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COMPANY LAW / 公司法

Supreme People's Court Issues Judicial Interpretation No. IV on Company Law
《公司法司法解释（四）》正式颁布

2017年8月28日最高人民法院公布了《关于适用〈中华人民共和国公司法〉若干问题的规定（四）》（法释〔2017〕16号）（“《解释》”），自2017年9月1日起施行。《解释》主要从公司决议效力、股东知情权、优先购买权、利润分配权和股东代表诉讼等五个方面解决《公司法》相关规定在实践中的法律适用难题。以下为《解释》中的重点内容及相关解读：

1. 规范股东知情权的行使：《公司法》赋予了股东查阅或者复制公司特定文件材料的知情权，《解释》对股东知情权进行了一定的补充与完善以保障其在实践中的适用。
 - (a) 强调知情权为股东的法定权利，公司章程及股东协议不得约定剥夺股东知情权，且股东在满足一定条件的情况下可提起知情权诉讼。为便利股东知情权的行使，《解释》明确股东在场的情况下，可以聘请会计师、律师等专业中介人士辅助查询公司的特定文件材料。但股东或其聘请的中介机构因行使知情权泄露公司商业秘密导致公司合法利益受到损害的，应当承担赔偿责任。上述规定也体现了在行使股东知情权时应注意与维护公司合法利益之间达到一定平衡。
 - (b) 列举了股东具有不正当目的具体情形：包括(i)自营或者为他人经营竞争性业务（但公司章程另有规定或者全体股东另有约定的除外）；(ii)为向他人通报信息，可能损害公司合法利益；及(iii)三年内曾通过查阅账簿，向他人通报有关信息损害公司合法利益。公司有证据证明股东存在上述不正当目的，可以拒绝其行使知情权的要求。值得注意的是，由于从事竞争性业务可能会对股东知情权造成一定限制，希望消除该等不利影响的股东应在章程或股东协议中作出另行约定。
 - (c) 明确了股东知情权范围：《公司法》规定有限责任公司股东可以查阅公司的会计账簿，但未明确说明股东是否可以查阅会计凭证，实践中就此问题也存在一定争议。此前发布的征求意见稿中曾将会计凭证纳入股东知情权的范围，但《解释》中最终删除了该条规定，因此目前股东知情权范围仍局限于章程、股东会会议记录、董事会会议决议、监事会会议决议、财务会计报告和会计账簿。

On August 28, 2017, the Supreme People's Court of China issued the fourth judicial interpretation on the PRC Company Law (the "Interpretation"), which became effective on September 1, 2017. The Interpretation provides clarifications mainly in five aspects, including the validity of board and shareholders' resolutions, shareholders' information and inspection rights, rights of first refusal in equity transfer, dividend rights, and representative shareholder litigation, which are often the subjects of disputes in the application of the Company Law. Major provisions of the Interpretation are as follows:

1. Under the PRC Company Law, shareholders of a company have a right to review, inspect and make photocopies of specified company documents. The Interpretation has made some further clarifications in order to facilitate the exercise of shareholders' information and inspection rights.
 - (a) The Interpretation emphasizes that the shareholders' inspection rights under the PRC Company Law cannot be deprived of by the articles of association of a company or by any agreements of the shareholders. To facilitate the exercise of the shareholders' inspection rights, the Interpretation clarifies that shareholders could inspect and make photocopies of the company's documents with the assistance of such professional advisors as accountants and lawyers. To achieve a balance between the shareholders' inspection rights and the company's legitimate interests, the Interpretation provides that a company may claim for compensation on damages against its shareholders and/or their advisors if such damages are attributed to the disclosure of the company's trade secrets by them.
 - (b) Pursuant to the Interpretation, a company may refuse shareholders' requests to inspect its documents on the ground that the shareholder may have *unjustified purpose*, if evidence shows that such shareholder is involved in any of the following circumstances: (i) without the permission of the company or by other shareholders, the shareholder owns, operates or is otherwise engaged in any business that is virtually competing with the main business of the company; (ii) the intention of the shareholder to inspect the company documents is to disclose such company information to a third party, the result of which may damage the company's legitimate interests; or (iii) the shareholder disclosed the company information obtained through document inspection in the last three years that has caused damage to the legitimate interests of the company. Based on the foregoing, if any shareholder intends to protect his inspection rights in the company while engaged in competitive business with the company, it is advisable for him to make specific and clear agreements with the company and all other shareholders.
 - (c) As to the question that whether a shareholder is entitled to inspect original accounting vouchers of a company, the PRC Company Law did not give an explicit answer, which raises controversies in judicial practice. The draft Interpretation released earlier suggested that shareholders may also review and access company accounting vouchers as well as

