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AMAC Strengthened Regulations on Services Provided by Senior Executives of Privately-Placed Fund Managers

基金业协会加强对私募基金管理人高管任职的监管

On November 23, 2016, the Asset Management Association of China ("AMAC") issued the *Answers to Relevant Issues Concerning Registration of Privately-Placed Funds (XII)* (the "Answers") to reaffirm the requirements on qualification of senior executives serving for privately-placed fund managers and completion of following training sessions for required credit hours. The Answers prohibit the persons holding senior management positions in privately-placed fund managers from working for other non-affiliated privately-placed institutions concurrently. If a senior executive of a fund manager concurrently works for a privately-placed institution affiliated to such manager, AMAC may require the senior executive to explain the reasonableness for taking such part-time job, his/her competence for such position and provide other information that AMAC may deem necessary. AMAC may further conduct inspections on the part-time working status of the senior executives currently served in fund managers later on and will order the institutions involved to rectify the non-compliant activities (if any). The Answers also require the senior executives to enter into employment contracts with the institutions they serve for. The corporate resolutions approving the appointment of the senior executives as well as the relevant executed employment contracts should be submitted to AMAC upon the applications for registration of the fund managers and

change of the senior executives.

Furthermore, AMAC explicitly specifies that such practices as hiring several external personnel with proper qualifications to engage in fund industry for the sole purpose of meeting fund registration requirements by a few privately-placed institutions are in violation of the *Trial Measures on Registration of Privately-Placed Fund Managers and Filing of Funds* and should be deemed as "providing false materials and information during registration of fund managers, filing of funds and other information reporting processes", thus the institutions involved should be subject to relevant penalties accordingly. The release of the Answers is expected to help curb the aforesaid non-compliant activities conducted by the privately-placed institutions and crack down on improper maintenance of existing shell entities that have never engaged in any business relating to private funds.

2016年11月23日, 中国证券投资基金业协会(“基金业协会”)发布了《私募基金登记备案相关问题解答(十二)》(“《问答十二》”), 对私募基金管理人高管从业资格及完成后续培训学时要求进行了重申。值得注意的是, 《问答十二》提出私募基金管理人高管人员不得在非关联的私募机构兼职; 如在关联的私募机构兼职的, 基金业协会可要求其说明兼职的合理性、胜任能力等, 且基金业协会下一步将对高管的兼职情况进行核查, 要求不符合规范的机构整改。《问答十二》还明确要求基金管理人高管人员应当与任职

机构签署劳动合同, 在基金管理人登记及相关高管人员提出变更申请时, 应上传有关高管人员任职的相关决议及劳动合同。

此外, 针对个别私募机构为完成其登记备案寻找具备基金从业资格的外部人员进行“挂靠”的行为, 基金业协会明确表明其违反了《私募投资基金管理人登记和基金备案办法(试行)》, 属于“在私募基金管理人登记、基金备案及其他信息报送中提供虚假材料和信息”的行为, 将按照相关规定进行处罚。《问答十二》的出台有望整治具备基金从业资格的人员“挂靠”多家机构的乱象, 并将对一些空壳私募的灰色保壳行动予以严厉的打击。

AMAC Solicits Public Comments on Draft Trial Administrative Measures on Private Investment Fund Service Business

基金业协会就私募投资基金服务业务管理办法征求意见

On November 21, 2016, AMAC released the *Draft Trial Administrative Measures on Private Investment Fund Service Business* (the "Draft Service Measures") for public comments, with an aim to regulate various professional services provided by third parties to private investment funds.

The Draft Service Measures allow the fund managers to outsource various fund services such as fundraising, investment consulting, fund unit registration, fund valuation calculation and information technology system services to qualified third party service providers.

According to the Draft Service Measures, the service providers intending to engage in the aforesaid fund services business should complete the registration with AMAC and become members thereof, and commence the service business within 6 months after the registration; otherwise they will be required to deregister with AMAC. It is noteworthy that a PRC legal opinion is one of the application documents required for registration of a service agency, which means AMAC will adopt the similar regulating approach applied to fund managers. To be specific, AMAC will leave law firms to run necessary inspections on service

agencies to evaluate whether they satisfy all requirements for providing relevant fund services rather than conducting substantive examination on its own. No clear rules concerning the form and content of legal opinions have been released by AMAC yet.

The Draft Service Measures are drafted based on the *Guidance on Outsourcing Services for Fund Business* issued by AMAC at the end of year 2014, which administrated the service activities provided by the service agencies through filing system. So far AMAC has published a filing name list which consists of 44 service agencies. The Draft Service

Measures constitute a significant part of AMAC's self-regulating rule system and the official version, along with a series of supporting documents is expected to be issued soon.

