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PRIVATE FUND / 私募基金

CSRC Tightened Supervision over Private Funds 证监会发布私募投资基金监管新规

2021年1月8日，中国证券监督管理委员会（“证监会”）发布了《关于加强私募投资基金监管的若干规定》（“《规定》”），《规定》自发布之日起施行。《规定》是继2014年《私募投资基金监督管理暂行办法》以来，证监会发布的首个直接针对私募基金业务的监管规范。虽然《规定》的内容多为中国证券投资基金业协会过往发布的自律规则等规范要求的重申与细化，但作为规范性文件发布，提高了监管层级，也相应加强了对违规行为的执法力度。《规定》要点如下：

1. **名称及经营范围**：要求私募基金管理人应当在其名称中标明“私募基金”、“私募基金管理”和“创业投资”三种字样之一，并在经营范围中体现受托管理私募基金特点。就实践中大量已完成登记、但不符合该要求的管理人，适用“新老划断”原则，无需变更名称和经营范围。
2. **投资范围**：重申私募基金财产不得用于借贷、担保、明股实债等“负面清单”内的投资活动。同时考虑到实践中广泛使用的过桥投资贷款，允许以股权投资为目的对被投资企业提供一年期限以内借款或担保，但借款或担保余额不得超过私募基金实缴金额的20%。
3. **集团化运作**：重申同一实际控制人设立两家以上管理人的限制性规定，要求说明设立多个管理人的合理性和必要性，建立完善的合规风控制度。
4. **合格投资者**：明确国务院金融监督管理部门监管的机构依法发行的资产管理产品、合格境外机构投资者（QFII）和人民币合格境外机构投资者（RQFII）为合格投资者。解决了实践中部分资管产品是否为合格投资者的争议，响应了2020年9月颁布的合格境外投资者新规（*具体分析请见我所《每月立法动态》2020年9-11月合刊*），一定程度上有利于缓解管理人的募资压力和该等产品对私募基金的投资。

On January 8, 2021, the China Securities Regulatory Commission (or CSRC) issued the *Several Provisions on Strengthening the Supervision of Private Investment Funds* (the “Rules”), which have taken effect from the date of issuance. The Rules have showed the PRC government’s determination and efforts to strengthen the regulation of the private fund industry by reiterating and clarifying the regulatory requirements under current self-discipline rules previously released by the Asset Management Association of China (or AMAC). Highlights of the Rules include, among others:

1. **Registration Requirements**. A fund manager who is established after the effectiveness of the Rules is required to include the words “private fund”, “private fund management” or “venture capital” in its registered corporate name, and specify that its core business is investment management in its registered business scope. Notably, the existing fund managers who do not meet the new requirements are not required to make rectifications.
2. **Clarifications on Investment Scope**. In Principle, the private funds are still prohibited from engaging in loan and guarantee activities under the Rules. As an exemption of the restrictions described, the Rules have allowed a private equity fund to provide loans and/or guarantees to its portfolio companies for less than one year, provided the assets of the fund used to make such loan arrangement do not exceed 20% of the total paid-in capital of the funds. Such clarification would dispel the long-standing compliance concerns of the fund managers who involved in short-term bridge loan and convertible bond investments in China.
3. **Regulations on Group Operations**. The Rules optimized the supervision of group private equity fund managers, allowing the same entity to establish more than two fund managers, but require them to truthfully explain the rationality and necessity of establishing multiple managers and formulate well-developed compliance and risk control policies.
4. **Recognition of Certain Qualified Investors**. The industry is pleased to see that the asset management products issued by entities governed by PRC financial regulatory authorities, as well as Qualified Foreign Institutional Investors (QFII), and Renminbi Qualified Foreign Institutional Investors (RQFII) have been officially recognized as qualified investors by the Rules. It has cleared up the previous ambiguities on whether certain asset management products could be deemed as qualified investors and echoed the new rules on QFII and RQFII issued in September 2020 (*please refer to our China Regulatory Updates of September – November 2020 for details*), which to some extent will help to ease the fundraising challenges of the fund managers posed by the pandemic and facilitate such products’ investments into private funds.