2. 强化股东优先购买权的保护：《公司法》中规定了有限责任公司股东的优先购买权，但对其行使程序、行使期限和损害救济等未具体规定，司法实践中存在不少争议和分歧，《解释》通过相关规定强化了该等权利的可操作性。
 - (a) 完善了优先购买权的行使程序：首先在通知方式上，除《公司法》规定的书面通知之外，增加了其他能够确认收悉的合理方式。其次在行使期限上，《解释》规定收到通知后（至少）30日内提出购买请求。此外，《解释》对判断购买转让股权的“同等条件”明确列举了相关考虑因素。
 - (b) 明确了损害优先购买权的后果：首先，《解释》规定了其他股东对于损害其优先购买权的行为有权提起司法救济，主张按照同等条件购买转让股权；其次，关于损害股东优先购买权的股权转让合同属于无效还是可撤销合同，实践中存在一定争议。《解释》认定该类合同原则上有效，其他股东行使优先购买权的，股东之外的股权受让人可以要求转让股东承担民事责任。
 - (c) 确认了转让股东的“反悔权”：《解释》规定了其他股东主张行使优先购买权的，转让股东可以放弃转让股权，其他股东并不享有强制缔约权。但转让股东应当赔偿其他股东的合理损失。该等规定也体现了股东优先购买权的立法宗旨在于维护有限公司的人合性，而非保障其他股东取得转让股权。
3. 保障股东的利润分配权：《解释》规定了就利润分配权请求司法救济的条件：一是提交载明具体分配方案的股东会或股东大会的有效决议；二是违反法律规定滥用股东权利导致公司不分配利润，给其他股东造成损失的，在公司不具有具体分配方案的情形下也可提起诉讼。上述规定有利于保障公司股东尤其是中小股东的利润分配权。
4. 完善决议效力诉讼与股东代表诉讼制度：就公司决议的效力争议，在《公司法》规定的无效之诉与可撤销之诉外，《解释》首次明文确立了决议不成立诉讼并列了决议不成立的具体情形。此外，《解释》明确了决议无效和不成立的诉讼主体应为公司股东、董事及监事。上述规定均在一定程度上填补了《公司法》相关规定中的空白。针对股东代表诉讼，《解释》则进一步明确了胜诉利益应归于公司，但股东就此支出的合理费用应由公司承担。

some other accounting source documents. However, the finalized and promulgated Interpretation did not adopt the suggestion, which means that shareholders will only have access to such company documents as specified by the PRC Company Law, namely, the articles of association, minutes of shareholders' meeting, resolutions of directors and supervisors, financial reports and books of account.
2. The Interpretation strengthens the protection of shareholder's first refusal rights in the following aspects:
 - (a) Refines the procedure to exercise rights of first refusal: In terms of notification, the Interpretation provides several ways that a shareholder may reasonably notify others of his intention to exercise the rights of first refusal in addition to those as stipulated by the PRC Company Law. Besides, the rights of first refusal are required to exercise within 30 days of the notification. The Interpretation also clarifies certain factors that should be taken into consideration in determining "equal conditions" to exercise rights of first refusal under the Company Law.
 - (b) Clarifies the legal consequences of jeopardizing other shareholders' rights of first refusal: The Interpretation stipulates that shareholders are entitled to file lawsuits against other shareholders when their rights of first refusal are jeopardized. To address the controversy in practice concerning the validity of the equity transfer agreement that excluded other shareholders' rights of first refusal, the Interpretation in principle recognizes the validity of the underlying equity transfer agreement, and provides further that the transferee, if it is not an existing shareholder of the company, may ask the transferor to assume civil liabilities if the equity transfer agreement is not performed or otherwise unfulfilled as a result of the exercise of rights of first refusal by other shareholders.
 - (c) Allows shareholder to withdraw from equity selling: According to the Interpretation, a shareholder of a limited liability company who intends to sell his equity may change his mind after other shareholders claim for rights of first refusal, but he should compensate other shareholders for their reasonable losses, which to some extent reflects the value and purpose of shareholders' rights of first refusal that is to maintain the *universitas iuris* of a limited liability company rather than simply satisfying any shareholder's intention to increase company stakes.
3. To protect shareholders' dividend rights, especially with respect to minority shareholders, the Interpretation provides that the court may uphold a shareholder's claim for company profit distribution under the following circumstances: (i) there is a validly passed resolution on profit distribution; or (ii) there is no valid resolution on profit distribution but the shareholder can prove that the lack of such resolution is due to the abuse of power by other shareholders.
4. With respect to the validity of company resolutions, the Interpretation makes it clear that the people's court shall hear the lawsuit brought up by a shareholder, director or supervisor of a company claiming that any shareholders' resolution or board resolution is not validly adopted. The Interpretation further clarifies certain circumstances under which the resolutions in question should be declared not validly adopted. With respect to the representative shareholder litigation, the Interpretation specifies that all benefits won from a prevailing litigation shall be credited to the underlying company while the company shall bear all reasonable expenses incurred by the shareholder therefor.

