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Legal Updates

1. Overview of the Amendment to the New Advertising Law (Authors: Jun HE, Qihui TANG)

The Advertising Law of the People's Republic of China (the “New Advertising Law”) was revised and adopted at the 14th session of the Standing Committee of the 12th National People's Congress of the People's Republic of China on April 24, 2015, and came into force as of September 1, 2015. As a result of rapid development in the advertising industry, the New Advertising Law was revised to further regulate and clarify the rules regarding advertising activities.

Overview of the Amendment to the New Advertising Law

The amendment to the Advertising Law is significant: the New Advertising Law includes 75 articles. Compared to the original law, the New Advertising Law adds 33 articles, deletes 3 articles and revises 37 articles. The amendment can be summarized as follows:

- a. **Specifying Rules on the Content of Advertisements.** Based on the seven products and services regulated in the original law, pharmaceuticals, medical devices, agricultural pesticides, tobacco, food, alcohol and beauty products, the New Advertising Law adds a number of specific rules regarding advertisements for the following items: narcotic drugs or other specific drugs, pharmaceutical precursor chemicals, drug addiction treatment medicines, treatment methods, healthcare foods, veterinary medicines, livestock feed and feed additives, crop seeds and cultivation, infant dairy products, beverages and other foods, education or training, investment products or services with anticipated investment returns, and real estate. Industries closely related to the daily lives of consumers and which attract consumer attention are all reflected in the New Advertising Law.
- b. **Clarifying the definition of false advertising and listing typical instances.** False advertising includes advertisements which deceive or mislead consumers, as well as advertisements which contain false or misleading information.
- c. **Strictly regulating the publication of tobacco advertisements.** Tobacco advertisements are prohibited in mass media communications, in public places, on public transportation, or outdoors. It is also prohibited to display tobacco products in advertisements or public service advertisements for other products.
- d. **Adding rules for the protection of minors.** It is prohibited to carry out advertising activities within elementary schools, secondary schools, and kindergartens. It is also prohibited to use teaching materials or stationery, etc. for advertising (including disguised advertising) at elementary schools, secondary schools, and kindergartens, with the exception of public service advertisements. It is prohibited to publish advertisements for medical treatment,

pharmaceuticals, healthcare foods, medical devices, cosmetics, alcohol, beauty products, and online games detrimental to the physical and mental health of minors in mass media communications which target minors. Advertisements for products or services which target minors under the age of 14 shall not induce such minors to ask their parents to buy the products or services advertised, nor shall be likely to cause such minors to imitate unsafe acts.

- e. Further regulating electronic advertising. The New Advertising Law sets out several general principles for advertisements transmitted electronically and via the internet. Advertisements published or distributed electronically will be restricted, such as those found in SMS messages, e-mails, and pop-up advertisements on internet pages. On July 1, 2015, the State Administration for Industry and Commerce promulgated *the Interim Measures for the Supervision and Administration of Internet Advertisements (Draft for Comment)* (the "Draft for Comment"). When the Draft for Comment is formally adopted, there will be special provisions for advertising published on or distributed via the internet.
- f. Strengthening supervision of mass media advertising. Mass media advertising through outlets such as radio stations, TV stations, and newspapers, which represent the main means of advertising, are further regulated in the New Advertising Law. Radio stations and TV stations shall, when broadcasting advertisements, comply with the provisions of the relevant authorities under the State Council on the length of time and means of broadcasting, and provide a clear indication as to the length the advertisements. Radio stations, TV stations, newspapers, periodical and audio-visual publishing entities, and internet information service providers shall not carry disguised advertisements for medical treatment, pharmaceuticals, medical devices and healthcare foods by way of introducing knowledge on health or health maintenance or by other means.
- g. Expanding the scope of the New Advertising Law by including public service advertisements.
- h. Clarifying the advertising supervisory and administrative responsibilities of the Administration for Industry and Commerce ("AIC"). There are certain new responsibilities entrusted to AIC authorities, such as the authority to conduct on-site inspections, to make inquiries, to require the production of documents, and to review and copy those documents. The AIC authorities shall issue to the public a telephone number, mailbox or email address to be used for the acceptance of complaints or reports, and the authorities receiving the complaints or reports shall handle such matters within seven working days upon receipt, and shall inform the filing party of the outcome. In addition, the AIC authorities, related authorities, and their staff members have an obligation to keep confidential any trade secrets that they may come to know through their advertising supervisory and administrative activities.
- i. Strengthening legal liability. There are relatively severe legal liabilities for distributing false advertisements and for using advertisements to promote products or services which are prohibited from production or sale by the New Advertising Law's provisions and regulations.

The New Advertising Law sets out new types of administrative penalties which may, in serious circumstances, result in the revocation of business licenses and advertising registration certifications. Any illegal act as set out in the New Advertising Law shall be recorded in the advertiser's credit files by the AIC authorities and will be disclosed to the public.

