

金融法律热点问题

简评《私募登记备案办法》(征求意见稿)对外资私募基金管理人的影响

2022年12月30日,中国证券投资基金业协会(“基金业协会”)发布通知,就《私募投资基金登记备案办法(征求意见稿)》(“《私募登记备案办法》”)及配套指引公开征求意见。《私募登记备案办法》的出台结合了基金业协会近年来登记备案的实践经验,在现行《私募投资基金备案须知(2019年版)》以及2022年6月更新的私募基金管理人登记和私募基金备案材料清单的基础上对私募基金管理人登记及私募基金备案的规则做出全面的整合和统一的规范。我们针对外资私募基金管理人主要关注的问题作以下简要提示:

一、实缴资本的要求

《私募登记备案办法》第八条要求私募基金管理人实缴货币资本不低于1000万元人民币。从已经登记的外资私募基金管理人来看,大多数都能满足实缴货币资本不低于1000万人民币的要求。实践中,不少地方政府对于申请新设私募基金管理人的公司也会对于其注册资本有“软性”最低要求。但一般而言,资本约束主要针对的是金融机构,对于私募基金管理人,更侧重于关注其投资管理能力而非资本能力。我们理解监管机构提高私募基金管理人准入门槛,将其纳入“类金融机构”管理模式的出发点,但过高的实缴资本要求可能对行业造成负担,不利于“行业内”从业人员创立新的管理机构。

该等要求是否最终会影响整个行业的长远发展是监管机构需要进一步斟酌的问题。此外,现行QDLP试点机制允许在上海设立的外资私募证券投资基金管理人(WFOE PFM)与其下设的QDLP子公司共享资本金,目前实践中QDLP子公司常见的注册资本为200万元人民币。QDLP子公司是否仍可豁免此要求仍有待澄清。

二、高管团队持股的豁免

根据《私募登记备案办法》第八条以及《私募基金管理人登记指引第1号——基本经营要求(征求意见稿)》(“《登记指引1号》”)第六条的规定,私募基金管理人的法定代表人、执行事务合伙人及其委派代表、负责投资管理的高级管理人员应当合计持有私募基金管理人一定比例的股权或者财产份额,实缴资本合计应当不低于私募基金管理人实缴资本的20%,或者不低于最低实缴货币资本1000万元人民币的20%(即200万元人民币)。《私募登记备案办法》同时规定了,外资持股比例合计不低于25%的私募证券投资基金管理人,以及符合规定的其他私募基金管理人,不适用前述的规定。除了外资持股比例合计不低于25%的外资私募证券投资基金管理人,目前市场上还存在外资持股比例合计不低于25%的外资私募股权基金管理人(包括取得地方QFLP/QDIE试点资格并在中国境内募资的私募股

权基金管理人)以及取得地方 QDLP 试点资格并在基金业协会登记为其他类的私募基金管理人。这些机构是否可以作为符合基金业协会规定的其他私募基金管理人,从而不适用高管团队持股的要求尚不明确。显然,市场上众多知名全球投资管理人可能客观上没有需要或者说不希望本土管理团队在其境内设立的私募基金管理机构中持股,因此建议在正式出台的《私募登记备案办法》明确将 QFLP 和 QDLP 管理机构以及外资持股比例合计不低于 25%的其他外资股权管理机构也纳入高管团队持股的豁免范围内。

三、高管从业经验要求

基金业协会于 2022 年 6 月发布的私募股权基金管理人和私募证券投资基金管理人登记材料清单中明确要求,申请机构高管人员应当具备 3 年以上与拟任职务相关的证券投资/股权投资、投行、基金、期货、经济金融管理、法律、会计、拟投领域相关产业科研等等相关工作经历,具有与拟任职务相适应的管理经历和经营管理能力。《私募登记备案办法》中要求管理人的法定代表人、执行事务合伙人及其委派代表以及负责投资的高级管理人员的相关工作经验(证券、基金、期货投资管理或股权投资管理或相关产业管理等相关工作经验)要满 5 年,《私募基金管理人登记指引第 3 号——法定代表人、高级管理人员、执行事务合伙人及其委派代表(征求意见稿)》(“《登记指引 3 号》”)进一步列明了符合前述工作经验的情形。由此可见,《私募登记备案办法》进一步提高了私募基金管理人高管人员工作经历的年限要求,《登记指引 3 号》列举的符合从业经历的标准也较高,对于主要依赖于本地社会招聘高管团队的外资私募基金管理人而言,其可以选择的适格人员范围进一步缩减。另一方面,前述规定也对拟向管理岗位转型的本土从业人员设置了更高的门槛。