PE&VC / 私募股权及创业投资

DRAFT Interim Regulation on Administration of Privately-Placed Investment Funds Released for Public Comments

国务院发布《私募投资基金管理暂行条例（征求意见稿）》

2017年8月30日，国务院发布了《私募投资基金管理暂行条例（征求意见稿）》（“《条例》”），向社会公开征求意见。《条例》从监管范围、基金管理人及托管人、基金募集、信息提供、创业投资基金、法律责任等多个方面对私募基金行业提出了系统的监管要求，其主要内容及相关解读如下：

1. 监管范围：《条例》对私募基金作出了明确的界定，将私募证券投资基金和私募股权投资基金均纳入了监管范围，并且首次明确将有限责任公司股权纳入私募基金投资标的。2013年修订的《证券投资基金法》未明确将私募股权投资基金纳入监管体系，此次《条例》的出台确立了证监会和基金业协会对私募股权投资基金进行监管的法律基础。
2. 私募基金管理人：《条例》首先明确管理人的适格主体只能是符合一定条件的公司或者合伙企业，不包括个人；其次列举了不得担任管理人、管理人的主要股东或者合伙人以及董监高、执行事务合伙人、委派代表等职务的情形。此外，《条例》还对管理人的法定职责及强制性登记要求作出了明确规定。
3. 基金募集：《条例》明确了管理人及基金销售机构在募集资金时的合格投资者审查义务和投资者适当性管理义务，不得公开宣传推介、不得虚假宣传、不得承诺保本保息。且管理人在基金募集完毕后应及时向基金业协会进行备案。
4. 信息提供：《条例》列明了管理人及销售机构在基金募集和基金运行期间应当向投资者披露的信息，相关规定在很大程度上反映了《私募投资基金信息披露管理办法》中的要求并对信息资料的保管期限提出了更长的要求，即自基金清算终止之日起不少于20年。
5. 行业自律和监管：《条例》规定了管理人、托管人应当加入基金行业协会，接受自律管理并报送基金投资运作和杠杆运用等方面的信息。因此未来私募股权基金管理人加入基金业协会将是一项明确的法律义务。
6. 创业投资基金：《条例》首先明确了创业投资基金的概念，是指向未上市成长性企业进行股权投资并通过股权转让获得资本增值收益的私募股权投资基金。从该定义来看，目前投资于非上市公司的大部分PE、VC 均可被认定为创

On August 30, 2017, the PRC State Council issued the *DRAFT Interim Regulation on Administration of Privately-Placed Investment Funds* (the “Draft Regulation”) for public comments, which set forth specific requirements on privately-placed funds in such aspects as the scope of governance, fund managers and trustees, fund raising activities, information disclosure, venture capital funds, legal liabilities, among others. Provisions of the Draft Regulation as well as our observations thereof mainly include:

1. **Scope of Governance.** The Draft Regulation defines the scope of privately-placed funds, according to which all privately-placed securities investment funds and privately-placed equity investment funds will also become subject to its governance. It specifies for the first time that privately-placed funds may make equity investment in any limited liability company. Since the *Securities Investment Funds Law* amended in 2013 did not specify whether it governs any privately-placed equity investment fund, the provision of the Draft Regulation is deemed the establishment of a legitimate base for the China Securities Regulatory Commission (or CSRC) and Asset Management Association of China (or AMAC) to regulate privately-placed equity investment funds.
2. **Fund Managers.** According to the Draft Regulation, only qualified corporate entities or partnerships, excluding any individual, can serve as fund managers. It further provides situations where any person is not eligible to act as manager, major shareholder or partner of a fund manager, or director, supervisor, senior officer, managing partner or delegate, among others. In addition, the Draft Regulation explicitly clarifies a fund manager’s statutory duties and mandatory registration requirements.
3. **Fund Raising.** The Draft Regulation requires all fund managers and fund sales agents to conduct examinations and carefully select qualified investors. Public marketing, false advertising and break-even commitment are prohibited. Further, fund managers are required to file with AMAC in a timely manner once the fund is fully raised.
4. **Information Disclosure.** The Draft Regulation sets out the scope of information that should be disclosed to the investors by fund managers and fund sales agents during fund raising and operations, which largely reflects the relevant requirements under the *Administrative Measures on Information Disclosure of Private Investment Funds* but extends the retention of data and information to no less than 20 years after the fund’s liquidation.
5. **Industry Self-Regulation and Governance.** The Draft Regulation requires that the fund managers and trustees should be members of AMAC, subject to self-discipline management and should submit information report indicating fund investment activities, use of leverages, among others. In this regard, being an AMAC member will become a mandatory requirement for all managers of privately-placed equity funds in the future.
6. **Venture Capital Funds.** The Regulation defines the venture capital funds as privately-placed equity investment funds making equity investments in growing non-public enterprises and acquiring capital gains through equity transfers. Based on this definition, it seems that most PE and VC funds investing in private companies will probably

业投资基金进而享受到相应的优惠政策，但该规定的落实程度仍取决于基金业协会在实践中的具体认定；其次，针对创业投资基金，《条例》规定应对其实行差异化管理并给予政策支持，但这一规定比较原则化，具体的实施细则仍有待出台。

7. **法律责任：**为防范市场风险和保护投资者合法权益，《条例》明确列举了三十多种违规行为及相应的处罚措施，且罚款额度较高，进一步加强了监管机关对违规行为的处罚力度。

《条例》正式出台后，将与现行有效的《证券投资基金法》及《私募投资基金监督管理暂行办法》共同构成规范私募基金行业的基本法律体系，并更加全面地指引与规范私募基金活动。

be deemed venture capital funds and therefore are eligible to enjoy certain preferential policies, subject of course to AMAC's further clarifications. Moreover, the Draft Regulation proposes to adopt a differentiated management system towards venture capital funds, along with tailor-made supporting policies. Detailed rules are yet to be made though.

7. **Legal Liabilities.** To eliminate market risks and protect investors' legitimate interests, the Draft Regulation clearly lists more than 30 illegal behaviors and corresponding penalties including fines of a relatively large amount, which marks an increased intensity of punishment on unlawful behaviors.

It is expected that the formal enactment of the Regulation, together with the currently effective *Securities Investment Funds Law* and the *Interim Measures for the Supervision and Administration of Privately-Placed Investment Funds* will constitute a unified and collaborated legal system to better guide and regulate the business and activities of privately-placed funds.