- j. Adding to the responsibilities and liabilities of advertisement endorsers. The New Advertising Law clarifies the definition, responsibilities and legal liabilities of advertisement endorsers. The regulation of advertisement endorsers is a particular focus of the New Advertising Law and is summarized below.

Advertisement Endorsers

a. Definition

“Advertisement endorser” is defined in the New Advertising Law as any natural person, legal person, or other organization, other than an advertiser that uses his/her/its own name or image, which gives an endorsement or testimonial for a product or service in an advertisement.

This definition may be broken down into three elements:

- i. Using one's name or image to promote products and services, namely by using one's identity or status to exert social influence. The person will not be deemed to be an advertisement endorser merely by appearing and performing in an advertisement if that person does not hold popularity or influence with the relevant audience.
- ii. Making endorsements or testimonials for a product or service in an advertisement. Such activities may be expressly indicated, such as by showing and expressing the advantages of certain products or services, or it may be implied by certain activities, such as a celebrity using a certain brand of mobile phone in public.
- iii. Natural persons, legal persons or other organizations. The definition not only includes natural persons, but also legal entities and organizations.

In addition, the duration of the endorsement or testimonial activity is not an essential condition to be identified as an advertisement endorser. When the above conditions are fulfilled, the person may be deemed to be an advertisement endorser even if the advertisement is broadcast only a single time.

b. Qualifications

The Article 38 of the New Advertising Law sets out three conditions which advertisement endorsers must satisfy:

- i. Advertisement endorsers cannot endorse or give testimonials for products they have not used or for services they have never received. Where the advertisement endorser fails to satisfy this condition, the AIC authorities shall confiscate the proceeds from the endorsement, and

impose a fine equivalent to the amount or double the amount of the proceeds. Such a condition sets restrictions on the range of advertisement endorsers for products and services towards particular consumers. For example, male celebrities would be unable to endorse products which are designed especially for women.

- ii. Minors under the age of 10 cannot be used as advertisement endorsers. Pursuant to the General Principles of the Civil Law of the People's Republic of China, a minor under the age of 10 lacks the capacity for civil conduct, so minors cannot endorse or give testimonials for a product or service. This is not to say that a minor under the age of 10 is prohibited from conducting any kind of advertising activities. It is legally permissible for a minor under the age of 10 to perform advertising activities which do not result in the minor being deemed to be an advertisement endorser by using *his or her own name or image to make endorsements or testimonials for a product or service*. Generally speaking, if a minor without public name recognition or influence among the relevant audience performs advertising activities, the minor will not be identified as an advertisement endorser. In addition, it is uncertain whether a celebrity minor would be considered to be an advertisement endorser when he or she takes part in advertising activities. Mr. Zhang Guohua, the chief of the department of advertising supervision and administration of the State AIC, interpreted the New Advertising Law publicly and explained that if the minor's performance in the advertising activity *does not reflect his or her identifying characteristics as a minor*, he or she should not be deemed to be an advertisement endorser. However, typically, in circumstances in which the minor wears certain apparel or goods which display a brand name or image, the minor would be considered to be an advertisement endorser.

In practice, the standard of recognizing "*his/her/its own name or image*" and identifying a celebrity is ambiguous and the authorities have not yet released any official interpretation regarding these articles, therefore we recommend that advertisers use care when selecting celebrity minors for advertising activities.

- iii. Any natural person, legal person or other organization that is subject to administrative penalties for making endorsements or testimonials in false advertising cannot be used again as an advertisement endorser for a period of 3 years. All natural persons, legal persons or other organizations which make endorsements or testimonials in a false advertisement will also face a 3-year ban even if the person or organization did not act as an advertisement endorser.

c. Prohibitions

Use of advertisement endorsers to make endorsements or testimonials in advertisements for medical treatment, pharmaceuticals, medical devices or healthcare foods is forbidden by the New Advertising Law. It should also be noted that although an advertisement endorser could be a legal person or other organization, this specifically precludes academic institutions and industry

associations.

d. Legal liability

- i. Advertisement endorsers are jointly and severally liable with advertisers for false advertisements

Advertisement endorsers are subjected to joint and several liability with advertisers in two circumstances, i) false advertisements for products or services relating to the lives and health of consumers which cause harm to consumers, and ii) for all other products and services in the event that the advertisement endorser knew or should have known of the falsity of the advertisement. As mentioned above, natural persons, legal persons or other organizations that have been subject to administrative penalties in the previous than three years for making endorsements or testimonials in a false advertisement shall not be used as an advertisement endorser.

