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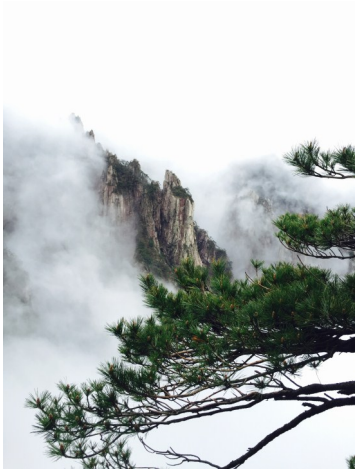

CORPORATE LAW / 公司法

Supreme Court Seeks Public Comments on Judicial Interpretation (IV) of the *Company Law*
公司法司法解释（四）征求意见、提高公司规范运作要求

On April 12, 2016, the Supreme People's Court released the *Provisions on Several Issues Concerning the Application of the Company Law of the People's Republic of China (IV) (Draft for Comments)* (the "Draft") to solicit public comments. The Draft covered the following five categories of cases:

(a) ***Board Resolutions and Shareholders' Resolutions***. The Draft has, among others: (i) specified that shareholders, directors, supervisors, executives, as well as employees or creditors who have direct interests in a resolution, can litigate the effectiveness of such a resolution (*except for a litigation to cancel a resolution*); (ii) added two new circumstances that would statutorily invalidate a resolution, i.e., if a shareholder abuses its shareholder's right and prejudices the interest of a company or other shareholders', or if a resolution involves profit over-distribution or a material improper affiliated transaction that harms creditor's interest in the company; and (iii) clarified circumstances that would cause an inexistent or void resolution (*a resolution adopted without convening a meeting, without a vote or a valid vote*, *without a presented quorum, or the content of a resolution is beyond the authorized scope, etc.*), and situations that would retroactively validate an otherwise ineffective resolution.

By allowing an expanded scope of plaintiffs (*especially by including creditors and employees*) to file a lawsuit on a company's internal resolution, the Draft is likely to cause a sharp increase of litigations on resolutions and may unreasonably affect a company's daily operation and increase its operational costs. In addition, the Draft has set higher standards on procedures and formalities of the companies' internal resolutions, alerting companies to pay more attention to the general compliance of the relevant resolutions according to their articles of associations and the *Company Law*. If necessary, a company may also tailor-make meeting procedures and voting rules in their own articles of associations, bylaws and/or other corporate governance documents to avoid unintended and accidental flaws of the relevant internal resolutions.

(b) ***Right of First Refusal (ROFR)***. The Draft has specified certain procedural matters when a shareholder party intends to exercise a ROFR according to the *Company Law* or the articles of association: (i) "equal condition" means equity transfer price, payment method and timing, and various other factors; (ii) "written notice" shall include the major provisions of an equity transfer agreement such as the name of the transferee, the class, quantity and price of the subject equity interest, the term and the parties' liabilities, etc.; (iii) ROFR is not applicable on equity transfers between existing shareholders unless otherwise stipulated in the articles of associations; and (iv) a shareholder cannot claim a ROFR to buy part of the equity interest unless otherwise provided by the articles of associations. In addition, the Draft has spelt out several circumstances that are considered as infringing upon a shareholder's ROFR and may therefore invalidate a share transfer agreement.

Meanwhile, the Draft has noticeably provided that if a clause in the articles of association is so restrictive on the equity transfer and thus such an equity transfer is *de facto* impossible, a shareholder may request invalidity of that clause. Despite debates over the merit and validity of this provision and questions on how the courts will interpret the *restrictive* standard, this provision, if implemented, will challenge effectiveness of the commonly seen restrictions on the transfer of equity holdings by relevant shareholders (*especially by founders*) in private equity or venture capital investments.

(c) ***Information Right***. The Draft has specified circumstances with "improper purposes" when a company may refuse a shareholder's request to examine the account books and/or other internal documents (*e.g., a shareholder is in a competing business with the company*); if directors and senior executives of a company failed to establish and maintain records as required by the *Company Law*, they shall bear civil liabilities accordingly.

