

## 金融法律热点问题

### 基金业协会出台更新版私募基金备案须知

经过一年半的反复讨论和修改，中国证券投资基金业协会(以下简称“**基金业协会**”)于2019年12月23日发布新版《私募投资基金备案须知》(以下简称“**《备案须知》**”),对私募基金的备案工作做出了相比旧版备案须知更为细致和全面的规范。我们注意到新版相关规定有严有松,在强调不能突破监管底线的同时又基于现实考虑有所侧重,体现了适度监管的原则。下文对《备案须知》的若干重要条款予以梳理。

#### 一、重申若干监管原则

《备案须知》延续了之前监管规定强调的重点,如禁止“伪私募”,禁止“资金池”、禁止“刚性兑付”等,并在如下方面重申了监管原则:

- (1) 首先,列举了不符合“基金”本质从而不应给予备案的情形。变相从事金融机构信贷业务或直接投向金融机构信贷资产;从事经常性、经营性民间借贷活动或投向与私募投资基金冲突业务的资产属于明确禁止的范围。
- (2) 其次,重申管理人不得从事与私募投资基金有利益冲突的业务,并要求管理人不得将应当履行的受托人责任转委托。同时第一次明文要求私募投资基金的管理人不得超过一家。
- (3) 最后,强调禁止私募基金刚性兑付,变相保本保收益,或明示或者暗示基金预期收益,使投资者产生刚性兑付预期。《备案须知》还特别针对私募证券投资基金规定管理人不得通过

设置增强资金、费用返还等方式调节基金收益或亏损,不得以自有资金认购的基金份额先行承担亏损的形式提供风险补偿,也不得利用分级安排进行利益输送、变相开展“配资”等违法违规业务,违背利益共享、风险共担、风险与收益相匹配的原则。

#### 二、强调托管人的职责

《备案须知》强调了托管人的职责,一方面,规定托管人不得通过合同约定免除其法定职责。在管理人发生异常且无法履行管理职责时,托管人应当按照法律法规及合同约定履行托管职责,维护投资者合法权益。托管人在监督管理人的投资运作过程中,发现管理人的投资或清算指令违反法律法规和自律规则以及合同约定的,应当拒绝执行,并向中国证券监督管理委员会(以下简称“**证监会**”)和基金业协会报告。另一方面,针对私募投资基金通过公司、合伙企业等特殊目的载体(SPV)间接投资底层资产的,《备案须知》还规定通过SPV投资底层资产的私募基金必须托管,且托管人应当持续监督该私募基金与SPV的资金流,事前掌握资金划转路径,事后获取并保管资金划转及投资凭证。

《备案须知》要求基金合同及风险揭示书明确约定,在管理人客观上丧失继续管理私募投资基金的能力时,基金财产安全保障、维持基金运营或清算的应急处置预案和纠纷解决机制。管理人和相关当事人对私募投资基金的职责不因基金业协会依

照法律法规和自律规则执行注销管理人登记等自律措施而免除。已注销管理人和相关当事人应当根据《证券投资基金法》、基金业协会相关自律规则和基金合同的约定，妥善处置在管基金财产。

### 三、穿透核查和合并计算

《备案须知》重申了向合格投资者募集的要求并明确只有在投资者为依法备案的资产管理产品的，方可豁免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。针对实践中存在的通过为单一融资项目设立多只私募投资基金的方式，变相突破投资者人数限制或者其他监管要求的情形，《备案须知》明确禁止管理人违反证监会等金融监管部门和基金业协会的相关规定从事此类行为。

值得注意的是，《备案须知》明确投资者不得汇集他人资金购买私募投资基金，并加重了募集机构的核查责任，即募集机构应当核实投资者对基金的出资金额与其出资能力相匹配，且为投资者自己购买私募投资基金，不存在代持。

### 四、募集推介材料

《备案须知》明确了管理人在私募投资基金招募说明书等募集推介材料中向投资者披露的内容范围，还特别规定了私募股权投资基金对主要意向投资项目的披露义务。

### 五、PE/VC 和资产配置类基金的封闭运作

针对 PE/VC 和资产配置类基金，《备案须知》要求其在备案完成后不得开放认购和赎回，但分红、退出投资项目减资、对违约投资者除名或替换以及基金份额转让除外。满足一定条件的已备案基金可以新增投资者或增加既存投资者的认缴出资，但增加的认缴出资额不得超过备案时认缴出资额的 3 倍。

