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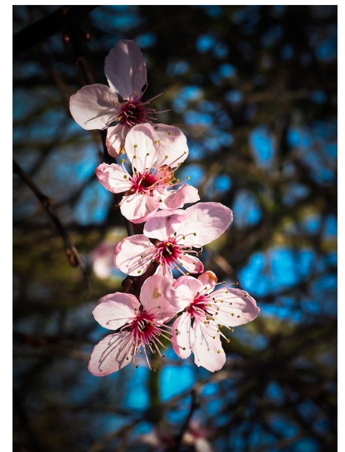

PE & VC / 私募股权及创业投资

AMAC Strengthened Regulations on Registration of Fund Managers for All Privately-Placed Funds
基金业协会加强私募基金登记备案管理

On February 5, the Asset Management Association of China ("AMAC") released the *Announcement on Certain Issues Concerning Further Regulation of Manager Registrations for Privately-Placed Funds* (the "Announcement") to strengthen regulations on registration of privately-placed fund managers ("Fund Managers"). The Announcement is expected to have quite significant influence on the daily operations of all Fund Managers already registered with AMAC as well as those to be registered with AMAC. Highlights of the Announcement include, among others:

(a) Fund Managers failing to timely register their first fund product will be subject to deregistration

In view of the facts that a large proportion of registered Fund Managers have never been engaged in any business relating to privately-placed fund products, the Announcement requires all Fund Managers to register their first funds within a given time period (for instance, 6 months for those to be registered after the issuance of the Announcement). Otherwise, the Fund Managers will be subject to deregistration penalty.

(b) Penalties will be imposed on Fund Managers failing to file required information on a timely basis

To implement information filing and registration requirements, the Announcement provided that if the Fund Managers (i) fail to make quarterly filing, annual filing and filing for material changes for more than once, (ii) fail to file audited annual financial report according to AMAC's requirements, or (iii) become subject to the blacklist of the credit information system for violating the *Interim Regulations on Enterprise Information Disclosure,* AMAC will not accept any filing application for fund products by the Fund Managers until such violation is rectified. In addition, AMAC will also record the Fund Managers on its own blacklist and disclose to the general public until 6 months after the rectification is completed.

(c) Legal opinions are required for initial registration and material change registrations by Fund Managers

Pursuant to the Announcement, when applying for initial registration and material change registrations thereafter, all Fund Managers are required to submit a legal opinion issued by a PRC law firm (*Fund Managers already registered with AMAC with ongoing fund products may be exempted from submission of legal opinions if permitted by AMAC*). The legal opinion should opine, among others, on the following aspects of the underlying Fund Managers: due incorporation and valid existence, business scope, shareholding structure, capital, business facility, risk management and internal control policy, and qualification of senior management members.

(d) Senior management members of Fund Managers are required to obtain professional qualifications

Pursuant to the Announcement, all senior management members of privately-placed securities fund managers should obtain the *Fund Practitioner's Qualification Certificate*, while the legal representative/executive partner and chief compliance/rick control officer of all other Fund Managers should also obtain such a certification. The Announcement sets forth detailed requirements that will apply to different categories of professionals engaged in the fund management business.

We noted that in addition to the Announcement, AMAC recently has also released a series of other documents which include, among others, the *Guidelines on Internal Control of Privately-Placed Fund Managers*, the *Measures for Administration of Disclosures by Privately-Placed Funds*, and the draft *Contract Guidelines for Privately-Placed Funds* to tighten up regulations of the fund industry. But it seems apparent that quite some requirements and provisions do not apply to private equity funds and may actually hinder the healthy development of the PE/VC industry as they have not been properly differentiated to suit the private equity players. It will be important to see how the market and the PE/VC industry will react to all these efforts by AMAC.

2月5日，中国证券投资基金业协会（"协会"）发布《关于进一步规范私募基金管理人登记若干事项的公告》（"《公告》"），进一步规范私募基金的登记和备案事项，其中多项要求不仅将影响尚未办理登记的私募基金管理人，也将对已登记完毕的私募基金管理人的日常运营带来较大的操作性影响：

(a) 未及时备案首只私募基金产品的管理人将被注销登记

鉴于目前存在大量已经登记却从未实际开展私募基金相关业务的私募基金管理人，《公告》规定新登记的私募基金管理人应于登记之日起6个月内备案私募基金产品，对于已经登记的私募基金管理人也应在规定期限内备案首只私募基金产品，否则将被注销登记。