(d) ***Shareholder Representative Litigations***. According to the Draft, a shareholder may request to join a shareholder representative litigation initiated by other shareholders before the end of trial court debate, and the final judgment shall be binding on shareholders who have not participated in the lawsuit. In addition, the Draft expanded the scope of defendants in shareholder litigations from the company's directors, supervisors and senior executives to such posts of its wholly-owned subsidiaries.

(e) ***Right on Profit Distribution***. The Draft has specified that a shareholder requesting profit distribution shall generally provide as evidence relevant shareholders' resolutions on profit distribution (*except that a shareholder produces evidence that there is abuse of shareholders' right or fraudulence by directors or executives that has caused failure to distribute profits*). The final judgment on such cases shall be binding on shareholders who have the right on profit distribution but failed to participate in the litigation.

This proposed *Judicial Interpretation (IV)* has been discussed and drafted for more than six years, with a major interruption caused by the revision of the *Company Law* on capital system. The Draft is expected to serve as a significant guideline on the judicial practice of the above five categories of cases, and to improve the internal compliance and corporate governance practice of the companies in general.

However, there are still a number of provisions that seem to be immature, insensible, unpractical, or even have violated the *Company Law* based on our preliminary reading of the Draft. For example, (a) the prohibition of shareholders' agreement to restrict or prohibit equity transfer in the articles of association is likely to have violated the *Company Law* which has explicitly allowed shareholders to provide special arrangements on equity transfer in the articles of association

(*Paragraph 4, Article 71*). This prohibition also runs counter to the common practice in equity investments where the relevant investors may frequently seek a stable shareholder structure at least for a certain period of time, as well as the legislative tendency of modern corporate law to respect shareholders' free will and increase flexibility of a privately held limited liability company; (b) as to the two newly added invalid resolutions, i.e., "*if a shareholder abuses its shareholder's right and prejudices the interest of the company or other shareholders*", and "*if a resolution involves profit over-distribution or a material improper affiliated transaction that harms creditor's interest*", questions as to whether the Draft has actually unauthorizedly amended (*not just interpreted*) the *Company Law*, and whether such stipulations are too vague and may unreasonably infringe on the companies' normal operation are still subject to further debate; and (c) as mentioned above, the Draft allowed not only shareholders, directors, supervisors and senior officers, but also outsiders such as interested employees and creditors to litigate a company's internal resolutions. It's yet to be discussed if such a broad scope of plaintiffs would cause excessive lawsuits and unnecessarily increase a company's operational cost and burden, and if there are better ways to properly and effectively protect such parties' rights such as through the *Contract Law* and/or the *Labor Contract Law*. We will continue to pay close attention to the Draft and keep you posted.

2016年4月12日，最高人民法院发布了《关于适用〈中华人民共和国公司法〉若干问题的规定（四）》（征求意见稿）（以下简称"《意见稿》"），向社会公开征求意见，对涉及以下五类案件的相关《公司法》条款进行了解释：

(a) **公司董事会、股东（大）会决议效力案件**。主要包括：(i) 明确哪些主体可以对公司内部决议提出异议，即公司股东、董事、监事以及与决议内容有直接利害关系的公司高管、职工、债权人等可以作为除了撤销之诉之外的决议效力之诉的原告；(ii) 新增导致决议无效的两种新的情形，即股东滥用股东地位损害公司及其他股东的利益，以及相关决议过度分配利润、进行重大不当关联交易导致公司债权人的利益受损；以及(iii) 新增哪些事项将导致决议不存在或未生效（应召开会议而未召开而形成的决议、未表决而形成的决议、未达到出席人数、表决人数、越权表决等）、哪些情况将导致事后追认决议等。

《意见稿》扩充了起诉主体，尤其是其将债权人和职工等人士列入原告范围，可能会导致此类案件的急速增加、从而大大增加公司的运营成本和负担。此外，《意见稿》也明显提高了公司作出内部决议的规范性要求。据此，公司在作出相关董事会或股东（大）会决议时需要尤其注意相关决议在内容和形式上是否符合各自《章程》及《公司法》的要求；如有必要，相关公司也可以考虑根据自身情况在《章程》中制定相关董事会/股东（大）会的议事及表决规则，避免因操作失误而导致相关决议的效力带来瑕疵。

