practice for HNWI settlors to fund family trusts with various non-monetary properties or property rights, including but not limited to real estate, vehicles, antiques, jewelry, precious metals, equity rights, legal titles in property, stocks, bonds, negotiable instruments, derivatives, and shares of various different kinds of asset management products.

Article 10 of the *Trust Law of the People's Republic of China* (the "Trust Law") stipulates that when establishing a trust, if trust property is required by laws and administrative regulations to undergo registration procedures, it shall do so according to the applicable laws and regulations; if a trustee fails to complete the trust property registration, then it shall complete supplementary registration procedures, and if not, the trust, even if established, shall not take legal effect. Such provision is based upon the principle of "strict registration effectiveness", i.e., the effectiveness of the trust rests in the due registration thereof. In addition to the requirement to register trust property, under current laws, regulations, and industry standards, there is also a requirement to register trust products and trust beneficiaries, though this is mainly for the purposes of public access and public announcement, and the principle of strict registration effectiveness does not apply. This section will therefore focus primarily on the registration of trust property, and not on the registration of trust products and trust beneficiaries.

With regard to the registration of trust property, there are as yet no explicit or detailed rules on the authority, formality, measure, and process of the registration of trust property. In practice, registration authorities often refuse to register trust property because such registration application lacks a statutory basis. Hence, if the holder of any equity interests or real estate applies to the industrial and commercial administrative authority or real property registration authority to register such equity interests or real property right as trust property, the related administrative authorities will refuse to process the applications due to a lack of legal basis for such registration applications. However, as stipulated in the Trust Law, a trust cannot be legally effective if the relevant registration procedures for any trust property are not completed. Such legislative design has inevitably resulted in trust companies tending towards monetary-type investments and has created a degree of uncertainty in the formation, investment, operation and administration of family trusts. Given that ownership registration is not currently available for the registration of rights-based trust property, the registration for non-monetary trust property in the form of real estate, equity interests, stocks and bonds is only available after the settlor has transferred such property to the trustee/trust vehicle.

Consequently, in practice, a settlor will typically first establish a monetary trust which will then purchase the non-monetary assets using trust property to overcome the obstacle that non-monetary assets cannot be registered as trust property. However, the process of property transfer that is required to satisfy the registration requirement will incur tax liabilities. The PRC tax law system currently fails to clarify the tax implications of trust-related transactions and there is no explicit tax exemption or preferential treatment for any nominal transfers incurred to fund a trust. Under these circumstances, local tax authorities tend to levy taxes on all such nominal transfers to shield themselves from potential responsibilities but in doing so cause double taxation.

To sum up, the lack of a clear process to register trust property, the potential tax burden and other legal ambiguities all constitute impediments to the development of family trusts.

2. Non-recognition of listed securities as trust property

To fund a family trust with listed securities, the settlor holding shares of listed companies is required to transfer such securities to the trustee/trust vehicle. Such transfers may impact upon the listed companies in various ways and the settlor, before any share transfer, should consider factors such as his or her role in the company, the nature of such shares, the proportion of the shares that will transfer to the trust, and the time of the transfer as well as any relevant legal restrictions. Some specific restrictions are as follows:

(1) Restrictions on sale of securities based on the settlor's role in the listed company

The settlor, based on his or her role in the listed company (such as promoter, actual controller, controlling shareholder, shareholder holding more than 5% shares, other shareholder, or the director, supervisor, or senior management officer), is subject to restrictions on the sale of securities under the *Company Law*, the *Security Law*, *Several Provisions on Reduction in Shareholding by Shareholders, Directors, Supervisors and Senior Management Personnel of Listed Companies*, and other applicable laws and regulations. Such laws and regulations impose various restrictions and requirements with respect to the settlor's shareholding period, shareholding ratio, method of share transfer, and type of transferrable shares. For example, controlling shareholders or the actual controller of a listed company shall not sell their shares during a thirty six-month lock-up period (the "Lock-up Period"); shareholders who subscribed for shares in a

listed company through private placement within twelve (12) months before the publication of the prospectus shall not sell their shares until the Lock-up Period expires.

Subject to the restrictions above, in order to comply with legal requirements, settlors should meticulously plan the transfer of any listed securities to the family trust, which may thereby affect the timeframe for the formation, the scale of trust property, the investment strategy and ultimately the fulfillment of beneficiary rights of the family trust. Accordingly, when setting up a family trust that involves any transfer of shares of listed companies, it is suggested that the settlors should consult with attorneys, financial advisors and other counsel regarding the background, trust purpose, and so on, to plan the formation of the trust and any transfer of listed securities (including timing, proportion and method), as well as the overall structuring of the family trust, in order to minimize the impact on the listed companies, while protecting the beneficiaries' interests.