2016年11月21日，基金业协会发布了《私募投资基金服务业务管理办法（试行）（征求意见稿）》（“《私募服务办法》”），以规范私募基金服务行业业务。

根据《私募服务办法》，基金管理人可委托服务机构为其提供基金募集、投资顾问、资产保管、份额登记、估值核算、信息技术系统等服务业务，提供上述服务业务的服务机构应在基金业协会完成登记并成为基金业协会的会员，而在完成登记之后连续6个月没有开展基金服务业务的服务机构将

被注销登记。需要注意的是，服务机构的登记材料中有一项为法律意见书，即基金业协会采取了和监管基金管理人类似的方式，不对服务机构进行实质审查，而是交由律师事务所对服务机构是否符合要求进行核查和判断。基金业协会目前尚未对法律意见书的形式和内容做出明确的规定。

本次向社会公开征求意见的《私募服务办法》是在基金业协会于2014年底发布的《基金业务外包服务指引（试行）》的基础上起草的，该指引对基金业务服务活动主要采取备案管理，截至目前基金业协会已先后公布三批共44家服务机构备案名单。虽然《私募服务办法》尚处于征求意见的阶段，但从内容上来看，该《私募服务办法》是自律规则体系中的重要组成部分。正式办法预计将于不久后落

地，同时基金业协会也将持续发布其他一系列的配套规则，以期进一步完善私募基金的法律规范体系。

FOREIGN INVESTMENT / 外商投资

MOFCOM Abolished Several Regulations including the *Administrative Measures on Foreign Investment in Commercial Fields*

商务部废止《外商投资商业领域管理办法》等部门规章

On November 3, 2016, the Ministry of Commerce ("MOFCOM") issued the *Decision on Abolishing Several Regulations* (the "Decision"), to abolish 16 regulations including the *Administrative Measures on Foreign Investment in Commercial Fields* and relevant supplementary rules (collectively, the "Administrative Measures"). The Decision takes effect upon promulgation.

We understand that the abolishment of the Administrative Measures was mainly driven by the implementation of the filing system for foreign-invested enterprises (please see the October 2016 issue of *Han Yi Monthly Newsletter* for more details). After the abolishment, if the proposed foreign investment in commercial fields falls outside the restricted and prohibited sectors as listed in the *Catalogue of Industries for Guiding Foreign Investment (2015 Revision)*, then only online filing will be required and there

is no need to obtain any approval from competent MOFCOM office. However, if a commercial enterprise to be established by foreign investors plans to engage in restricted sectors therein (such as wholesale of grain and cotton), the approval will still be a must (the specific approval measures and procedures remain to be further clarified by relevant government authorities).

2016年11月3日，商务部公布《商务部关于废止部分规章的决定》，决定废止包括《外商投资商业领域管理办法》及其补充规定（合称“《管理办法》”）在内的共十六件部门规章，该决定于公布之日起施行。

我们理解，商务部本次废止《管理办法》是为了顺应外商投资企业备案制（详细内容请参见我所2016年10月刊 *China Regulatory Updates*）的实施，即如果外国投资者设立商业企业从事的是《外商投资产业指导目录（2015年修订）》的限制类和禁止类之外的项目，则仅需在线办理备案手续而无需取得商

务主管部门的批准。而如果商业企业从事的是其中的限制类项目（如粮食、棉花批发），则仍应报商务主管部门审批，但具体的审批办法和程序尚待相关部门予以进一步明确。

OUTBOUND INVESTMENT AND FINANCING / 境外投、融资

China to Tighten up Control over Outbound Investment and Lending Activities

中国拟收紧境外投资及放款

The State Council is reportedly set to announce soon a series of control measures on Chinese companies seeking to make outbound investments, in an effort to deal with the continuous depreciation of RMB and slow a surge in fast and giant capital flight through various channels.

It is generally believed that those measures would subject many overseas deals to stricter regulatory oversight and no approval or filing for various types of overseas transactions will be honored in principle by the relevant government authorities.

It is reported that overseas transactions that would be covered by the pending rules include foreign acquisitions with large value, outward foreign direct investments made by onshore limited partnerships, companies with capital scale smaller than their domestic subsidiaries or

newly established companies, small percent equity investments in overseas-listed companies, and participation in the delisting of overseas-listed Chinese companies. If the rumored measures are in place, overseas investments by Chinese companies, especially those privately-placed funds whose overseas investments are made through limited partnerships, will be inevitably subject to greater restrictions.

Furthermore, it is said that regulatory authorities will further clamp tighter controls on offshore lending provided by PRC onshore companies to offshore entities. Equity relationship between the onshore lender and the offshore borrower is required and the lender needs to complete the registration with the competent local foreign exchange administration office

before it grants any offshore loan. A macro-prudential management system will be implemented to restrict the net capital outflows through setting a cap on the onshore lenders' overseas lending amount. We will keep an eye on whether formal documents in this connection will be released in the near future.