### 六、备案前临时投资

《备案须知》明确在私募投资基金完成备案前，可以以现金管理为目的，投资于银行活期存款、

国债、中央银行票据、货币市场基金等证监会认可的现金管理工具。放开备案前临时投资响应了市场长期以来的呼声。

### 七、组合投资

出于控制通道业务的目的，《备案须知》对组合投资提出了原则性的要求，即鼓励私募投资基金进行组合投资，并建议基金合同中明确约定私募投资基金投资于单一资产管理产品或项目所占基金认缴出资总额的比例。我们注意到监管层并没有一刀切地制定比例，对此显示出较为务实的态度。

### 八、关联交易及其他对投资者利益的保护机制

《备案须知》针对私募投资基金进行的关联交易要求管理人在基金合同中明确约定涉及关联交易的事前、事中信息披露安排以及针对关联交易的特殊决策机制和回避安排等。除对关联交易的限制性规定外，《备案须知》的多处规定都体现保护投资者利益和公平对待投资者的原则：

#### (1) 关于下设投资单元

《备案须知》第一次明确管理人不得在私募投资基金内部设立由不同投资者参与并投向不同资产的投资单元/子份额，认为这种做法规避了备案义务，属于不公平对待投资者。

#### (2) 关于临时开放日机制

《备案须知》禁止滥用临时开放日机制，要求基金合同中设置临时开放日的，应当明确临时开放日的触发条件，原则上不得利用临时开放日的安排继续认购或申购。

#### (3) 关于业绩报酬

业绩报酬提取应当与私募证券投资基金的存续期限、收益分配和投资运作特征相匹配，单只私募证券投资基金只能采取一种业绩报酬提取方法，保证公平对待投资者。业绩报酬提取比例不得超过业绩报酬计提基准以上投资收益的 60%。私募投资

基金连续两次计提业绩报酬的间隔期不应短于 3 个月。鼓励管理人采用不短于 6 个月的间隔期。

#### (4) 关于同一管理人管理的多个基金

管理人应当公平地对待其管理的不同私募投资基金财产，有效防范私募投资基金之间的利益输送和利益冲突，不得在不同私募投资基金之间转移收益或亏损。在已设立的私募股权投资基金尚未完成认缴规模 70% 的投资（包括为支付基金税费的合理预留）之前，除经全体投资者一致同意或经全体投资者认可的决策机制决策通过之外，管理人不得设立与前述基金的投资策略、投资范围、投资阶段均实质相同的新基金。

### 九、私募资产配置基金

《备案须知》还对私募资产配置基金做出具体规定，包括：(i) 应当主要采用基金中基金(FOF)的

投资方式；(ii) 80% 以上的已投资基金资产应当投资于依法设立或备案的资产管理产品；(iii) 私募资产配置基金投资于单一资产管理产品或项目的比例不得超过该基金认缴出资总额的 20%；(iv) 分级私募资产配置基金投资跨类别私募投资基金的，杠杆倍数不得超过所投资的私募投资基金的最高杠杆倍数要求。

### 十、其他

我们注意到《备案须知》特别提及有关私募投资基金投向债权、收益权、不良资产等特殊标的的相关要求将另行规定。这可能意味着基金业协会需要等待针对此类基金备案的特别规定出台后会重新启动此类基金的备案。

我们将持续关注并及时与我们的客户分享最新的进展。

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## Financial

### AMAC Releases an Updated Version of the Guidance on Private Fund Filing

Following a year and a half of ongoing discussions and amendments, on December 23, 2019 the Asset Management Association of China (AMAC) released an updated version of the *Guidance on Filing of Private Investment Funds* (“Filing Guidance”), which provides a more detailed and comprehensive framework for regulation than the previous version of the Filing Guidance. We note that the regulation of private fund filing has been strengthened in some aspects but relaxed in others. While reiterating the importance of sticking with regulatory bottom lines, the Filing Guidance still focuses on key aspects of responding to market needs, which reflects the desire to maintain a moderate level of regulation. Some key provisions of the Filing Guidance are summarized as follows.