OUTBOUND INVESTMENTS / 境外投资

Four Government Departments Issued Guiding Opinions on Outbound Investments 商务部等四部委发布境外投资指导意见

2017年8月18日，国务院办公厅发布了《国务院办公厅转发国家发展改革委、商务部、人民银行、外交部关于进一步引导和规范境外投资方向指导意见的通知》（以下简称“《通知》”）。《通知》的出台也体现了我国政府自2016年底逐渐施行的“扩流入、控流出”的境外投资管控政策。《通知》的主要内容如下：

1. **确立分类管理模式：**目前我国对外商投资准入采取以产业指导目录为基础实行差异化管理的模式，而在此前的境外投资管理规定中并没有类似的产业指引。《通知》中采用了外商投资准入的管理模式，将企业境外投资活动划分为鼓励、限制与禁止三类进行分类管理，按照“鼓励发展+负面清单”的管理模式引导和规范企业境外投资方向。
2. **进一步明确监管重点：**根据《境外投资管理办法》，除敏感国家和地区、敏感行业之外的境外投资，都应适用备案而非核准程序。《通知》明文列举了限制开展的5类境外投资类型，并规定其中“房地产、酒店、影城、娱乐业、体育俱乐部的境外投资”及“境外设立无具体实业项目的股权投资基金或投资平台”须经境外投资主管部门核准，意味着上述两类境外投资的监管口径将更加严格，但具体的核准标准仍有待主管机关明确。值得注意的是，由于“在境外设立无具体实业项目的股权投资基金或投资平台”需要经过核准，在境外设立投资机构以及特殊目的公司未来获得审批的不确定性及难度可能会加大，并可能会对一些跨境交易安排造成不利影响。

On August 18, 2017, the General Office of the State Council issued the *Notice on Forwarding the Guiding Opinions of the National Development and Reform Commission, the Ministry of Commerce, the People's Bank of China and the Ministry of Foreign Affairs on Further Guiding and Regulating the Directions of Outbound Investments* (the "Notice"), with an aim to continue restrictions on outbound investments implemented since the end of 2016. Major provisions are as follows:

1. **A Classified Management System Is Adopted.** The Notice introduces a classified management system similar to that on foreign investments in China, pursuant to which outbound investments for the first time are classified into encouraged, restricted or prohibited categories and subject to different government guidance and regulations.
2. **Regulation Focus Is Further Clarified.** According to the *Administration Measures on Outbound Investments*, filing procedure rather than approval system shall be applied to all outbound investments except for those involving sensitive destination countries, regions or sensitive industries. The Notice specifically lists five types of restricted outbound investments. In addition, the Notice provides that making outbound investments in real estate, hotels, movie theaters, entertainment industry, sports clubs, setting up equity investment funds or investment platforms with no specific industrial project overseas to invest shall obtain approval from competent government authorities in charge of outbound investments. Based on the foregoing, the establishment of overseas investment arms or other special purpose vehicles will almost certainly become more challenging in the future. As a result, cross-border transactions in that regard will also be affected adversely to some extent.
3. **Management Mechanism Is Improved.** (i) The Notice requires strengthening the authenticity and compliance examination of outbound investment activities in order to curb bogus investments and strictly control capital outflows. (ii) The Notice provides that a blacklist of outbound investments should be set up to crack down on cross-border capital transfers under the disguise of outbound

3. **完善境外投资管理制度**，包括 (i)真实合规性审查：为防范虚假投资行为、严控资金外流，《通知》要求加强对境外投资的真实性、合规性审查；(ii)设立境外投资黑名单：防范以境外投资名义进行跨境资金转移并对违规行为实施联合惩戒；(iii)国企境外投资审计：为进一步维护境外国有资产安全，《通知》要求对国有企业的境外投资项目实行境外投资审计，扩大了《中央企业境外投资监督管理办法》中规定的审计范围。

investments, together with penalties on illegal activities. (iii) According to the Notice, in an effort to safeguard the overseas PRC state-owned assets, all outbound investments by PRC state-owned enterprises should be subject to outbound investment audit.

FOREIGN INVESTMENTS / 外商投资

State Council Further Relaxed Foreign Investment Restrictions 国务院发布吸引外资新政

继2017年1月12日国务院发布《关于扩大对外开放积极利用外资若干措施的通知》后（“20条引资措施”）（详细内容请见我所2017年2月刊*China Regulatory Updates*），国务院于2017年8月16日再次发布《关于促进外资增长若干措施的通知》（“《通知》”），从减少外资准入限制、提供财税支持、完善国家级开发区综合投资环境、便利人才出入境及优化营商环境五大方面，进一步提出吸引外资的22条指导性措施。《通知》中的部分措施是对20条引资措施的重审和补充，此外也提出了一些新的吸引外资措施，我们从中选取了部分最为境外投资者关注的利好措施予以说明：