FOREIGN INVESTMENT / 外商投资

Hainan FTP Further Relaxed Restrictions on Market Access for Foreign Investments 海南自由贸易港放宽外资准入

为配合党中央、国务院于2020年6月1日发布的《海南自由贸易港建设总体方案》，国家发展和改革委员会、商务部于2020年12月31日联合发布了《海南自由

Following the *Master Plan for the Construction of Hainan Free Trade Port* issued by the Central Committee of the Communist Party of China and the State Council on June 1, 2020, on December 31, 2020, the National Development and Reform

贸易港外商投资准入特别管理措施（负面清单）（2020年版）》（“海南负面清单”），自2021年2月1日施行。

与现行的2020年版全国以及自贸区外商投资负面清单（具体分析请见我所《每月立法动态》2020年7月刊）相比，海南负面清单进一步提高了增值电信、教育、商务服务、制造业、采矿业等领域的开放水平，包括但不限于取消在线数据处理与交易处理业务的外资准入限制，允许境外理工农医类高水平大学、职业院校独立办学，允许外商投资部分涉海南商事非诉讼法律事务、社会调查行业等。

Commission and the Ministry of Commerce jointly released the *Special Administrative Measures on Access of Foreign Investments in Hainan Free Trade Port (the Negative List - 2020 Edition)* (the “Hainan FTP Negative List”), which has taken effect on February 1, 2021.

Compared with the currently effective negative lists for nationwide and the Free Trade Zones (please refer to our *China Regulatory Updates of July 2020 for details*), Hainan FTP Negative List further expanded market access to foreign investment in various sectors, such as value-added telecommunications, education, business services, manufacturing and mining. In particular, foreign investors are allowed to engage in online data and transaction processing businesses, non-litigation legal services and social investigation activities, and overseas high-level universities and vocational colleges specializing in science and engineering, agriculture and medicine are now permitted to operate schools in Hainan independently.

CROSS-BORDER TRADE / 跨境经贸

China's Blocking Rules Officially Launched

2021年1月9日，商务部颁布《阻断外国法律与措施不当域外适用办法》（“《阻断办法》”），自公布之日起施行。《阻断办法》针对的是外国法律与措施不当禁止或者限制中国公民、法人或者其他组织与第三国（地区）及其公民、法人或者其他组织进行正常经贸往来的情形。

具体而言，根据《阻断办法》，中国公民、法人或者其他组织遇到外国法律与措施禁止或限制其与第三国主体进行正常经贸活动的，有义务在30天内向商务部报告。经相关部门评估确有不当域外适用情形的，商务部将发布禁令，要求不得承认、执行、遵守该等外国法律与措施。就违反上述报告义务及不遵守上述禁令的行为，《阻断办法》规定了相应的处罚措施以确保执行效力，同时为受外国法律和制裁措施影响的中国企业提供了救济渠道。

《阻断办法》是中国政府在当前的中美贸易战等国际形势背景下，结合欧盟等境外立法经验，在法律层面对于他国对华制裁政策的反制；但其目前仅为框架性的规定，如何落实及具体影响仍有待根据后续细则及实践进一步观察。

《阻断外国法律与措施不当域外适用办法》出台

MOFCOM released the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures* (the “Rules”) effective on January 9, 2021. The Rules applied to situations where the extraterritorial application of foreign legislation and measures, unjustifiably prohibits or restricts the Chinese entities (including the PRC citizens, legal persons or other organizations) from engaging in normal economic, trade and related activities with a third state (or region) or its citizens, legal persons or other organizations. Many elements of the new Rules appear to derive from the EU's Blocking Statute.

According to the Rules, if a Chinese firm or individual is prohibited or restricted from engaging in normal economic or trade activities with a third country entity or individual due to foreign laws or measures with long-arm jurisdiction, it shall file a report with MOFCOM within 30 days. Upon thorough assessment and consideration, MOFCOM may issue a prohibition order that prohibit the recognition of, the enforcement of, and the compliance with such foreign legislation or measures. Any failure to fulfil the above reporting obligation or comply with the prohibition order will expose such Chinese party to penalties. The Rules also provided remedies to the Chinese entities who suffer losses as a result of the unjustifiable extraterritorial application of non-Chinese laws and measures.

Amid the rising tensions between the US and China, the promulgation of the Rules by MOFCOM is widely believed to be a direct response to and a counter measure against the ongoing sanctions imposed upon Chinese entities by US. However, the new Rules have only outlined the basic principles, and we are expecting specific implementing rules and detailed guidelines from the regulatory authorities in the future.

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