#### I. Regulatory Principles

The Filing Guidance reiterates several key points in previous rules and regulations, such as the prohibition on “fake private funds”, the prohibition on “pooling businesses” and the prohibition on “rigid payment”, and reformulates the regulatory rules in the following aspects:

(1) First, the Filing Guidance lists out items that do not possess the features of a “fund” and

thus shall not be accepted for filing as a private fund. For example, items that have the following features are explicitly prohibited: (i) conducting credit lending (savings) businesses of financial institutions in a disguised form, or directly investing in credit assets of financial institutions; (ii) engaging in regular or operational private lending activities; and (iii) investing in assets of businesses that conflict with the private investment fund business.

(2) Second, the Filing Guidance reemphasizes that a private investment fund manager (“manager”) shall not engage in business that can create conflicts of interest with the private investment fund or entrust the fiduciary duties of the manager to others. For the first time it also expressly provides that a private investment fund shall have no more than one manager.

(3) Third, the Filing Guidance prohibits any rigid payment, guarantee of principal and returns in a disguised form, or any express or implicit indication of expected returns of a private investment fund that may cause investors to have an expectation for rigid payment. Specifically, the Filing Guidance prohibits a

manager of a private securities investment fund from conducting the following activities that violate the principles of sharing interests and risks, and matching risks with returns: (i) adjusting returns or losses of the fund by offering capital enhancement or fee refunds; (ii) using the fund units subscribed with its proprietary capital to bear the losses first so as to provide risk compensation for the fund; and (iii) using structured share classes to conduct interest tunneling or engaging in illegal businesses such as “margin financing” in a disguised form.

## **II. Duties of Custodians**

The Filing Guidance underscores the duties of a custodian. A custodian shall not be exempted from their statutory duties through any contractual arrangement. In the event that a manager encounters any abnormality and is unable to perform their managerial duties, the custodian shall perform the duties of a custodian pursuant to laws, regulations and relevant contracts, as well as safeguard the legitimate rights and interests of investors. If a custodian, in the course of supervising the investment operation of a manager, finds out that the investment or settlement instructions of the manager violate laws, regulations, self-regulatory rules or relevant contracts, they shall refuse to execute such instructions, and shall report to the China Securities Regulatory Commission (CSRC) and the AMAC. Moreover, the Filing Guidance provides that a private investment fund, which indirectly invests in underlying assets through special purpose vehicles (SPVs) in the form of companies and partnerships, shall have a custodian, and the custodian shall maintain constant supervision of the capital flow of the private investment fund as well as the SPVs, identify the capital transfer route in advance, and secure and retain the capital transfer and investment certificates afterwards.

The Filing Guidance requires the fund contract and the risk disclosure letter of a private investment fund to stipulate the emergency disposal plans and dispute resolution mechanisms for safeguarding the fund assets, maintaining the fund operation or liquidating the fund in the event that the manager objectively loses their capacity to continue managing the private investment fund. Moreover, the responsibilities of the manager and relevant parties for a private investment fund shall not be exempted by the deregistration of such manager or other measures taken by the AMAC in accordance with laws, regulations or self-regulatory rules. In the event of deregistration, the deregistered manager and relevant parties shall, in accordance with the *Securities Investment Fund Law*, relevant self-regulatory rules of the AMAC and the fund contract, properly dispose the fund assets under management and protect the legitimate rights and interests of investors in accordance with the law.

## **III. Look-Through For Investor Verification and Aggregation of the Number of Ultimate Investors**

The Filing Guidance reiterates that private investment funds shall only be raised from qualified investors, and also specifies that only a legally filed asset management product can be exempted from the look-through verification to confirm the ultimate investors are qualified investors and the aggregation of the total number of ultimate investors. The Filing Guidance also strictly prohibits a manager from establishing multiple private investment funds for a single financing project to circumvent the restriction on the maximum number of investors or any other regulatory restrictions in a disguised form.

Notably, the Filing Guidance provides that an investor shall not collect funds from others to purchase private investment funds. In addition, it



enhances the verification obligation of a fundraising institution, namely, the fundraising institution of a private fund shall verify that the amount of investment made by the investor matches its funding capacity, and that the investor purchases the private investment fund for itself rather than on behalf of others.

#### **IV. Fundraising and Promotional Materials**

The Filing Guidance stipulates the scope of information that a manager shall disclose to investors in the fundraising and promotional materials, such as the prospectus. It also specifies the disclosure obligation of a private equity investment fund in connection with its main intended investment projects.