四、最终投资者豁免穿透的情形

《私募登记备案办法》第二十七条第四款规定以合伙企业等非法人形式投资私募基金的,除另有规定外私募基金管理人、基金销售机构应当穿透核查最终投资者是否为合格投资者,并合并计算投资

者人数。《私募投资基金监督管理暂行办法》已经明确规定了该等穿透核查的要求,并且规定了不再穿透核查最终投资者是否为合格投资者和合并计算投资者人数的情形(如依法设立并在基金业协会备案的投资计划等可不穿透),但《私募登记备案办法》并未规定前述豁免穿透情形。此外,目前私募基金管理人和代销机构有通过设立一层信托计划或保险资管计划来向最终投资者募集资金的实践操作。对于未在基金业协会备案,而在中信登或中保登备案的信托计划或保险资管计划是否属于豁免穿透最终投资者的情形,在法律法规和基金业协会规则层面尚不明确。根据我们的观察,实践中信托计划和保险资管计划已视同合格投资者,无需穿透核查最终投资者和合并计算投资者人数,建议基金业协会借此机会在《私募登记备案办法》中明确予以豁免穿透以与目前的监管实践保持一致。

五、对 QDLP 管理人和 QDLP 基金的影响

《私募登记备案办法》第十一条对高管兼职做了进一步详细的规定,法定代表人、高级管理人员、执行事务合伙人及其委派代表对外兼职应当具有合理性;而合规风控负责人不得对外兼职,除非对《私募登记备案办法》第十七条规定的集团化私募基金管理人另有规定的除外。此外,《登记指引 1 号》第八条规定私募基金管理人应当具有独立、稳定的经营场所,不得使用共享空间等稳定性不足的场地作为经营场所,不得存在与其股东、合伙人、实际控制人、关联方等混同办公的情形。现行 QDLP 试点机制中,允许外资私募证券投资基金管理人(WFOE PFM)与其下设的 QDLP 子公司共享员工和办公场地。鉴于该等实践操作已经存续多年,建议在《私募登记备案办法》及其配套指引正式出台后能继续执行。

《私募登记备案办法》第四十四条规定,当私募基金的基金财产主要在境外进行投资,协会可以视情形对私募基金管理人拟备案的私募基金采取提高投资者要求、提高基金规模要求、要求基金托管、要求托管人出具尽职调查报告、加强信息披露、提示特别风险、额度管理、限制关联交易,以及要求其出具内部合规意见、提交法律意见书或者相关

财务报告等措施。该等审慎备案规定将直接适用于所有 QDLP 基金和 QDIE 基金。目前实践中, QDLP 基金管理人普遍通过与境内代销机构合作来进行募资, 如将底层是境外投资标的的 QDLP 基金纳入审慎备案范畴, 会使得 QDLP 基金管理人和境内代销机构均面临更高的内部风控要求, 可能会给目前已较为成熟的 QDLP 私募基金销售模式造成不利影响。

我们的观察

该征求意见稿尚未明确《私募登记备案办法》施行之后是否适用现有私募基金管理人和私募基金或者新老划断或给予一定的过渡期。考虑到《私募登记备案办法》的出台将对整个私募基金行业产生深远持久的影响, 建议对有关问题做出进一步澄清, 以消除外资机构的担忧。我们将持续关注并及时与我们的客户分享最新进展。

谢青 合伙人 电话: 86 21 2208 6238 邮箱地址: xieq@junhe.com
张弛 合伙人 电话: 86 21 2208 6177 邮箱地址: zhangchi_Austin@junhe.com
张琳 律师 电话: 86 21 2283 8271 邮箱地址: zhangl_Joyce@junhe.com
罗丹晨 律师 电话: 86 21 2283 8320 邮箱地址: luodch@junhe.com

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Financial

A Brief Commentary on the Impact on Foreign-Invested Private Fund Managers of the Measures for Private Fund Manager Registration and Private Fund Filing (Draft for Comment)

