

January 2019



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PE&VC / 私募股权及创业投资

AMAC Updated Registration Requirements for Fund Managers 基金业协会更新私募基金管理人登记要求

2018年12月7日，中国证券投资基金业协会（“协会”）发布了新版《私募基金管理人登记须知》（2018年12月更新）（“《新须知》”），取代了2017年12月22日发布的《私募基金管理人登记须知》（《老须知》）（具体分析请见我所《每月立法动态》2018年1月刊）。《新须知》总结和列举了《老须知》发布以来管理人登记实务中存在的突出问题（包括虚假出资或抽逃资本、股权代持、股权架构不稳定、关联方从事冲突业务潜在风险等），整合了之前协会发布的各类解答、通知、系统提示等相关内容，进一步明确并加强了对管理人的合规性要求。以下为《新须知》中值得注意的几项主要要求：

1. **细化股权结构要求。**《新须知》加强了对管理人股权架构清晰和稳定的要求，明确规定申请机构不得存在股权代持、股权结构层级过多、循环出资、交叉持股等情形。
2. **增加关联方要求。**《新须知》严禁规避关联方规定，并限制同质化竞争，如对于同一实际控制人下再有新申请机构的，要求说明设置多个管理人的目的与合理性、业务方向区别、如何避免同业化竞争等问题；且该实际控制人及其控制的已登记关联管理人需书面承诺，在新申请机构展业中出现违规情形的，应承担连带责任和自律处分后果。
3. **明确SPV无需申请管理人登记。**《新须知》明确，对于已登记的管理人为某只基金的设立或投资目的而专门设立的、符合规定的特殊目的载体（如无管理人员、无实际办公场所或不履行完整管理人职责），无需申请管理人登记，只需作为关联方披露。
4. **新增中止办理登记情形。**《新须知》引入中止办理流程，列举了11种情形，若申请机构有其中两项及以上情形的，协会将中止办理该类机构管理人登记申请6个月，申请机构应在整改完成后再次提交登记申请。

On December 7, 2018, the Asset Management Association of China (“AMAC”) issued the modified *Private Fund Manager Registration Guideline* (the “New Guideline”) to replace the former version issued on December 22, 2017 (the “Old Guideline”; please refer to our January 2018 issue of *China Regulatory Updates* for details). The New Guideline clarified and enhanced the compliance requirements for managers of private funds by summarizing and enumerating various issues and problems (including false capital contribution or unlawful capital withdrawal, shareholding nominee arrangement, instability of equity structure, engagement in conflict business by related parties, among others) identified in the previous registration practice since the release of the Old Guideline and consolidating various existing applicable rules (e.g., answers to questions, notices, system prompts) previously issued by AMAC. Set forth below are some notable highlights of the New Guideline:

1. **Requirements on equity structure.** The New Guideline stressed that a fund manager shall keep its equity structure clear and stable. Such arrangements as shareholding nominee, multilayer equity structure, capital contributions in different entities with same source, cross-shareholding structure are strictly prohibited by the New Guideline.
2. **Additional regulations on related parties.** According to the New Guideline, any circumvention of regulations on related parties of fund managers is prohibited and conduction of competing business by different fund managers under the same control is discouraged. For instance, if an applicant has an affiliate already registered as a fund manager, (i) the applicant is required to clarify such matters as the purpose and reasonableness for setting up another fund manager(s), the difference of businesses between such affiliate and the applicant and the proposed measures to be adopted to avoid competition between the two affiliated fund managers; and (ii) the actual controller of the applicant and such affiliate are required to undertake that they shall take joint liabilities for any violation by the applicant in its future business operation.
3. **No registration requirement for SPVs.** The New Guideline clarified that a qualified special purpose vehicle (“SPV”) established by a registered fund manager (such as a SPV established without any management personnel or actual office, or not performing functions of a fund manager) for establishment of a fund or investment purpose is not required to be registered as a fund manager with AMAC. Instead, the SPV should be disclosed as a related party of such fund manager.
4. **Introduction of registration suspension mechanism.** The New Guideline for the first time listed 11 situations that may result in suspension of the fund manager registration process. According to the New Guideline, if there exist two or more situations as provided in the list, AMAC will suspend the registration process for 6 months and resumption of the application process will not be accepted by AMAC unless and until the noncompliance has been rectified by the applicant.