#### **V. Close-End Operation of PE/VC Funds and Private Asset Allocation Funds**

The Filing Guidance provides that neither a PE/VC fund nor a private asset allocation fund shall open for subscription or redemption after completion of fund filing, except for dividend distribution, reduction of subscribed capital of investment projects, removal or replacement of defaulting investors, or transfer of fund units. A PE/VC fund or a private asset allocation fund that has completed the filing with the AMAC, upon satisfying certain conditions, may accept new investors or increase the subscribed capital contribution of existing investors, provided that the increased amount does not exceed three times the subscribed capital contribution amount at the time of filing.

#### **VI. Temporary Investments Prior to Filing**

Pursuant to the Filing Guidance, prior to the completion of fund filing, a private investment fund may, for the purpose of cash management, invest in bank current deposits, treasury bonds, central bank notes, money market funds or other

cash management tools recognized by the CSRC. Allowing such temporary investments prior to fund filing is in response to increasing appeals from the market in this regard.

#### **VII. Portfolio Investments**

To suppress channel businesses, the Filing Guidance stipulates the general requirements for making portfolio investments. Namely, private investment funds are encouraged to make diversified portfolio investments and the fund contract of a private investment fund is recommended to specify the proportion of the total subscribed capital of the private investment fund that invests in a single asset management product or project. We note that the regulators take a more pragmatic approach in this regard by not proposing any fixed proportion.

#### **VIII. Related-Party Transactions and Other Protective Mechanisms for Investors**

In regard to related-party transactions conducted by private investment funds, the Filing Guidance requires a manager to specify in the fund contract the ex-ante and interim information disclosure arrangements and the special decision-making mechanism and recusal arrangements for related-party transactions. Apart from the restrictions on related-party transactions, the Filing Guidance proposed a few mechanisms to ensure compliance with the principles of protecting the rights and interests of investors and treating investors fairly.

##### **(1) Prohibition on investment sub-fund**

The Filing Guidance for the first time prohibits a manager from setting up investment units/sub-funds invested by different investors in different underlying assets within a private investment fund. This practice is deemed an evasion of the fund filing obligation and an unfair

treatment of investors.

(2) Ad hoc dealing day

The Filing Guidance precludes any abuse of ad hoc dealing day mechanisms. It provides that if a fund contract stipulates an ad hoc dealing day mechanism, it shall also specify the triggering conditions of such ad hoc dealing day, and in principle, subscription/purchase shall not be continued by using the ad hoc dealing day mechanism.

(3) Performance fee

The performance fee shall match the duration, distribution of returns and investment operation characteristics of a private securities investment fund; a single private securities investment fund may only adopt one performance fee accrual method to ensure fair treatment of investors. The payment ratio for performance fee shall not exceed 60% of the investment returns above the accrual basis for the performance fee. The interval between two consecutive instances of accruing the performance fee by a private investment fund shall not be less than three months. Managers are encouraged to adopt an interval of not less than six months.

(4) Several funds managed by the same manager

A manager shall treat different private investment fund assets under its management fairly, prevent any interest tunneling and conflict of interest between such funds effectively, and shall not transfer gains or losses between different funds. Prior to the completion of investment of 70% of the subscribed amount of an established private

equity investment fund (including a reasonable reservation for payment of fund taxes), except with unanimous consent of all investors or approved under a decision-making mechanism recognized by all investors, the manager shall not establish a new fund with substantially same investment strategies, scope and phases as those of the aforesaid fund.

## **IX. Private Asset Allocation Funds**

The Filing Guidance also specifies the requirements for private asset allocation funds. Namely, (i) a private asset allocation fund shall mainly adopt the investment method of fund-of-funds (FOF); (ii) more than 80% of the fund assets of a private asset allocation fund shall be invested in legally established or filed asset management products; (iii) investment of a private asset allocation fund in a single asset management product or project shall not exceed 20% of the total subscribed capital of the fund; and (iv) where a structured private asset allocation fund invests in a cross-category private investment fund, the leverage ratio shall not exceed the maximum leverage ratio prescribed for any private investment fund it has invested.

## **X. Others**

We note that the Filing Guidance specifically provides that the relevant requirements for private investment funds investing in debts, rights to receive proceeds, non-performing loans assets or other special investment targets shall be stipulated separately. This may imply that certain types of private investment funds may not be accepted for filing until the relevant rules and regulations governing them are promulgated.

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