(2) Regulatory concerns in the change of actual controllers of listed companies

If the settlor of a family trust is the actual controller of a listed company, when the shares of the listed company transferred into that family trust reach a certain proportion, the regulatory authorities will need to confirm whether the actual controller of the listed company has changed accordingly.

Therefore, when setting up a family trust, the settlor should take various measures to maintain his or her role as the actual controller of the listed company, including but not limited to:

a) When the settlor transfers his or her shares in the listed company into the family trust, it shall be expressly stated in the Equity Transfer Agreement that the designated trust property is purely the right to earnings, while the voting rights and any other shareholder rights of equity interests in the listed company are still held and exercised by the settlor;[3] and/or

b) The trustee, the beneficiary and the settlor of the family trust shall all sign an Agreement of Persons Acting in Concert so that the family trust may act consistently with the intention of the settlor in matters concerning the listed company's operation, management and decision-making.

Be that as it may, the demands of the settlors and the family members and the corresponding solutions are often complicated. Documents addressing the aforementioned measures should be drafted with a forward-looking perspective, the rights and obligations of relevant parties therein shall be explicitly stated and corresponding precautionary measures shall be included to address potential risks.

(3) Potential disclosure obligations of the settlor in funding the family trust with listed securities

If the settlor funds a family trust with shares of a listed company held by him or her and if, following the transfer, the family trust subsequently after the transfer holds a certain proportion of the shares of the listed company, the settlor will be obliged to disclose such information. Pursuant to the *Measures for the Administration of the Takeover of Listed Companies* (2014 Revision), if a family trust holds or intends to hold such shares of a listed company that reaches or exceeds a certain proportion of the issued shares of the listed company, an equity change report (the "Equity Change Report") shall be prepared in the required format and submitted to both the CSRC

[3] Although there do not appear to be any published cases regarding the transfer of the right to earnings of shares for the purpose of establishing a family trust in China, there are market precedents in which controlling shareholder of a listed company transferred the right to earnings of its shares to the lender for the purpose of financing (e.g. the *Announcement of Huayi Electric Co., Ltd Regarding its Controlling Shareholder Transferring Part of its Right to Yields of the Equity and Pledging of Shares*). This would suggest that the CSRC does not prohibit the shareholders of a limited-liability company to transfer their right to earnings alone, but without transferring the voting rights and other equity rights of such shares.

and the relevant stock exchange, the listed company shall be notified and an announcement shall be published within a certain time limit as required; if the proportion of the equity shares of the listed company held by the family trust subsequently increases or reduces by a certain percentage, the aforementioned reporting and announcement obligations shall also be fulfilled.

The content of the Equity Change Report shall include but is not limited to:

i. Basic information of the family trust;

ii. Purpose of shareholding, and whether the family trust intends to continue to increase its shares of the listed company within the next 12 months;

iii. Name, type of shares, quantity and proportion of the listed company;

iv. Timeframe and method for the shareholding in the listed company by the family trust holding the interests in shares to reach or exceed a certain proportion, or subsequent increase or decrease of the certain proportion of the shares held by the family trust, and the method for the aforementioned alteration;

v. Brief information on the purchase and sale of the shares of the listed company through the securities transactions at the stock exchange by the family trust within six months prior to the alteration of shareholding in the listed company in item iv above; and

vi. Other content to be disclosed as required by the CSRC or the stock exchange.

Furthermore, if the family trust is has the largest shareholding or is actual controller of the listed company, the family trust is required to further disclose the following information:

i. Structure of the family trust;

ii. The price, capital, sources of capital or other payment arrangements for the family trust to acquire the relevant shares of the listed company;

iii. Whether there is any horizontal competition or potential horizontal competition, or whether there are any ongoing affiliated transaction between the family trust and the listed company; if so, whether corresponding arrangements have been made to avoid horizontal competition and maintain the independence of the listed company;

iv. Subsequent plans for adjustment of the assets, businesses, personnel, organizational structure or articles of association of the listed company in the next 12 months;

v. Major transactions between the family trust and the listed company in the preceding 24 months;

vi. Whether there are any circumstances that may harm the lawful rights and interests of a target company or its shareholders by benefitting from the takeover of the listed company, or violation of the laws, administrative regulations or requirements of the CSRC to take over the listed company; and

vii. Other documents relevant to the alteration of shareholding as required by the laws and regulations for inspection.