(b) **优先购买权案件**。《意见稿》对优先受让权行使过程中常见的程序性事项进行了明确，主要包括：(i) 行使优先受让权的"同等条件"的主要考虑因素包括股权转让价格、付款方式及期限等综合情况，(ii) 行使优先受让权的书面通知应包括受让人的姓名或名称、转让股权的类型、数量、价格、履行期限及方式等股权转让合同主要内容；(iii) 除非章程另有规定，股东之间转让股权时不得主张优先受让权、相关股东不得主张优先购买部分股权。此外，《意见稿》也列举了损害股东优先受让权导致相关转让合同无效的几种情形。

值得特别注意的是，《意见稿》规定有限责任公司章程条款"过度限制股东转让股权，导致股权实质上不能转让的"，股东可请求确认该条款无效。尽管如何判断"过度限制"尚待司法实践的检验，但该条款如果被实施则很可能导致股权投资实践中常见的限制实际控制人股权转让条款的效力受到挑战。

(c) **股东知情权案件**。《意见稿》明确了哪些情形将构成股东有"不正当目的"而不得查阅有限公司会计账簿及相关原始凭证（包括股东涉及与公司的同业竞争时），首次确认董事、高管对未依法制作和保存相关文件资料应承担民事赔偿责任。

(d) **股东代表诉讼案件**。《意见稿》规定，对于股东依据《公司法》代表公司进行的诉讼，其他股东在一审法庭辩论结束前以相同的诉讼请求申请参加诉讼的，应当列为共同原告，并且判决对未参加诉讼的股东发生法律效力。此外，《意见稿》将董监高诉讼主体范围扩展至"全资子公司的董监高"。

(e) **利润分配请求权案件**。《意见稿》明确股东根据股东（大）会决议起诉请求公司分配利润的，应提交载明具体分配方案的股东会或股东大会的有效决议（但有证据证明其他股东滥用股东权利或董监高存在欺诈行为导致不分配利润的除外），判决对未参加诉讼的有利润分配请求权的股东发生法律效力。

《公司法》司法解释（四）已酝酿六年有余，期间曾因修改公司资本制度等原因暂停，目前形成的《意见稿》对前述五类案件的审判实践应当会有重要的指导作用，有助于提高公司运作及公司治理结构的规范性。

但是，根据我们对《意见稿》的初步解读，《意见稿》依然不乏部分条款考虑欠周、与公司运作实务脱节、甚至涉嫌越权解释违反《公司法》的情况。比如，(a) 对于其中关于禁止股东之间在章程中约定过度限制相关股东转让股权的条款与股权投资的常见实践向左，也与有限责任公司股东之间人合性较强、立法应尽少干涉股东的意思自治、及提高封闭公司的柔韧及灵活性的现代公司法立法趋势不太一致，而且涉嫌违反《公司法》关于允许公司章程对股权转让另作规定的条款（第71条第4款）；(b) 《意见稿》新增加的"股东滥用股东权利通过决议损害公司或者其他股东的利益"，"决议过度分配利润、进行重大不当关联交易等导致公司债权人的利益受到损害"两种类型的无效决议是否存在修改（而不仅仅是解释）《公司法》的嫌疑，以及该两种情形是否过于宽泛、模糊而可能会对公司正常运作带来不合理的重大不利影响尚需进一步论证；以及(c) 如前文已经有所提及的，《意见稿》提出，有权对公司内部决议提出异议的主体不仅包括股东、董监高，还包括职工、债权人，该等主体是否过于宽泛而可能导致有关公司决议效力诉讼的泛滥、从而大大增加公司的运营成本和负担，该等主体的权利是否可以通过其他法律（比如合同法、劳动合同法等）来更合适及平衡地提供保障等等。我们将持续关注《意见稿》的后续发展，并及时跟进。

FUND FORMATION / 私募股权

AMAC Regulates Fundraising Activities and Fund Contracts
基金业协会发布《私募投资基金募集行为管理办法》及《私募投资基金合同指引》

On April 15, 2016, the Asset Management Association of China ("AMAC") issued the *Administrative Measures for Raising Private Investment Funds* (the "Measures"), in which it has introduced a set of

industry standards, business rules and specific procedures applicable to fund-raising activities in respect of qualified fund-raising parties, fund marketing, screening of qualified investors , among others. Major provisions include:

(i) Fund-raising parties are limited to direct sale by private fund managers registered with AMAC, and indirect sale as represented by a AMAC member which is qualified to sell fund interest as recognized by the China Securities Regulatory Commission ("CSRC").