1. **进一步扩大对外开放**：《通知》明确要全面实施准入前国民待遇加负面清单的管理制度，提出持续向外资扩大开放的12个领域，除了强调银行、证券、保险、互联网、电信等已在20条引资措施中开放的领域继续扩大开放外，《通知》还承诺对外资开放包括高端制造业在内的新的领域，并要求各部门明确开放时间表和路线图。
2. **制定税收优惠政策**：《通知》针对利用外资提出了一系列的财税支持政策，其中最为吸引投资者的政策是：(i)对境外投资者在中国投资取得的利润直接投资于鼓励类投资项目可实行递延纳税，暂不征收10%的预提所得税，以鼓励境外投资者持续扩大在华投资，但该等税收优惠的具体实施条件及程序仍有待主管部门后续政策文件的落实；及(ii)对我国居民企业分回国内符合条件的境外所得，研究出台相关税收支持政策，以促进对外投资回流。
3. **优化投资环境**：针对境外投资者一直十分关注的投资收益汇出问题及知识产权保护问题，《通知》特别提出了相应的保障措施：明确了境外投资者在华投资的利润、股息等投资收益

Following the release of the *Circular on Several Measures Concerning the Expansion of Opening-up and Active Use of Foreign Capitals* (the “Measures”, please refer to our February 2017 issue of *China Regulatory Updates* for details) early this year, the State Council on August 16, 2017 issued the *Circular on Several Measures to Boost the Growth of Foreign Investments* (the “Circular”), proposing to promote the growth of foreign investments from some five perspectives, including further lifting restrictions on foreign capital inflow, providing fiscal and taxation supports, improving comprehensive investment environment in national-level development zones, facilitating the entry and exit of qualified personnel and optimizing the business environment. The Circular reiterates and boosts the Measures in certain aspects while in the meantime also providing some new measures to attract foreign investments. Set out below are a few key points of the Circular for your general reference:

1. **To further lift restrictions on foreign investment**: The Circular provides that the pre-entry national treatment and the negative list management system will be implemented on a nation-wide basis. It specifies 12 sectors that should be further opened up to foreign capitals, including such areas already mentioned by the Measures as banking, securities, insurance, internet and telecom services, as well as such areas newly added by the Circular as high-end manufacturing. The Circular also urges relevant government authorities to promulgate explicit schedules and roadmaps to facilitate the further opening-ups.
2. **To make supportive tax policies**: With the goal of better utilizing foreign investments, the Circular employs a series of preferential fiscal and taxation policies. Highlights include: (i) to encourage foreign investors to stay and expand their investments in China, the Circular provides a general tax deferral and temporary exemption of 10% withholding tax to foreign investors if they make reinvestments in the encouraged areas within China using profits obtained from earlier investments; and (ii) to encourage backflows of overseas investments, the Circular pledges to provide tax reliefs on eligible profits obtained by onshore resident enterprises from overseas investments if they repatriate such profits back to China.
3. **To optimize the investment environment**: To address the concerns of foreign investors on outward remittance of investment profits and the protection of intellectual property rights, the Circular guarantees foreign investors' freedom to move their investment profits and pledges to take strong measures against infringement of intellectual property

可依法以人民币或外汇自由汇出；要求主管部门对知识产权侵权问题开展集中整治，加大侵权行为的惩治力度。此外，《通知》还通过完善外资法律体系、提升外资管理及服务水平等各方面的措施进一步优化外商投资环境。

值得注意的是，引资20条措施中提出的扩大开放制造业、采矿业及服务业领域的承诺，已在新版《外商投资产业指导目录》得到一定体现与落实。我们预计，《通知》中提出的吸引外资措施也将在后续的政策文件中得到进一步落实，我们将持续关注相关具体实施细则的出台。

rights. In addition, the Circular also calls for efforts to optimize the legal system and enhance the management of and services for foreign investments.

It is noteworthy that certain points under the Measures have become an integrated part of the amended *Catalogue of Industries for Guiding Foreign Investment*, e.g., the further opening up of manufacturing, mining and service industries. It is anticipated that implementing rules will be formulated soon to support the Circular and we will closely monitor further developments in this regard.

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