在人民币持续贬值、资金借助各种通道加速流出国内的背景下，近期，有传闻称国务院将就境内企业境外直接投资出台一系列管控措施，对多项对外投资业务实施规范监管、从严控制，原则上不予备案或核准。传闻中将受严格管控的业务包括大额投资项目、合伙企业的对外直接投资、母子大、快设快出、小比例参股境外上市公司、参与中概股退市等。如若该传闻属实，则中国企业跨境并购投资将会受到极大的限制，特别是对于私募基金来说，其以有限合伙形式进行对外投资的方式将面临挑战。

此外，有消息称将监管部门将进一步加强对境内企业人民币境外放款业务的管理，要求放款人在办理境外放款业务前在所在地外汇管理部门进行登记，并对境外放款实行本外币一体化的宏观审慎管理，通过设置境外放款额度对净流出进行明确限制，还要求放款人和境外借款人之间应存在股权关系。相关正式文件是否会于近期出台，我们将持续关注。

EDUCATION / 教育法

Amended *Private Education Promotion Law* Released 修订版《民办教育促进法》出台

On November 7, 2016, the Standing Committee of the National People's Congress issued a decision to amend the *Private Education Promotion Law* and the newly revised law, which adopts a classified administration and registration system for different types of private schools, will take effect from September 1, 2017. Under the new law, sponsors may elect to establish a non-profit private school or a for-profit private school without engaging in compulsory education sector.

Provisions related to non-profit private schools and for-profit private schools under the new law mainly include the following:

- (i) **School-Running Proceeds.** Sponsors of non-profit private schools are not allowed to obtain any profit from the school-running activities and all school-running proceeds shall be used for the school operation only, while sponsors of for-profit private ones may get profit share from the school-running proceeds according to applicable laws and regulations (including the Company Law).
- (ii) **Fee Charging Method.** The fee charging method for non-profit private schools will be formulated by relevant people's government, while that for for-profit private ones will be determined by the schools independently and adjusted by

the market.

- (iii) **Supporting Measures.** The relevant people's government may take multiple measures from various aspects to support operation of private schools, including purchase service, student loans, scholarships and stipends, lease or transfer of unused state-owned property. More supporting measures such as government subsidies and fund rewarding and donation may be offered to non-profit private schools by the government.
- (iv) **Tax Benefits.** Private schools will enjoy the state preferential tax treatments. The tax benefits enjoyed by public schools will be also provided to non-profit private schools.
- (v) **Land Policies.** When a non-profit private school is proposed to be established or expanded, it will enjoy the same preferential treatments on land use right offered by the relevant local people's government as enjoyed by a public school (e.g., providing allocated land). Where a for-profit private school is concerned, the relevant people's government should supply the land according to applicable law.
- (vi) **Choice for Existing Private Schools.** As to those private schools established prior to

release of the new law, their sponsors may choose the registration type of the schools at their sole discretion. If the sponsor determines to register the private school as a non-profit one, then the school's articles of association should be amended before it continues to operate. If the sponsor intends to register the private school as a for-profit one, it should go through the financial settlement, pay the relevant taxes and reregister the school to further operate it.

Note that the governing registration authorities, detailed requirements and procedures required for registration or registration of newly established and existing private schools (as the case maybe) remain to be further clarified by a series of supporting rules. Nevertheless, with the release of the newly-amended law, for-profit private education market is expected to be a valuable investment hot land and will attract more private investors.

2016年11月7日，全国人大常委会公布了关于修改《中华人民共和国民办教育促进法》的决定，修改后的新法将于2017年9月1日起施行。本次修改明确提出对民办学校实施分类管理和登记制度，民办学校的举办者可以自主选择设立非营利性或者营利性民办学校，但是不得设立实施义务教育的营利性民办学校。

该法针对非营利性及营利性民办学校的主要规定如下：

- (i) 办学收益。非营利性民办学校的举办者不得取得办学收益，学校的办学结余全部用于办学；而营利性民办学校的举办者可以取得办学收益，学校的办学结余依照公司法等有关法律、行政法规的规定处理。
- (ii) 收费办法。非营利性民办学校的收费办法由政府制定，而营利性民办学校的收费标准实行市场调节，由学校自主决定。
- (iii) 扶持政策。政府可以对民办学校采取购买服务、助学贷款、奖助学金和出租、转让闲置的国有资产等措施等多项扶持措施；对非营利性民办学校还可以采取政府补贴、基金奖励、捐资激励等扶持措施。
- (iv) 税收优惠。民办学校享受国家规定的税收优惠政策；其中，非营利性民办学校享受与公办学校同等的税收优惠政策。
- (v) 土地政策。新建、扩建非营利性民办学校，人民政府应当按照与公办学校同等原则，以划拨等方式给予用地优惠；新建、扩建营利性民办学校，人民政府应当按照国家规定供给土地。
- (vi) 已设民办学校的选择权。对于此次新法公布前已设立的民办学校，选择登记为非营利性民办学校的，需修改学校章程继续办学；选择登记为营利性民办学校的，应当进行财务清算，并缴纳相关税费，重新登记，继续办学。
- 有关新设及现存的民办学校涉及的具体登记机关、登记要求及程序等仍有待相关配套细则的出台来予以进一步落实。可以预期的是，随着新法的出台，营利性民办教育将吸引更多民营资本进入，并有望成为投资热点。

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