(b) 设置了未及时履行信息报送义务的处罚措施

为督促私募基金管理人履行信息报送义务，《公告》规定(i) 累计达2次未及时履行季度、年度和重大事项信息报送更新等信息报送义务的；(ii) 未按要求报送经审计的年度财务报告的；以及(iii) 因违反《企业信息公示暂行条例》相关规定而被列入企业信用信息公示系统严重违法企业公示名单的，在完成相应整改要求前，协会将暂停受理私募基金产品备案申请，并列入异常机构名单并公示（即使整改完毕，至少6个月后才能恢复正常机构公示状态）。

(c) 法律意见书将作为私募基金管理人登记和重大事项变更登记的必备材料

《公告》要求私募基金管理人在申请登记时（对于已备案私募基金产品的私募基金管理人协会可能视情况豁免补提）和发生重大事项变更时应提交法律意见书，对其合法设立及存续、经营范围、股权结构、从业的资金场所等基本设施、风险管理和内控制度、高管人员任职资格等合规情况发表明确法律意见。

(d) 高管人员应取得基金从业资格

根据《公告》，从事私募证券投资基金业务的私募基金管理人，其高管人员均应当取得基金从业资格；从事非私募证券投资基金业务的私募基金管理人，至少2名高管人员应当取得基金从业资格，且其法定代表人/执行事务合伙人（委派代表）、合规/风控负责人应当取得基金从业资格。除通过基金从业资格考试外，其他通过金融资格相关考试或有一定资产管理经验的人员需通过基金从业资格考试科目一才能取得基金从业资格。

近来协会密集出台了一系列管理措施和自律文件，除《公告》外，还发布了《私募基金管理人内部控制指引》、

《私募投资基金信息披露管理办法》、《私募投资基金合同指引》（征求意见稿）等，加大了对私募基金行业的监管力度，有利于行业的整体规范。然而对于私募股权投资基金而言，《公告》的不少规定并不太适合其运营特点，具体的实施效果还有待市场的检验。

ONLINE PUBLICATION / 互联网出版

Online Publication Subject to More Stringent Regulation
国家新闻出版广电总局和工信部出台互联网出版新规

On February 14, the State Administration of Press, Publication, Radio, Film and Television ("SAPPRFT") and the Ministry of Industry and Information Technology issued the *Administrative Provisions on Online Publication Services* (the "Provisions"), which will take effect on March 10, 2016. The Provisions will replace the *Interim Provisions on the Administration of Internet Publication* (the "Interim Provisions").

Compared with the Interim Provisions, the Provisions (i) further specified and expanded the definition and scope of online publication services, allowing SAPPRFT to define "other kinds of online publishing service"; (ii) set out higher standards for application for *Online Publication Service License* (the "License") and expressly prohibited any form of lending, renting or transfer of the License; (iii) reiterated that Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures and wholly foreign-owned enterprises are not allowed to extend any online publication service (*which is in line with the Catalogue of Industry for Guiding Foreign Investment amended last year*), and introduced SAPPRFT administrative approval over other Sino-foreign cooperation projects; and (iv) strengthened routine administration on online publication activities by implementing annual inspection on enterprises holding the License, requiring publication of online games *(including games licensed by foreign copyright owners*) to be approved by SAPPRFT, among others.

The promulgation of the Provisions indicates an increasingly strengthened administration on online publication activities. However, the fast developing technology and market may challenge the implementation of the Provisions. With further government clarifications to be expected in the near future, we will keep an eye on major developments in this connection.

2月14日，国家新闻出版广电总局和工信部发布《网络出版服务管理规定》（"《规定》"），将于3月10日起施行，正式取代《互联网出版管理暂行规定》（"《暂行规定》"）。

与《暂行规定》相比，《规定》进一步细化了互联网出版服务的定义并允许国家新闻出版广电总局认定"其他类型的数字化作品"，一定程度上扩大了监管范围。《规定》要求从事互联网出版服务取得《网络出版服务许可证》，但是申请条件相比《暂行规定》更为严格，同时明令禁止其他网络信息服务提供者以持证单位的名义提供网络出版服务及其他转借、出租、出卖《网络出版服务许可证》的行为。在外资准入方面，《规定》明确中外合资经营、中外合作经营和外资经营的单位不得从事网络出版服务，这与去年修订的《外商投资产业指导目录》相一致，对于涉外项目合作亦须国家新闻出版广电总局的事前审批。除了提高行业准入门槛外，《规定》也强化了日常监管，如要求网络出版服务单位须每年进行一次年度核验，任何网络游戏的出版（包括境外著作权人授权的网络游戏）均需国家新闻出版广电总局审批等。