(ii) In order to ensure fund safety, fund raising proceeds must be separately deposited in a special account to be supervised by a custodian institution (*such as China Securities Depository & Clearing Company Limited or CSDC, a commercial bank or a securities company with fund sales qualification, etc.*), which entity shall bear joint and several liability for any safety problems occurred during the transfer of raised proceeds.

(iii) Fund-raising institutions shall follow such specific procedures: screening specific investors for fund marketing, matching investors to the appropriate fund products, risk disclosure, confirmation of qualified investors, going through the investment cooling-off period and return visits.

(iv) Fund units must not be further split and sold to unqualified investors.

On April 18, 2016, AMAC further released the *Guidelines on Private Investment Fund Contracts No.1 (Guidelines on the Content and Form of Contracts on Contractual-type Private Investment Funds)*, the *Guidelines on Private Investment Fund Contracts No.2 (Guidelines on Essential Clauses of the Articles of Associations)*, and the *Guidelines on Private Investment Fund Contracts No.3 (Guidelines on Essential Clauses of the Partnership Agreements)* (collectively, the "Guidelines"), providing differentiated guidelines as to the key fund formation document based on different organizational forms of the raised funds. Practically speaking, Guidelines No.1 mainly applies to private securities investment funds, while Guidelines No.2 and No.3 generally apply to private equity investment funds and private venture capital funds. Each of the Guidelines was set forth in the form of a general guideline as opposed to a standard contract with specified terms, with an aim to maximize private funds' autonomy right, provided that the investors' interest should be sufficiently protected and the industry is orderly regulated.

The Measures and the Guidelines will both take effect on July 15, 2016, allowing a three-month transitional period for the industry. Both of them, together with other regulations and rules such as the *Interim Measures for the Supervision and Administration of Private Investment Funds* and the *Administrative Measures for Information Disclosure of Private Investment Funds*, constitute important parts of the supervision and management system of private investment funds by AMAC.

2016年04月15日，中国证券投资基金业协会（"基金业协会"）正式下发《私募投资基金募集行为管理办法》（"《募集办法》"）。《募集办法》分别从募集主体、募集对象、募集行为和法律责任等方面对私募基金进行了规范，主要内容包括：

(i) 募集主体限定为两类：登记的私募基金管理人（自行销售）和具有基金销售业务资格且为基金业协会会员的机构（代销），遏制非法私募。

(ii) 引入资金账户监督机构，监督机构对募集专用账户进行有效监督，保证资金不被募集机构挪用，并确保资金原路返还。监督机构对募集结算资金的划转安全承担连带责任。

(iii) 明确私募基金的募集程序，募集机构应履行六项义务：筛选特定对象、完成投资者适当性管理、揭示基金产品的风险、对合格投资者实质审查、设置投资冷静期、安排回访确认。

(iv) 为了杜绝某些私募机构将投资者所购买的私募基金份额进行拆分，转售给非合格投资者的乱象，《募集办法》禁止非法拆分转让。

随后，2016年4月18日，基金业协会按照不同组织形式基金的特点，发布了私募投资基金合同指引1号《契约型私募投资基金合同内容与格式指引》、私募投资基金合同指引2号《公司章程必备条款指引》以及私募投资基金合同指引3号《合伙协议必备条款指引》（以下统称"《合同指引》"），对不同的组织形式的基金进行差异化监管，其中1号契约型基金合同指引主要适用于私募证券投资基金，而2号公司型基金和3号合伙型基金的章程/合同指引则主要适用于私募股权投资基金和私募创业投资基金。《合同指引》采用了指引的方式而非固化的标准合同文本，目的是为了能在保护投资者利益和规范行业秩序的前提下最大程度地给予私募基金自治的权利。