FOREIGN INVESTMENT / 外商投资

A New Draft of Foreign Investment Law Released 《外商投资法》草案征求意见

2018年12月26日，全国人民代表大会在其官网公布了《中华人民共和国外商投资法（草案）》（“《18年

On December 26, 2018, a draft of the *Foreign Investment Law* (the “New Draft”) was released by the National People’s

草案”），向社会公开征求意见，征求意见时间截止到2019年2月24日。与2015年1月19日商务部在其官网公布的《中华人民共和国外国投资法（草案征求意见稿）》（“《15年草案》”）（具体分析请见我所《每月立法动态》2015年2月刊）相比，《18年草案》整体上改动较大，在篇幅上进行了大幅缩减，拟在前国民待遇加负面清单管理制度的基础上整合和统一目前外商投资各项规章制度以及地方实践之间存在的差异，统一内外资管理，进一步扩大对外开放。

值得注意的是，曾经在《15年草案》中国家首次尝试规制的VIE结构，并未在《18年草案》里出现。根据《15年草案》，外国投资者通过合同、信托等方式控制境内企业或者持有境内企业权益的投资活动（即VIE结构）属于外国投资的一种形式，商务部在当时发布的立法说明中，对既存的VIE结构如何处理提出了三种考虑方案（申报制、申报及认定制和许可制），但《18年草稿》中未提及相关内容。

MARKET ACCESS / 市场准入

China Introduced Nationwide Negative List for Market Access 市场准入负面清单制度全面实施

2018年12月25日，国家发展和改革委员会、商务部发布《市场准入负面清单（2018年版）》（“《负面清单》”），全面实施市场准入负面清单制度。与2016年3月公布的《市场准入负面清单草案（试点版）》相比，《负面清单》减少了超过一半的禁止和许可事项，并且无论市场主体的性质（内资还是外资；国资还是民营）、规模大小，均可平等进入市场，有利于激发各类市场主体的活力。

值得注意的是，《负面清单》针对当前金融、互联网领域层出不穷的新产品、新商业模式，在禁止准入类新增“禁止违规开展金融相关经营活动”和“禁止违规开展互联网相关经营活动”，以防范该等领域的重大风险。同时，为衔接其他现有的市场准入规则，《负面清单》将现行的《产业结构调整指导目录》、《政府核准的投资项目目录》、《互联网行业市场准入禁止许可目录》中的相关内容一并纳入其中，以确保全国政策的统一性，并方便管理。

CAPITAL MARKET / 资本市场

Measures on Share Redemption of NEEQ-Listed Companies Implemented 新三板回购政策落地

2018年12月28日，全国中小企业股份转让系统有限公司发布了《挂牌公司回购股份实施办法》（“《回购办法》”），表明新三板市场期待已久的股份回购制度正式出台。《回购办法》详细规定了回购方式、实施程序、信息披露、监督管理等内容，进一步完善新三板市场功能，稳定资本市场预期，保护投资者和挂

Congress for public comments by February 24, 2019. This draft was much shorter than the previous version (i.e., the *Draft Foreign Investment Law* (the “2015 Draft”, please refer to our *February 2015 issue of China Regulatory Updates for details*)) issued by the Ministry of Commerce (“MOFCOM”) on January 19, 2015. With the aim to streamline management of investments by both domestic and foreign investors and further boost foreign investment, the New Draft is meant to build a fundamental legal framework by clarifying differences in various existing foreign investment rules and local practice on the basis of pre-establishment national treatment system and negative list for foreign investment.

It is noteworthy that the 2015 Draft tried to clarify the legal ambiguity of VIE structures widely used by foreign and Chinese investors in many industries where foreign investment is restricted or prohibited. According to the 2015 Draft, investment in any domestic enterprise or holding interests in any domestic enterprise by foreign investors via contract, in trust or through other ways (i.e., a VIE structure) is deemed as one form of foreign investment and the MOFCOM, in an official explanation, proposed three solutions to deal with the existing VIE structures (i.e., *filing approach, filing and approving approach and approving approach*). However, all the aforesaid have not been addressed by the New Draft.

On December 25, 2018, the National Development and Reform Commission and the Ministry of Commerce jointly promulgated the *Negative List for Market Access (2018 Edition)* (the “Negative List”), which marks the start of nationwide implementation of negative list approach for market access. Compared with the trial version released in March 2016, the Negative List removed more than half of the items from the prohibited and restricted lists and offered equal entry access for all market players regardless of their natures (e.g., *domestic investors or foreign investors, state-owned enterprises or private entities*) or scale with an aim to stimulate the vitality of investment throughout the country.