《规定》的出台表明国家对于互联网出版行业的监管正日趋严格和精细，然而，由于互联网所催生的各种媒体形态日新月异，《规定》的适用范围和实施效果仍有待观察，而《规定》中提及将另行制定的网络出版服务具体业务分类将对《规定》的准确适用产生重要影响，我们将持续保持关注。

COMPETITION LAW / 竞争法

Draft Amended Anti-Unfair Competition Law Published to Seek Public Comments
国务院法制办对反不正当竞争法修订稿征求意见

Recently, the Legislative Affairs Office of the State Council released the draft amended Anti-Unfair Competition Law (the "Draft") for general public to comment. In comparison with the currently applicable *Anti-Unfair Competition Law*, the Draft intended to modify the definition and scope of unfair competition behaviors and activities in a significant manner, specifically:

(a) The Draft introduced and defined the terms of *business marks* and *confusion marketing*, and clearly labeled such wrongdoings as using other famous entity's business marks or using other entity's registered trademark in its trade name as *confusion marketing*, in a hope to further curb *free rider* behaviors.

(b) The Draft further addressed the definition and typical behaviors of *commercial bribes* so that they can be more easily identified from commercial discounts permitted by applicable law. In addition, according to the Draft, any commercial bribe activity committed by employee to benefit the employer should be deemed the wrongdoing of the employer rather than of the employee himself. Therefore, the underlying employer should assume the corresponding legal liabilities, which hopefully in turn will urge employers to strengthen internal control against potential commercial bribe behaviors.

(c) The Draft also defined the following behaviors as *unfair competition*: leveraging comparatively dominant position to conduct unfair trading activities (e.g., eliminating counterparties or trading commodities, imposing unfair transaction terms or conditions), using internet technology to interfere with competitors' business, among others.

In addition, the Draft also attempted to further improve regulations on sales

promotion with prizes, infringement of trade secrets, misleading advertisement and etc. In terms of law enforcement, the Draft proposed to empower the relevant government authority to seize illegal assets and apply to court to freeze illegal funds allegedly involved in unfair competition activities. To enhance the implementation, the Draft proposed fines of up to RMB3 million and penalties on those who refuse to cooperate during government investigations.

The *Anti-Unfair Competition Law* currently in effective was promulgated more than two decades ago, which could no longer function well in today's economic circumstance. The proposed Draft, in contrast, with notable efforts to accommodate developed business practice, is widely expected to promote fair competitions in a better fashion.

近日，国务院法制办发布公布《中华人民共和国反不正当竞争法（修订草案送审稿）》（“征求意见稿”）公开征求意见。与现行《反不正当竞争法》相比，征求意见稿对具体不正当竞争行为的定义和范围进行了调整，具体而言：

(a) 将现行《反不正当竞争法》中列举的“搭便车”行为统一界定为利用商业标识实施市场混淆的行为，并补充完善了具体的行为方式（如擅自使用他人知名的商业标识，将他人注册商标作为企业名称中的字号使用），同时明确了商业标识和市场混淆的定义；

(b) 明确了商业贿赂的概念及典型的商业贿赂行为，有利于区别正当的利益折让，同时还规定员工利用工商业贿赂为经营者争取交易机会或竞争优势的行为应认定为是经营者的行为，使经营者无法推脱责任，并促使其加强对员工的管理；

(c) 新增利用相对优势地位限定交易相对方的交易对象、商品或交易条件等不公平交易行为；以及利用网络技术干扰其他经营者的行为。

此外，征求意见稿还对有奖促销、侵犯商业秘密、虚假宣传等不正当竞争行为做了相应的补充和完善。在监管方面，征求意见稿赋予了监管部门查封、扣押涉嫌不正当竞争行为的财物以及申请司法机关冻结违法资金的职权；对于违法行为大幅提高了处罚力度，罚款最高可达人民币三百万元，对于拒不配合调查的当事人规定了责任追究。

现行《反不正当竞争法》制定于1993年，虽然最高院于2007年发布过相关司法解释，但显然已经不能完全适应如今的经济和市场发展，征求意见稿规定的不正当竞争行为更符合目前的商业实践，针对现行法监督检查手段不足、力度弱，违法责任偏轻等问题也作出调整，增强了威慑力，有利于维护市场秩序和商业环境。

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