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## COMPANY LAW / 公司法

### New Draft Amendments to *Company Law* Issued for Public Comments 《公司法》二审稿公开征求意见

2022年12月30日，经第十三届全国人大常委会第三十八次会议审议，《公司法（修订草案二次审议稿）》（“《二审稿》”）向社会公布并公开征求意见。这是自2021年12月全国人大常委会发布《公司法（修订草案）》（“《21年草案》”；具体分析请见我所《每月立法动态》2021年12月&2022年1月合刊）后，国家第二次就《公司法》的修改向社会公开征求意见。与《21年草案》相比，《二审稿》的主要修订内容如下：

1. **强化股东的出资责任：**(i)完善失权股权处理规定，明确了未按期足额缴纳出资的股东失权后，失权股权在六个月内未转让或者注销时的处理方式，即由公司其他股东按照其出资比例足额缴纳相应出资；(ii)取消股东出资义务加速到期的限制，在公司不能清偿到期债务时，无需证明公司“明显缺乏清偿能力”，公司或已到期债权的债权人即可要求未届缴资期限的股东提前缴纳出资；(iii)强化了股权出让人的责任，对于股东转让已认缴出资但未届缴资期限的股权的，出让人对受让人未按期足额缴纳出资承担补充责任。
2. **进一步优化公司治理结构：**(i)规定规模较小的有限责任公司经全体股东一致同意，也可以不设监事；(ii)明确职工人数三百人以上的有限责任公司，除依法设监事会并有公司职工代表的外，其董事会成员中应当有公司职工代表；(iii)在股份有限公司可以在董事会中设置由董事组成的审计委员会的基础上，明确审计委员会的人员组成和资格要求（如独立董事数量应过半数，且至少有一名独立董事是会计专业人士）。
3. **其他修订要点：**(i)优化授权资本制规则，明确公司章程或股东会可以授权董事会在三年内决定发行不超过已发行股份50%的股份，此外，规定以非现金方式支付价款的，应当经股东会决议；(ii)强化上市公司治理，明确上市公司审计委员会的职权，严格规制上市公司股权代持，上市公司控股子公司不得取得该上市公司的股份；(iii)进一步优化董事和高管的责任，新增规定公司可以为董事执行公司职务投保责任保险。

On December 30, 2022, the second draft of *Amendments to Company Law* (the “2022 Amendments”) was issued for public comments following the review by China’s top legislative authority, the NPC Standing Committee. The initial draft amendments were issued for public comments in December 2021 (the “2021 Amendments”, please refer to our December 2021 & January 2022 issue of *China Regulatory Updates for details*), which were thereafter further revised and evolved to this more recent draft. Compared to the 2021 Amendments, the 2022 Amendments proposed the following major improvements:

1. **Tightening capital contribution responsibilities of shareholders.** The 2022 Amendments (i) clarified that for the shares, the shareholders’ rights attached to which have been forfeited due to the failure of a shareholder to make a full capital contribution as committed, other shareholders of the company shall fulfill such capital contribution obligations in full in proportion to their shareholdings in the company if such forfeited shares have not been sold or otherwise disposed of within 6 months; (ii) lowered the bar for accelerating shareholders’ obligations of capital contribution. As long as a company is unable to pay off its due and payable debts, the company or its creditors will have the right to require the shareholders who have not yet done so, to make the full capital contribution in advance, without having to prove that the company is “obviously insolvent”; and (iii) strengthened the liabilities of a share transferor by requiring such transferor to bear supplementary liabilities, if the capital contribution obligations attached to the transferred shares have not been fulfilled and the transferee fails to make such contribution in full as scheduled.
2. **Further optimizing corporate governance rules.** The 2022 Amendments (i) allowed small-sized limited liability companies to operate without having a company supervisor if it is decided unanimously by its all shareholders; (ii) clarified that the board members of a company with more than 300 employees should include one or more employee representatives of the company; and (iii) detailed the requirements for the composition of a company’s audit committee and qualifications of such committee members (for example, more than half of the members of the audit committee should be independent directors and at least one independent director should specialize in accounting).
3. **Other notable changes.** The 2022 Amendments (i) improved the rules governing issuance of shares decided by the board of directors of a company and clarified that the articles of association or the shareholders’ meeting of a joint stock company may authorize its board of directors to decide, within three years, to issue additional shares with a maximum number of no more than 50% of the issued shares (however, shareholders’ resolutions are still required if the consideration is non-cash); (ii) tightened the regulations of listed companies by clarifying the responsibilities of their audit committees and prohibiting any shareholding entrustment and shareholding of listed companies by their controlled subsidiaries; and (iii) further clarified the liabilities of directors and senior executives and expressly allowed companies to purchase liability insurance for their directors.