It is noteworthy that, in order to effectively monitor and prevent potential risks associated with the new products and new business models incessantly emerging in finance and TMT internet areas, the Negative List newly introduced two items prohibiting market players from engaging in illegal financing activities and illegal internet-related businesses. Moreover, with an effort to consolidate market access restrictions provided in some existing rules and streamline nationwide management, the Negative List has consolidated the restrictions provided in the following rules: the *Directory for the Guidance on Adjustment of Industrial Structure*, the *Directory for the Investment Projects Approved by Government* and the *Directory for Market Access of the Internet Industry*.

On December 28, 2018, the National Equities Exchange and Quotations Co., Ltd. (the “NEEQ”) finally released the long-awaited *Implementing Measures on Share Redemption of NEEQ-Listed Companies* (the “Redemption Measures”). The Redemption Measures have provided such detailed requirements for the share redemption as the redemption method and among others with the aim of further improving the NEEQ market functions, stabilizing capital market expectations,

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《回购办法》规定了三类回购方式：以竞价或做市转让回购股份、以要约方式回购股份、以及定向回购股份。其中，定向回购仅可在《回购办法》规定的情形下才可开展（即挂牌公司发行股份购买资产，发行对象对标的资产有业绩承诺，因标的资产未完成业绩承诺，挂牌公司回购发行对象所持股份；以及挂牌公司实施股权激励或员工持股计划，对行使权益的条件有特别规定，因行使权益的条件未成就、发生终止激励或员工持股计划情形的，挂牌公司回购激励对象或员工持股计划所持股份）。《回购办法》明确回购股份应主要用于员工持股计划、股权激励以及减少注册资本等情形。

and protecting legal rights and interests of investors and NEEQ-listed companies.

According to the Redemption Measures, a NEEQ-listed company may redeem its shares through the following ways: (a) bidding or market-making process, (b) tender offer, or (c) private agreements. Among the aforesaid ways, share redemption by a private agreement shall only be carried out under the following circumstances as set out in the Redemption Measures: (i) the shares to be redeemed were originally issued by the company to the shareholders in exchange of relevant assets transferred by such shareholders to the company ("Issuance for Purchase of Asset") and such shareholders failed to fulfill its performance commitments made during the Issuance for Purchase of Asset; or (ii) the shares to be redeemed are held by the employees who obtained such shares based on the company's employee stock ownership plans or equity incentives (the "ESOPs") and failed to satisfy the vesting/exercising conditions. Further note that pursuant to the Redemption Measures, the redeemed shares shall be mainly used for the purpose of implementation of the ESOPs or capital reduction of the company.

Stock Exchanges Released Guidelines for Share Trading Suspension and Resumption 沪深交易所发布停牌复牌业务指引

根据证监会2018年11月6日发布的《关于完善上市公司股票停牌制度的指导意见》（“《意见》”）（详情请见我所《每月立法动态》2018年12月刊），2018年12月28日，上海证券交易所发布《上海证券交易所上市公司筹划重大事项停牌复牌业务指引》（“《上交所指引》”）、深圳证券交易所（与上海证券交易所，合称“沪深交易所”）发布《深圳证券交易所上市公司信息披露指引第2号 - 停牌复牌业务》（“《深交所指引》”，与《上交所指引》统称“《指引》”），自发布之日起施行。《指引》落实了《意见》的要求，进一步保护投资者的交易权，有利于国内资本市场与国际接轨。

虽在具体规则上存在一定的差异，但沪深交易所均在各自的《指引》中将《意见》的要求在以下重大方面进行了细化，包括减少停牌事由、明确停牌条件、缩短停牌期限、强化信息披露等。

In line with the *Guiding Opinions on Improving Suspension and Resumption Systems for Shares of Listed Companies* (the "Opinions") issued by the CSRC on November 6, 2018 (please refer to our December 2018 issue of *China Regulatory Updates* for details), on December 28, 2018, Shanghai Stock Exchange (the "SSE") and Shenzhen Stock Exchange (the "SZSE") have released their respective guidelines to implement the Opinions (the "Guidelines", i.e., the *Guidelines for Companies listed on Shanghai Stock Exchange on Suspension and Resumption of Share Trading for Major Events* and the *Guidelines for Companies Listed on Shenzhen Stock Exchange on Information Disclosure No.2 - Suspension and Resumption of Share Trading*) with an aim to provide further protection for the trading rights of the investors and promote integration of domestic and international capital markets.

Although there might be differences in relevant rules, both Guidelines have set out their respective detailed requirements based on the principles under the Opinions in such major aspects as reducing suspension reasons, clarifying suspension preconditions, shortening suspension period, strengthening disclosure obligations and among others.

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For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编：200235
电话：(86-21) 6083-9800



Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800