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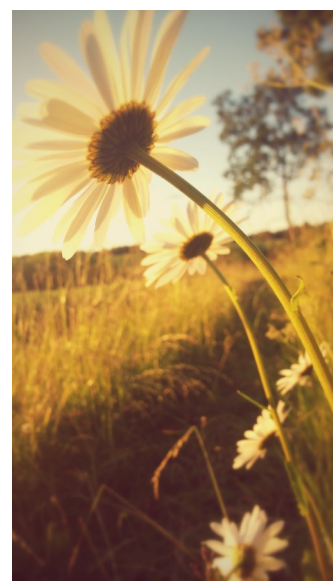
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FUND FORMATION / 私募基金

Asset Management Association to Regulate Fundraising Activities 基金业协会拟规范私募投资基金募集行为

On December 16, 2015, the Asset Management Association of China (the "Association") released drafts of the *Trial Measures for Administration of Private Equity Fundraising Activities* (the "Measures") and the *Private Equity Fund Agreement Guidelines* (the "Guidelines") to solicit public opinions.

The Measures pledged to deal with the various noncompliance issues in the current private equity/PE fundraising practices, such as splitting the raising amount to evade accredited investor requirements as well as a lack of clear boundaries of rights and responsibilities of various parties involved. According to the Measures: (i) only registered fund managers and licensed fund sales institutions are

eligible to conduct fundraising activities; (ii) beneficial rights in PE funds shall not be split and transferred separately; and (iii) added new provisions such as investigation on investors' accreditation, cooling-off period before signing PE fund agreements, among others. The Guidelines provide general guidance of essential provisions applicable to different PE fund agreements. The Measures and the Guidelines, once implemented, will help promote a healthier and better regulated fundraising environment in the private equity industry.

2015年12月16日, 中国证券投资基金业协会(“基金业协会”)就《私募投资基金募集行为管理办法(试行)》(“《管理办法》”)和《私募投资基

金合同指引》(“《基金合同指引》”)征求意见。

《管理办法》旨在规范当前私募基金募集和销售过程中存在的缺乏规范、拆分募集、募集和管理权责不清等问题, 强调: (i) 仅在基金业协会登记的私募基金管理人以及取得基金销售业务资格并成为基金业协会会员的机构从事私募基金的募集活动, (ii) 禁止将基金收益权拆分转让; (iii) 进一步规范了私募基金的募集程序, 新增合格投资者确认程序、基金合同签署前的冷静期、以及基金合同签署后的回访程序等规范, 并对违规募集行为制定行业处罚规定。

《基金合同指引》针对不同类型基金合同的必备条款进行了指导性规定。《管理办法》和《基金合同指引》的出台将有助于规范私募销售行为, 使私募基金行业更为健康、规范地发展。

CAPITAL MARKET / 资本市场

NPC Authorized State Council to Revamp China's IPO System 全国人大常委会授权国务院进行IPO注册制改革

On December 27, 2015, the Standing Committee of the PRC National People's Congress ("NPC") approved the *Decision on Authorizing the State Council to Adjust Relevant Provisions in the Securities Law for IPO Registration Reform* (the "Decision"). The Decision will take effect since March 1, 2016 and is to be implemented tentatively for a 2-year period while the amendment process of the current *Securities Law* is delayed due to various disagreements according to reports.

According to the Decision, the NPC's Standing Committee authorized the State Council to implement the so-called IPO registration system for companies expecting to list on the Shanghai Stock Exchange or the Shenzhen Stock Exchange, the country's two main exchanges.

The registration-based IPO system is a fundamental reform from the current approval-based IPO system, and will have a profound influence on the country's capital market and financial system in the long run. For example, A-share market stock valuation is likely to become more rational and investors are likely to pay more attention to the

true value of the target company; delisting and privatization will be more common and shell resources are likely to become less attractive; needless to say that the waiting period to get listed may be significantly shortened and more China-based companies will consider exit opportunities on the A-share market as opposed to offshore markets such as those in Hong Kong and the United States.