## ANTI-UNFAIR COMPETITION / 反不正当竞争

## China Released Draft Amendments to Anti-Unfair Competition Law Targeting Digital Economy 反不正当竞争法修订草案征求意见

2022年11月22日，国家市场监督管理总局发布《反不正当竞争法（修订草案征求意见稿）》（“征求意见稿”）并向社会公开征求意见。作为规范市场竞争行为的基础性法律，《反不正当竞争法》本次为自2017年、2019年修订以来的五年内第三次修订。此次征求意见稿中尤其值得关注的有：

1. **全面完善数字经济领域的反不正当竞争规则：**结合数字经济的特点，征求意见稿主要从以下方面强化了对该领域不正当竞争行为的规制：**(i)**新增了“不得利用数据和算法、技术、资本优势以及平台规则等从事不正当竞争行为”的原则性规定；**(ii)**增设了利用“相对优势地位”对交易相对方的经营进行不合理限制或附加不合理条件的不正当竞争行为，具体包括已在现行《反垄断法》中体现的排他交易（即“二选一”）、搭售、附加不合理条款等行为。“相对优势地位”是指经营者在技术、资本、用户数量、行业影响力等方面的优势，以及其他经营者对该经营者在交易上的依赖等，但在认定上仍然缺乏明确、可操作的细则，有待后续立法进一步落实；**(iii)**新增列举了恶意交易、流量劫持、阻碍网络服务和产品开放共享、非法爬取数据、大数据杀熟等实践中常见的网络不正当竞争行为类型。值得注意的是，虽然目前可以根据《反垄断法》对上述新增的部分不正当竞争行为予以规制，但区别于《反垄断法》，征求意见稿并不以相关经营者具有“市场支配地位”为认定违法行为的前提条件，因此不具有“市场支配地位”的企业或仅具有“相对优势地位”的企业从事相关不正当竞争行为仍可能受到《反不正当竞争法》规制，合规风险相应增大。
2. **加强对商业贿赂的规制：**征求意见稿将“交易相对方”纳入受贿主体（即受贿主体不仅包括个人，亦包括单位）；明确了受贿行为亦构成不正当竞争并原则上适用与行贿行为相同的罚则，填补了相关行政监管空白。此外，“指使他人”实施商业贿赂的行为也被纳入《反不正当竞争法》的规制范围，以遏制实践中经营者通过他人间接实施行贿行为、以逃避法律监管的情形。
3. **总体上提升了不正当竞争行为的法律责任：**征求意见稿将民事责任中的惩罚性赔偿的适用范围从侵犯商业秘密的行为扩大至违反该法的全部不正当竞争行为；并将商业贿赂、商业诋毁和本次增设的不正当竞争行为等的行政处罚罚则上限提升至500万元；对本次增设的部分不正当竞争行为，还参考《反垄断法》的相关罚则设计，设置了最高上一年度销售额5%的重罚。

整体而言，征求意见稿体现了我国加强和优化反不正当竞争监管，特别是数字经济领域监管的整体趋势。我们建议相关企业，特别是网络平台及平台上的经营

On November 22, 2022, China's antitrust regulating authority, the State Administration for Market Regulation issued the *Draft Amendments to Anti-Unfair Competition Law* (the "Amendments") for public comments. The *Anti-Unfair Competition Law* (the "AUCL") has been amended twice in 2017 and 2019 and functions as the fundamental law regulating fair market competition in China. Highlights of the Amendments include, among others:

1. **Specifically addressed unfair competitions in digital economy.** In light of the characteristics of competition in the digital economy, the Amendments (i) added the principle rule that prohibits unfair competition practices through leveraging advantages in data, algorithms, technology, capital or platform rules; (ii) prohibited companies with "relatively advantaged market positions" from practices including exclusive dealing, tying and attaching unreasonable trading conditions, which are already regulated under the *Anti-Monopoly Law* (the "AML") but only apply to companies with "dominant market positions" (the "relatively advantaged market position" was defined in the Amendments as a competitive advantage based on technology, capital, user numbers, industry influence, or the commercial reliance by the counterparty); and (iii) provided detailed rules on new types of unfair competition conducts on the Internet, such as malicious trading, obstruction of open sharing, data crawling and big data-enabled price discrimination, etc. It is noteworthy that although the AML already covers some of the above-mentioned practices, it only applies to enterprises with "dominant market positions" while the Amendments also regulate market players with and in some circumstances even without "relatively advantaged market positions".
2. **Expanded the scope of commercial bribery activities.** The Amendments expand the scope of prohibited bribe recipients to include the "trading counterparty" in addition to the employees of the trading counterparty. The Amendments also clarified that directing a third party to bribe shall also be deemed as a form of bribery conduct, and the administrative penalties for offering a bribe may also apply to accepting a bribe.
3. **Generally raised legal liabilities.** The Amendments expanded the application of punitive damages from infringement of business secrets to all unfair competition practices. In addition, the Amendments also raised the maximum fine to RMB5 million for commercial bribery, commercial slander and newly added unfair competition practices, and even proposed fines up to 5% of the sale revenues in the preceding year for some of the newly added unfair competition practices under extreme circumstances.

Overall, the Amendments have reflected a general legislative trend to enhance and improve China's anti-unfair competition enforcement. It is suggested that relevant enterprises, especially internet platform operators and in-platform operators, review their sales and marketing activities in light of the proposed Amendments to minimize compliance risks. We will continue to monitor and update PRC regulatory developments in this regard.

者对此予以关注，并重新评估相关商业模式的合规风险。我们也将持续密切关注相关立法动态和进展。

## CAPITAL MARKET / 资本市场

### China Revised Listing Indicator Rules for GEM and STAR Boards 创业板、科创板更新上市标准规定

2022年12月30日，深圳证券交易所和上海证券交易所分别发布新修订的创业板和科创板企业发行上市申报及推荐暂行规定，均自发布之日起施行。该等新规有助于进一步明确创业板和科创板定位的判断标准。

关于创业板企业，深圳证券交易所发布的《创业板企业发行上市申报及推荐暂行规定（2022年修订）》(i)明确了符合创业板定位的成长型创新创业企业的财务指标，包括研发投入复合增长率、研发投入金额、营业收入复合增长率等评价指标，并对申报创业板的已境外上市红筹企业等符合特定条件的企业，豁免适用营业收入复合增长率等部分指标；(ii)在行业负面清单条款中，新增产能过剩行业、《产业结构调整指导目录》中淘汰类行业，以及从事学前教育、学科类培训、类金融业务的企业不得在创业板发行上市的规定。

关于科创板企业，根据中国证券监督管理委员会发布的《关于修改〈科创属性评价指引（试行）〉的决定》以及上海证券交易所发布的《上海证券交易所科创板企业发行上市申报及推荐暂行规定（2022年12月修订）》，符合条件的已境外上市红筹企业，可豁免适用科创板上市标准中的营业收入相关指标。该等规定还修订了科创属性发明专利指标的表述，使相关要求能够更准确地适用于无营业收入的企业。

On December 30, 2022, Shenzhen Stock Exchange (the "SZSE") and Shanghai Stock Exchange (the "SSE") released respectively the revised interim provisions on application and recommendation of enterprises for issuance and listing on the GEM Board and the STAR Board (the "Revised Rules"), both of which came into effect immediately on the day of issuance. The Revised Rules further clarified the financial indicators to be met for listing on the GEM Board and the STAR Board.

For listings on the GEM Board, the Revised Rules issued by the SZSE, (i) specified the financial figures that an applicant applying for a listing on the GEM Board should meet (including such indicators as compound growth rate of R&D cost, the amount of R&D cost and the compound growth rate of operating income, and among others), and clarified that for the qualified red-chip enterprises which have been listed overseas (the "Qualified Red-chip Enterprises") and are willing to further pursue a listing on GEM Board, they could be exempt from satisfying the required compound growth rate of operating income; and (ii) further supplemented the negative list of industries which are not eligible for listing on the GEM Board, which includes industries with overcapacity or in the "obsolete" category of the *Catalogue for Guiding Industry Restructuring*, preschool education, curriculum-related training or quasi-financial business.

For listings on the STAR Board, according to the *Decision on Amending the Guidelines for Evaluation of Sci-Tech Innovation Attribute (for Trial Implementation)* issued by the CSRC and the Revised Rules issued by the SSE, the Qualified Red-chip Enterprises are exempt from satisfying the operating income indicator. In addition, those rules further adjusted the definition of the invention patents with sci-tech innovation attributes to better fit the applicants that have not generated any operating income.

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