In addition, according to the *Standards for the Contents and Formats of Information Disclosure by Companies Offering Securities to the Public No. 2 - Contents and Formats of Annual Reports* (2017 Revision), the listed company shall disclose its actual controller, the ownership and control relationships between itself and the actual controller, as well as information about the de

facto control relationship formed by way of trusteeship. If the actual controller controls the listed company by way of trusteeship or any other means of asset management, the listed company shall disclose the main contents of such trust contract or asset management agreement, including the specific form of trusteeship or asset management, trustee's authority (including the exercise of the company's voting rights, etc.), number of shares involved, the relevant shareholding ratio in the listed company by the trust, trust fee or asset management fee, trust asset disposal arrangement, the execution, duration, conditions for modification and termination of the relevant contracts and other special terms, etc.

A concern for privacy has always been one of the key reasons for HNWIs to choose a family trust over other wealth management vehicles. If a family trust is bound by the disclosure requirements described above, especially those with relating to listed companies under the current PRC laws and regulations, it may significantly restrict the funding of such family trust, and thus the overall development of family trusts as a wealth management vehicle.

IV. Conclusions and Suggestions

Although the family trust is still in its infancy in mainland China, with the rapid increase in the number of HNWIs, it is important to build a sound and specialized legal system for family trust. The relevant legislative authorities have recognized the need, and are pressing ahead with a legislation agenda on a specialized family trust law. Meanwhile, with Notice 37 already noting certain concerns within the administrative authorities in relation to family trusts, it appears it will not be long before the family trust is brought into a systematic orbit rather than just allowing it to develop unfettered. In such context, we propose the following suggestions to improve the existing trust law system.

1. Separate legislation focused on civil trusts in addition to the existing Trust Law

Notice 37, by excluding family trusts from the regulatory scope of the Asset Management New Opinion, embodies to some extent the regulatory approach to gradually distinguish in practice between civil trusts and commercial trusts. Nevertheless, Notice 37 is only a departmental regulatory document. The applicable upper-level law governing civil trusts remains the Trust Law, which draws no distinction between civil trusts and commercial trusts. In addition, in terms of its structure and provisions, the Trust Law heavily leans towards commercial trusts. Founded as they are on a civil fiduciary relationship, family trusts should be subject to civil trust rules rather than the rules and regulations designed for commercial trust. However, the absence of the guidance from provisions specifically addressing the requirements for civil trusts has led to banks, trust companies, insurance companies and other institutions developing family trusts on the basis of the type of thinking and practices that are more appropriate for commercial trusts, and thereby causing family trusts to deviate from their original intention. Without an appropriate regulatory framework to serve the purposes and needs of family trusts, further development of family trust business will likely be hampered. It is therefore imperative to accelerate the introduction of relevant legislation on civil trusts.

2. Establish a comprehensive trust property registration system

Given that family trusts also function as a safeguard for family wealth, the trust property should be able to declare its independence from that of the settlor through trust property registration, which is in practice equally as important as the registration of equity interests and real rights. Appropriate regulations and rules are required to facilitate the registration of any trust-motivated asset transfer, so that a family trust can be funded according to the settlor's intent.

3. Clear tax treatment for family trust

Currently, there is no special tax treatment for family trusts during the processes of trust formation, trust assets transfer, the appreciation of trust assets, distribution of trust income to beneficiaries, etc. Under Anglo-American common law, family trusts are a familiar and legal method to avoid costly inheritance taxes. While an inheritance tax has as yet to be imposed in China, the possibility of the introduction of such tax should be a paramount consideration for estate planning going forward. There is an inescapable tension between family trust taxes and an inheritance tax: if enforceable family trust taxes are much higher than an inheritance tax, they will significant harm the beneficiary's interests, thereby defeating one of the basic purposes of the family trust as a vehicle for family wealth inheritance; conversely, if there is no family trust tax or the family trust tax is set at a nominal rate, it may lead to family trusts becoming a tax evasion tool, rendering null and void the legislative purpose of inheritance taxes. As such, in designing tax policy, there is a need to thoroughly consider both types of taxes and to develop integrated tax policies that preserve the positive role that family trusts can play while maintaining social fairness and stability.

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