Yet China's registration-based IPO system is to be distinguished from its western counterparts, at least in the short term. The China Securities Regulatory Commission ("CSRC") said separately that reforms are likely to be gradual and will not lead to a large-scale expansion of IPOs. The State Council will soon announce various implementing rules and schemes after filings with NPC's Standing Committee.

2015年12月27日, 全国人大常委会表决通过《关于授权国务院在实施股票发行注册制改革中调整适用〈中华人民共和国证券法〉有关规定的决定》(“《授权决定》”)。《授权决定》自2016年3月1日起施行, 实施期限为2年。全国人大授权意味着注册制改革突破了现有《证券法》下的关键性障碍。

《授权决定》指出, 全国人大常委会授权国务院对拟在上海证券交易所、深圳证券交易所上市交易的股票的公开发行(“IPO”), 调整适用《证券法》关于IPO核准制度的有关规定, 而改为实行注册制度。

注册制改革是中国证券市场监管的一项根本性改革。从长远看, 其对中国证券市场、投资界乃至金融体系的影响都将是不可忽视的, 比如: (i) 随着融资渠道的畅通, A股市场估值应会逐渐回归理性, 一、二级市场的价差应会缩短, 投资机构对“IPO前投资”的动力亦会降低, 而应会更加关注目标公司自身的价值; (ii) “借壳上市”的吸引力以及壳资源的价值将大为降低, 退市将不再是个案; (iii) 尽管还受制于市场整体情况、配套制度是否完善及实施到位等诸多因素的影响, 优秀企业考虑在国内市场融资的可能性增强; 以及(iv) 倒逼监管部门完善与注册制相关的配套制度, 比如股东集体诉讼制度的建立。

受限于多方面因素, 注册制的真正落实恐怕需要一段不短的时间。证监会发言人表示, IPO注册制改革需要循序渐进地实施, IPO不会大规模扩容。注册制具体实施方案有待国务院出台进一步的文件。

China Released Guidance to Further Promote "New Third Board" 新三板指导性文件及新三板分层草案发布

In order to further implement the *Decision of the State Council on Issues concerning the National Equities Exchange and Quotations*, CSRC issued the *Several Opinions on Further Developing the National Equities Exchange and Quotations* (the "Opinions") on November 16, 2015 and made overall arrangements to promote the development of the National Equities Exchange and Quotations Co., Ltd (the "NEEQ"), or the "New Third Board". The Opinions include pilot programs that allow NEEQ-listed companies to transfer to the ChiNext board, and explore relaxing a restriction on the maximum number of qualified investors (i.e., 35) allowed when companies seek to offer new shares, and split the board into two tiers to allow investors to target different companies with distinct listings and trading requirements to be formulated.

On November 24, 2015, the NEEQ system published the draft *Scheme for Dividing NEEQ Market into Different Tiers* (the "Draft") to solicit public opinions, providing details of the board

split according to the Opinions.

According to the Draft: (i) NEEQ board is to be temporarily divided into the innovation tier and basic tier according to three parallel thresholds; (ii) companies to on the basic tier will apply the current rules, while those on the innovation tier shall apply higher thresholds and fulfill stricter information disclosure requirements, among others. On the other hand, innovation tier companies may enjoy future service innovations (such as transfer to ChiNext); and (iii) NEEQ will annually adjust the lists of the two tiers based on the various maintenance and the board-dividing thresholds. The Draft is another move of the country's bid to establish a multi-level capital market and is likely to benefit resource allocations as well as promote NEEQ trading activities.

为进一步落实《国务院关于全国中小企业股份转让系统有关问题的决定》（国发〔2013〕49号），中国证监会于2015年11月16日发布了《关于进一步推进全国中小企业股份转让系统发展的若干意见》（“《意见》”），从多个

方面对推进新三板制度完善作出总体性的部署，比如研究推出新三板挂牌公司向创业板转板试点、探索放开挂牌同时向合格投资者发行股票新增股东人数35人的限制、实施新三板内部分层等。