On December 30, 2022, the Asset Management Association of China (“AMAC”) announced that it is soliciting public comments on the *Measures for Private Fund Manager Registration and Private Fund Filing (Draft for Comments)* (the “Measures”) and the ancillary guidelines. The Measures aim to formulate rules to uniformly govern PFM registration and fund filing in addition to the *Instructions on Filing of Private Investment Funds (2019 Version)*, the checklists for private fund manager registration (the “PFM Registration”) and private fund filing (the “Fund Filing” - updated by the AMAC in June 2022) and in consideration of the most recent regulatory practice of the AMAC. We have summarized below some of the key points of most concern to foreign-invested PFMs:

I. Requirements on Paid-in Capital

Article 8 of the Measures stipulate that the paid-in monetary capital of a PFM shall not be less than RMB 10 million and most existing foreign-invested PFMs can meet this paid-in monetary capital requirement. In practice, some local governments may have “soft requirements” on the minimum registered capital of newly established PFMs. It is generally believed,

however, that capital thresholds are mainly set for licensed financial institutions, while for PFMs, the focus should be primarily on their investment management capabilities rather than their capital capabilities. We understand the regulatory intention is to raise the entry threshold for PFMs and to subject PFMs to regulations similar to that of financial institutions. However, such an excessively high paid-in monetary capital requirement may place a heavy regulatory burden on managers, which may be disadvantageous for practitioners in the industry to establish new PFMs. In this regard, the regulators may evaluate and decide whether to impose such a requirement in view of the long-term impact on the development of the industry. In addition, the current QDLP (qualified domestic limited partner) pilot program permits a QDLP subsidiary established in Shanghai to share registered capital with its WFOE PFM parent to qualify as a PFM. At present, the common practice for registered capital of those QDLP subsidiaries is RMB 2 million. Clarification needs to be made if this is still treated as an exception exempting QDLP subsidiaries from this requirement.

II. Exemption of Shareholding for Senior Management Personnel

Pursuant to Article 8 of the Measures and Article 6 of the *Guidelines No. 1 for Registration of Private Fund Manager: Basic Operational Requirements (Draft for Comments)* (the “Guidelines No. 1”), a PFM’s legal representative, executive partner and its appointed representative, and senior management personnel in charge of investment management shall collectively hold a certain percentage of equity interest or property shares in the PFM, and their total paid-in capital shall not be less than 20% of the PFM’s paid-in capital or not less than 20% of the minimum paid-in monetary capital of the PFM (i.e., RMB 2 million). The Measures further clarify that these requirements do not apply to WFOE PFMs with a total foreign shareholding of no less than 25% and other PFMs that meet the relevant requirements. We understand that, in addition to the afore-mentioned WFOE PFMs with a total foreign shareholding of no less than 25%, there are foreign-invested equity-type PFMs (such as equity-type PFMs that have obtained the QFLP/QDIE pilot qualifications and raise capital in China) and foreign-invested other-type PFMs that have obtained the QDLP pilot qualifications. In this respect, if those foreign-invested equity-type PFMs and other-type PFMs have a total foreign shareholding of no less than 25%, it is unclear whether they would be regarded as “other PFMs that meet the relevant requirements” as provided in the Measures and therefore their senior management personnel could also be exempted from the shareholding requirement. It is our observation that many well-known global managers may have no need or may not wish for their local management team to hold shares in the onshore PFM subsidiaries. Therefore, we suggest that the Measures, in the final version after the formal promulgation, clarify that the same shareholding exemption would apply to QFLP and QDLP fund managers, as well as other foreign-invested private equity fund managers with a total foreign shareholding of no less than 25%.

III. Work Experience of Senior Management Personnel

In the checklist for equity-type and securities-type PFM registration released by the AMAC in June 2022, the AMAC explicitly requires that the senior management personnel of an applicant shall have at least 3 years relevant work experience in securities investment/equity investment, investment banking, funds, futures, economic and financial management, law, accounting, research in the relevant industry of the proposed investment field, or other related work experience, and shall have management experience and operation and management capabilities that match the proposed position. The Measures provide that a PFM’s legal representative, executive partner and its appointed representative, and the senior management personnel in charge of investment management shall have at least 5 years relevant work experience (i.e., work experience in securities, funds or futures investment management, equity investment management, relevant industry management, or other relevant work experience). The details of the work experience requirements are further set out in the *Guidelines No. 3 for Registration of Private Fund Manager: Legal Representative, Senior Management Personnel and Executive Partner and Its Appointed Representative (Draft for Comments)* (the “Guidelines No. 3”). In other words, the Measures further increase the length of work experience of PFM’s senior management personnel, and we note that Guidelines No. 3 also set forth relatively high work experience standards, which further narrows down the potential local candidates that foreign-invested PFMs may recruit as their local senior management personnel. The requirements also set a higher threshold on local practitioners who wish to take senior management positions.