- ii. Liability for using advertisement endorsers in violation of the laws

For certain violations, the AIC authorities may order an advertiser to cease advertising activities, order the advertiser concerned to remedy any harm caused within the scope of the advertisement, and impose a fine. For serious violations, the advertiser's business license may be revoked, and the advertisement review authorities may revoke the advertiser's advertising registration certificate and not reissue the certificate for a period of one year. These violations include:

- (i) Using advertisement endorsers in advertisements for medical treatment, pharmaceuticals, medical devices or healthcare foods.
- (ii) Using minors under the age of 10 as advertisement endorsers.
- (iii) Using an advertisement endorser who has been subject to administrative penalties within the last than three years due to making endorsements or testimonials in a false advertisement.

When the advertisement endorser makes endorsements or testimonials for medical treatment, pharmaceuticals, medical devices, healthcare foods, or for products which they have not used or for services which they have not personally received, the advertisement endorser shall face confiscation of the endorsement proceeds, and have imposed a fine equivalent to the amount or double the amount of the proceeds.

2. China Insurance Regulatory Commission Releases the NEW Rules on Formation of Insurance Private Equity Funds (Authors: Evan ZHANG, Lu RAN, Qikun XU)

In order to further standardize behaviors regarding the formation of insurance private equity funds, China Insurance Regulatory Commission (“CIRC”) released the *Circular on Relevant Issues of the Formation of Insurance Private Equity Funds* (the “Circular”) on September 11, 2015. The Circular specifies the categories, investment objectives, qualifications of the sponsors and the managers, conditions for formation, and other relevant systems of the private equity funds formed by insurance capital. The main points of the Circular are as follows:

Specify the Categories of Insurance Private Equity Funds

According to the Circular, the private equity funds formed by insurance capital can be categorized into growth funds, buyout funds, funds for emerging strategic industries, mezzanine funds, real estate funds, venture capital funds, and fund of funds (FOF) mainly investing in the aforesaid funds.

Limit the Investment Objectives of Insurance Private Equity Funds

According to the Circular, private equity funds formed by insurance capital shall invest in the industries and fields under the key support of the state, including but not limited to major infrastructure projects, shantytown renovation projects, new-type urbanization construction projects, and other livelihood projects and national key projects; scientific and technological enterprises, small and micro enterprises, emerging strategic industries, and other enterprises or industries under the key support of the state; and pension service, health and medical service, security service, Internet financial services, and other industries and businesses in line with the extension of the insurance industry chain.

Standardize the Management Structure of Insurance Private Equity Funds

The Circular specifies that the sponsor and the fund manager of an insurance private equity fund shall be determined before the formation of the fund. The sponsor shall be chaired by a subordinate body of an insurance asset management institution. The fund manager should be appointed by the sponsor and may be served by the sponsor or by an insurance asset management institution appointed by the sponsor or other subordinate body of the insurance asset management institution. If the fund manager is chaired by an insurance asset management institution, such institution shall have a corresponding investment and management capacity and have not less than three investment projects; if the fund manager is chaired by a subordinate body of the insurance asset management institution, such institution and its associated insurance institutions shall hold 30% or more of the shares of the subordinate body; such subordinate body should have at least three core decision makers who have more than 8 years’ experience in the related field; team members of which shall have completed not less than three exited projects.

Specify the Registration System of Insurance Private Equity Funds

According to the Circular, a registration system shall be introduced for private equity funds formed by insurance capital, and relevant registration formalities shall be applied to the CIRC or its designated institutions by insurance asset management institutions or fund sponsors.

Specify other Systems Regarding Insurance Private Equity Funds

The Circular also specifies other systems regarding the private equity funds formed by insurance capital, including: (1) the relevant negative list system and segregation system between the insurance institutions and fund sponsors to avoid risk transmission; (2) the custodian system to guarantee the safety and independence of fund assets; (3) rules regarding related party transactions, according to which if the investment business involves related party transactions, it shall be approved by two-thirds of voting rights of non-related parties in the decision-making bodies without objection of the investment advisory board, and the scale of investment shall not exceed 50% of the target size; (4) the report system which requires fund managers submit the fund raising report, quarterly report, annual report, and other relevant information to the information registration platform designated by the CIRC within five working days after the final closing, within 20 working days after the end of each quarter, and before April 30 each year.

Specify the Market-oriented Operation of Insurance Private Equity Funds

Circular sets forth that the fund manager shall have independent and market-oriented management and operation mechanisms, including but not limited to equity incentive mechanism, interest sharing mechanism, successor investment mechanism and other key mechanism; the sponsor and the associated insurance institutions shall contribute to or commit for not less than 30% of the amount of the target size.

The Circular provides definite legal ground for the formation and management of private equity funds formed by insurance capital. It helps to develop new means and path to connect insurance capital to entity economy and introduces new fund mode to the field of private equity fund.

Important Announcement

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