2015年11月24日，为落实《意见》中提到的市场分层机制，全国股转系统就《全国股转系统挂牌公司分层方案（征求意见稿）》（“《征求意见稿》”）公开征求意见。

《征求意见稿》对新三板挂牌公司的分层标准、差异化制度安排以及层级调整等做出规定：(i)新三板挂牌公司暂行划分为创新层和基础层，全国股转系统将根据三套并行标准（“分层标准”）筛选进入创新层的挂牌公司；(ii)基础层公司以现行市场制度为基础运行，而创新层公司在信息披露、制度建设和违规管理等方面适用比现行市场制度严格的监管规则，但同时将享受服务制度创新（如融资更加便利、创业板转板便利等）；以及(iii)全国股转系统每年根据维持标准和分层标准调整创新层和基础层企业名单。新三板的分层方案适应挂牌公司差异化特征和多元化需求，符合多层次资本市场发展的要求，将有利于进一步促进新三板的资源配置和交易活跃度。

CSRC Cleared Disclosure Rules for VIE Structured Companies 证监会规范拆除VIE信息披露要求

On December 18, 2015, CSRC published Q&As on *Information Disclosure in Major Asset Restructurings Involving Assets Subject to Dismantled VIE Structure* on its official website, and clarified that the following information should be disclosed: (i) the establishing and dismantling processes of the VIE structure, the execution of the VIE agreements and the control structural charts both before and after dismantling; (ii) the offshore IPO progress (if applicable) and reasons of discontinuation; (iii) compliance analyses involving foreign investment, foreign exchange, tax and other related regulations in VIE establishing and dismantling processes, and whether there exists any administrative penalty risks; (iv) whether the VIE structure has been completely removed, whether the asset ownership and share structure

after dismantling are clear enough, and if there exists any lawsuit risks; (v) whether the target asset is in compliance with the applicable laws and regulations relating to the country's industrial policy after dismantling; (vi) if the asset restructuring constitute a back-door listing, whether the business, directors or senior executives of the target asset have significantly changed or if the actual controller has changed within 3 years because of the dismantling.

CSRC's clarification will provide better guidance for the dismantling process of VIE structured companies and reduce uncertainties in the merger and restructuring reviews involving such companies.

2015年12月18日，证监会在其官网上公布《关于重大资产重组中标的资产曾拆除VIE协议控制架构的信息披露要求的相关问题与解答》，对拟购买的标的

资产历史上曾拆除VIE协议控制架构的信息披露提出明确要求：(i)VIE协议控制架构搭建和拆除过程、VIE协议执行情况、拆除前后的控制关系结构图；(ii)如标的资产曾筹划境外上市的，披露筹划上市进展、未上市原因等情况；(iii)VIE协议控制架构的搭建和拆除过程是否符合外资、外汇、税收等有关规定，是否存在行政处罚风险；(iv)VIE协议控制架构是否彻底拆除、拆除后标的资产股权权属是否清晰、是否存在诉讼等法律风险；(v)VIE协议控制架构拆除后，标的资产的生产经营是否符合国家产业政策相关法律法规等规定；(vi)如构成借壳上市，还应当重点说明VIE协议控制架构拆除是否导致标的资产近3年主营业务和董事、高级管理人员发生重大变化、实际控制人发生变更。

证监会此次对拆除VIE资产回归提出明确的信息披露要求，有助于规范相关公司拆除VIE过程中的合法合规性，并降低相关公司并购重组过程中的不确定性。

CSRC to Amend ESOP Measures 证监会拟修订上市公司股权激励管理办法

On December 18, 2015, CSRC released the draft (the "Draft") to amend the *Measures for the Administration of Equity Incentive Plans of Listed Companies* tentatively implemented since 2005. The revisions have mainly reflected a focus on information disclosure and a

general relaxation of approval requirements involved, with an aim to unfetter the listed companies to decide their own incentive plans disciplined mainly by the market.

Major revisions in the Draft include: (i) added a separate chapter to strengthen the information disclosure;

(ii) further refined entities forbidden to carry out and individuals prohibited from participating in equity incentive plans (e.g., supervisors shall not participate incentive plans); (iii) relaxed various compulsory requirements such as performance assessment indicators, mandatory interval period

from the occurrence of a major issue to the carrying out of an incentive plan, etc.; (iv) set out more detailed rules relating to the decision-making, equity grant and execution processes of incentive plans; and (v) strengthened ex-post supervision by adding internal control mechanisms and detailed supervision and punishment provisions.