前述《募集办法》和《合同指引》均将自2016年7月15日起生效，为行业预留三个月的过渡期。两者与《私募投资基金监督管理暂行办法》、《私募投资基金信息披露管理办法》等一起，构成基金业协会私募投资基金监管法规规则体系的重要内容。

OUTBOUND INVESTMENT / 境外投资

NDRC Solicits Comments on Relaxing Outbound Investments; USD1 Billion Approval Threshold to Be Removed
国家发改委拟放宽境外投资门槛、取消10亿美元核准门槛

With explosive growth of China's overseas investments in recent years, to further streamline and decentralize government administrations on the same, on April 13, 2016, the National Development and Reform Commission ("NDRC") released a draft for comments (the "Draft") to revise the *Administrative Measures for the Approval and Filing on Overseas Investment Projects* (the "Measures"), which has taken effect since May 1, 2014.

The Draft has made some seven revisions to the Measures, among which the most significant one is that it has removed the dollar-based approval threshold, i.e., such provisions as "*overseas investments with the Chinese party's investment amount of not less than USD1 billion shall be approved by NDRC*" and "*overseas investments that have the Chinese party's investment amount of not less than USD2 billion and involve any sensitive country or region or any sensitive industry ("Sensitive Projects") shall be approved by the State Council*" are deleted. With the above, only outbound investments involving Sensitive Projects shall be approved by NDRC (*without any additional review by the State Council*), and all other projects are only subject to a much more simplified filing procedure.

In addition, under the Measures, for overseas investments with the Chinese party's investment of not less than USD300 million, the investors shall submit project information reports to NDRC, and NDRC shall issue a "confirmation letter" within seven (7) working days thereafter if such a project "meets the country's outbound investment policy". The Draft deleted the vague condition of "the country's outbound investment policy", and further replaced the "confirmation letter" with a "receipt" issuable by NDRC, which better accords with the spirit of a filing process.

The current government approval threshold of USD1 billion or even USD2 billion is becoming an unreasonable burden for many Chinese investors seeking overseas opportunities especially with the rapid growth of large amount outbound investments in recent years. In fact, such approval requirement has been gradually relaxed not long after the release of the Measures in practice. The official removal of such a requirement will further help consolidate a filing-based administration system in respect of outbound investments with very limited exceptions that may require an approval.

为适应我国境外投资发展的需要，进一步提高境外投资便利化水平，加大简政放权的力度，国家发改委对2014年5月1日开始施行的《境外投资项目核准和备案管理办法》（"9号令"）进行了修订，并于2016年4月13日发布了关于修订9号令的征求意见稿（"《征求意见稿》"），向社会公开征求意见。

《征求意见稿》在9号令的基础上做出7处修改。其中，最值得关注的是，《征求意见稿》仅仅规定涉及敏感国家和地区、敏感行业的境外投资项目（"敏感项目"）不分限额由国家发改委核准，而取消了9号令下"中方投资额10亿美元及以上的境外投资项目"由国家发展改革委进行核准、中方投资额20亿美元及以上的敏感项目报国务院核准的规定。据此，除了敏感项目需发改委核准之外（不再需要国务院核准），其他所有项目均将采用备案制。

此外，对于中方投资额3亿美元及以上的境外投资项目，依据9号令，投资主体应向国家发改委报送项目信息报告，"对符合国家境外投资政策的项目"，国家发改委在7个工作日内出具"确认函"。《征求意见稿》删除了"对符合国家境外投资政策的项目"的模糊条件，而要求国家发改委在收到项目信息报告后7个工作日内出具"收悉函"，更加符合备案制的精神。

近年来，大额甚至巨额境外投资项目增长迅速，10亿甚至是20亿美元的核准门槛都可能已显得不合时宜。在实践中，特定金额以上的境外投资项目的核准早已经放开，本次修订进一步确认了对于境外投资项目备案为主、核准为辅的管理模式。

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