IV. Exemption of Look-Through Up to Ultimate Investors

According to paragraph 4 of Article 27 of the

Measures, unless otherwise provided, if non-legal persons such as partnership enterprises invest in private funds, PFMs and fund distribution agencies shall look-through up to verify whether the ultimate investors are qualified investors and calculate the number of investors on a consolidated basis. The *Interim Measures for Supervision and Administration for Private Investment Funds* have explicitly set out such looking-through requirements and have further specified the circumstances whereby the requirement of verifying if the ultimate investors are qualified investors and calculating the number of investors on a consolidated basis can be exempted (e.g., investment plans manufactured pursuant to the law and filed with the AMAC will be exempted from such looking-through requirements). However, the Measures are silent on the exemption of looking-through requirements. In addition, some PFMs and fund distribution agencies raise funds from ultimate investors through setting up a trust plan or insurance asset management plan between the private fund and the ultimate investors. These trust plans or insurance asset management plans are not filed with the AMAC but are filed with the China Trust Registration Co., Ltd. or the China Insurance Asset Registration and Trading System Co., Ltd.. Currently, neither the law nor the AMAC rules have clarified whether trust plans or insurance asset management plans could be exempted from the looking-through requirement if investing in private funds. Based on our observations, trust plans and insurance asset management plans are deemed as qualified investors, and thus there is no need to look-through to verify the ultimate investors and calculate the number of investors on a consolidated basis. We suggest the Measures exempt trust plans and insurance asset management plans from the looking-through requirement to stay consistent with the current regulatory practice.

V. Impact on QDLP Fund Managers and QDLP Funds

Article 11 of the Measures provide details on the dual-hatting restrictions on senior management personnel. It stipulates that it must be reasonable for a PFM's legal representative, senior management personnel, executive partner and its appointed representative to take any concurrent positions, while a PFM's compliance officer is prohibited from holding concurrent positions unless otherwise provided for PFMs within the same group, as stated in Article 17 of the Measures. In addition, pursuant to Article 8 of the Guidelines No. 1, PFMs shall have independent and stable business premises, and shall not use shared office space or other premises of insufficient stability as business premises, nor shall PFMs share offices with their shareholders, partners, de facto controllers, or related parties. WFOE PFMs approved in Shanghai are allowed to share staff and business premises with their QDLP subsidiaries. This is a long-established exemption which we hope will continue after the promulgation of the Measures and the ancillary guidelines.

If private fund assets will be mainly invested in overseas markets, the AMAC may, according to the authorization under Article 44 of the Measures, adopt additional filing requirements on the relevant private funds. This could include imposing higher requirements on investors, raising requirements for the fund size, requiring mandatory custody of the fund assets and requiring the custodian to issue a due diligence report. It could also include enhancing information disclosure requirements, disclosing special risk factors, implementing quota administration, restricting related-party transactions, and requiring to issue an internal compliance opinion, submit a legal opinion or to submit relevant financial reports. These so called "prudential filing" requirements will apply to all QDLP funds and QDIE funds as they mainly invest in overseas markets. In practice, QDLP fund managers generally cooperate with domestic distribution agencies to raise capital. If QDLP funds with

offshore assets underlying are subject to the prudential filing requirements, both QDLP fund managers and domestic distribution agencies may face a higher compliance burden for internal risk control, which may adversely affect the existing distribution model of QDLP funds which currently prevails.

Our Observations

Whether the Measures, upon formal promulgation,

will have a retrospective effect as well as a grace period on the existing PFMs and private funds is not spelled out. Considering that the promulgation of the Measures will have a profound and lasting impact on the whole private fund industry, we suggest that the AMAC provide more clarification on the relevant issues to address the concerns of foreign-invested institutions. We will continue to monitor the situation and keep our clients apprised of the latest developments.

Natasha XIE	Partner	Tel: 86 21 2208 6238	Email: xieq@junhe.com
Austin ZHANG	Partner	Tel: 86 21 2208 6177	Email: zhangchi_Austin@junhe.com
Lin ZHANG	Associate	Tel: 86 21 2283 8271	Email: zhangl_Joyce@junhe.com
Danchen LUO	Associate	Tel: 86 21 2283 8320	Email: luodch@junhe.com

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