2015年12月18日，中国证监会发布征求意见稿（“《征求意见稿》”）拟对自2005年起试行的《上市公司股权激励管理办法》进行修订。本次修订的总体原则为以信息披露为中心，根据“宽进严管”的监管理念，逐步形成公司自主决定、并由市场进行约束的上市公司股权激励制度。

《征求意见稿》主要内容如下：(i)对信息披露作专章规定，强化信息披露监

管；(ii)进一步完善不得实行股权激励与不得参与股权激励的负面清单，明确激励对象的范围（监事不得作为激励对象）；(iii)放宽绩效考核指标、股权激励与其他重大事项的间隔期等方面要求；(iv)细化股权激励的决策、授予、执行等各环节程序；以及(v)加强事后监管，增加公司内部问责机制安排，细化监督处罚的规定。

INVESTMENT & FINANCEING / 投、融资

Shanghai's Pudong New District Will Separate Business Licenses from Administrative Permits 浦东新区率先试点“证照分离”，拟大幅简化行政审批流程

On December 29, 2015, the PRC Central People's Government released on its website the *Reply from the State Council on the General Program for Shanghai to Launch Pilot Reform of "Business Licenses - Administrative Permits Separation"* (the "Program"), according to which the Pudong New District will adopt on a trial basis the separation of business licenses from administrative permits for a 3-year period. The Program is expected to further transform government functions and stimulate social innovation.

The Program involves altogether 116 permit items that will be canceled, simplified or significantly streamlined and has divided them into five categories: (i) cancel approval requirement (10 items), (ii) change approval requirement to a filing with competent government authorities (6 items); (iii) grant the approval in advance if the company can undertake that it has fulfilled the permit requirements and will submit relevant documents (26 items); (iv) simplify approval procedure with transparent

standards and predictable timelines (41 items); (v) as to certain items directly involves public safety, environmental protection, among others, strengthen market access managements (33 items).

The Program also emphasized information sharing and collaborative supervision among different governmental agencies and shifted more weight towards self-disciplined managements and society supervisions.

2015年12月29日，中国政府网发布《国务院关于上海市开展“证照分离”改革试点总体方案的批复》（“《试点方案》”），上海浦东新区将率先开展“证照分离”改革试点，试点期为自批复之日起3年。《试点方案》的实施应有助于进一步精简行政审批、有助于释放经济活力。

浦东新区的“证照分离”改革按照易操作、可管理的要求，从与企业经营活动密切相关的行政许可事项中，选择审批频次比较高、改革后效果比较明显的116项行政许可事项先行开展试验。《试点方案》将试点事项分为5类：(i)取消审批（10项）：对市场竞争机制能够有

效调节并能够有效实现行业自律管理的事项，取消行政审批。(ii)取消审批改成备案(6项)：为政府及时、准确地获得相关产业信息，对部分行政许可事项实行事前备案管理。(iii)简化审批实行告知承诺制(26项)：对暂时不能取消审批，但通过事中事后监管能够纠正且不会产生严重后果的行政许可事项，实行告知承诺制。(iv)审批标准化管理并提高审批透明度和可预期性(41项)：对暂时不能取消审批，也不适合采取告知承诺制的事项，简化办事流程，推进标准化、透明化管理和网上办理，明确审批标准和办理时限。(v)对涉及公共安全等特定活动，加强市场准入管理(33项)：对直接涉及国家安全、公共安全、生态环境保护以及直接关系人身健康、生命财产安全等特定活动的行政许可事项，按照国际通行规则，加强风险控制、强化市场准入管理。

《试点方案》同时规定了一些综合监管措施，比如以信息互联共享为基础、实施各政府部门之间的协同监管，加快公共信用信息平台的建设和应用，实施自律监管、社会监管等。

CBRC Solicits Commons on Draft P2P Rules 银监会就P2P机构监管规则草稿征求意见

On December 28, 2015, the China Banking Regulatory Commission ("CBRC") published the draft of *Interim Measures on Managing the Business of Online Intermediary Agency of Lending Information* (the "Draft"), aiming to regulate the recently rocketing online peer-to-peer lending industry (or P2P). A few highlights of the Draft include:

(i) *Ex post filing*: A P2P company does not need to acquire approval before it runs business but only shall, after obtaining the business license, complete filing procedures with local financial supervision department and competent telecommunications

department (an ICP license would be required if it engages in value-added telecommunications);

(ii) *Negative actions*: P2P Companies shall not use the platform to finance itself or related parties, provide financing securities, establish capital pool, sell monetary fund products, among others, nor shall they carry out any offline physical businesses. This means that some P2P companies currently involved in relevant financing businesses or has actual physical branches will need to spin off relevant businesses to get compliant with the Draft;

(iii) *Separate clients' capital*: P2P companies shall separate its own capital from clients' capital and select eligible deposit bank, which may create a factual hurdle for some of them because of banks' careful screening process for deposit and custodian clients in its usual practice; and

(iv) *Joint supervision*: P2P companies will be facing joint supervision from CBRC, the Ministry of Industry and Information, the Ministry of Public Security and the State Internet Information Office as well as their local counterparts and certain self-regulatory organizations.

2015年12月28日，银监会公布《网络借贷信息中介机构业务活动管理暂行办法（征求意见稿）》（“《征求意见稿》”）。《征求意见稿》旨在将网络借贷信息中介机构（“P2P机构”）全面纳入监管。《征求意见稿》的主要亮点如下：

(i) **事后备案制度**：P2P机构在设立方面不受前置审批或牌照的限制，但应于取得营业执照后向注册地金融监管部门进行备案，并向通信主管部门履行网站备案手续，

涉及经营性电信业务的，应当申请相应的电信业务经营许可；

(ii) **负面清单管理**：P2P机构的经营实行负面清单管理模式，其不得从事或受委托从事为自身或关联主体融资、为融资提供担保、设立资金池、发售货币基金类产品等业务，并且不得开展线下业务。据此，部分在实践中发展综合业务和线下业务的P2P平台将需要进行业务剥离或重整；

(iii) **客户资金银行存管**：P2P机构应隔离自身资金与客户资金，并选择符

合条件的银行业金融机构作为借贷双方的资金存管机构。由于银行对存管业务客户的谨慎选择，此项规定事实上可能导致P2P机构的优胜劣汰；以及

(iv) **协同监管**：P2P机构的业务活动由银监会、工业和信息化部、公安部以及国家互联网信息办公室协同监管，同时受地方金融监管部门具体监管和行业自律组织的约束。

INTELLECTUAL PROPERTY / 知识产权

Draft Amendments to Patent Law Solicit Public Opinions 《专利法修订草案》公开征求意见

On December 2, 2015, the State Council Legislative Affairs Office published the *Draft of Patent Law Amendment (Draft for Review)* (the “Draft”) to solicit public opinions.

The Draft made extensive amendments and proposed to substantially revise some 30 provisions, in an effort to modernize the current *Patent Law*, strengthen patent protection and improve patents quality, as well as regularize responsibility of patent administration agencies, among others. For instance: (i) service inventions are re-defined so

that those mainly by using employer’s materials and technologies are no longer employer’s patents but shall be subject to an agreement between the employer and employee (*if there is no such an agreement, the patent right belongs to the employee*); (ii) network service provider shall bear joint liability with the relevant tortfeasor.

2015年12月2日，国务院法制办公室就《专利法修订草案（送审稿）》（“《草案》”）向社会公开征求意见。《草案》对现行专利法进行了较大幅度的修改，涉及实质性修改的条文共约30条，旨在加大专利保护力度、提升

专利质量、强化对侵权行为的处罚力度、提升专利市场价值、强调专利行政部门在提供专利信息公共服务、促进专利运用等方面的职责等。举例来说，具体修订包括：(i) 重新划分了职务发明创造的范围，仅规定“执行本单位任务所完成的发明创造”为职务发明创造，不再规定“主要利用本单位物质技术条件所完成的发明创造”为职务发明创造，而是明确“利用单位物质技术条件所完成的发明创造”的权属由双方进行约定（没有约定的，申请专利的权利属于发明人或者设计人）；(ii) 《草案》明确了网络服务提供者与侵犯专利权的网店承担连带责任。

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