CHINA REGULATORY UPDATES

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TABLE OF CONTENTS / 本期内容

STATE-OWNED ASSET MANAGEMENT / 国有资产管理

PRC State Council Released New Rule Governing Mandatory Allocation of State-Owned Assets to Social Security Fund 国务院发布国有资本划转社保基金的新规

为弥补社保基金的缺口，2017年11月18日，国务院印发了《划转部分国有资本充实社保基金实施方案》（“《实施方案》”），以此取代现行的《减持国有股筹集社会保障资金管理暂行办法》以及《境内证券市场转持部分国有股充实全国社会保障基金实施办法》（统称“原政策”）。新规从划转范围、划转对象、划转比例、承接主体、划转后管理、工作进度安排等多个角度重新框定了国有资本充实社保基金的框架。

在原转（减）持政策中，需要转（减）持的主体为“上市公司的国有股东”，转（减）持的对象为“国有股东持有的上市公司的股份”，转（减）持的时点为“公司境外上市或增发时，或公司境内上市时”。一般而言，公司（无论其规模大小、业务类型）的国有股东在公司境内外上市或境外增发时会面临转（减）持上市公司股份的问题。此次《实施方案》意图将国有资本划转与原政策规定的上市公司的国有股份以及上市时点相脱钩，转变为从国有股权的源头（即，国有大中型企业集团最上层母公司的股权层面）进行统一的股权划转。

在《实施方案》下，划转范围变更为“中央和地方国有及国有控股大中型企业、金融机构（但不包括公益类企业、文化企业、政策性和开发性金融机构以及国务院另有规定的企业）”。《实施方案》将划转对象按是否已经完成公司制改革进行了区分：对于已经完成公司制改革的中央和地方企业集团，直接划转企业集团股权；而对于尚未完成公司制改革的中央和地方企业集团，要求抓紧推进改革，改制后按要求划转企业集团股权；同时探索划转未完成公司制改革的企业集团所属一级子公司股权。新规下的划转时点将按照试点先行、分级组织、稳步推进的原则进行：即在2017年选择部分中央企业和部分省份开展试点；在总结试点经验的基础上，2018年及以后，分批划转其他符合条件的国有股权。

- 对国资背景的私募基金的影响

  在原转（减）持政策下，对于如何认定含有国有资金的私募股权基金（尤其是有限合伙形式的基金）的性质（即，其是否属于原转（减）持政策下的“国有股东”，是以其普通合伙人的性质来认定，还是根据有限合伙人国有资金的占比来判断）），以及该等基金在所投资企业上市时是否需要履行股权转持义务，缺乏明确和统一的认定标准，这也成为私募股权基金在募集国有资金和上市退出时，一直备感困扰的问题之一。而在《实施方案》下，由于划转的对象上移至国有企业集团公司层面，通常情况下，含有国有资金的私募股权基金在其所投资企业上市时，毋需再去纠结其所持股权是否需要履行国有股转持义务。

- 对资本市场的影响

  对于已经上市的公司而言，由于《实施方案》

To make up for the gap in the National Social Security Fund (the “NSSF”), the PRC State Council released the *Implementation Plans on Allocating Certain Portion of the State-Owned Assets to Enrich the NSSF* (the “Implementation Plans”) on November 18, 2017, which at the same time has replaced the *Temporary Management Measures on Raising Social Security Funds by Reducing State-Owned Equity Shares* and the *Implementation Measures on Transferring Part of the State-Owned Equity Shares to Enrich the NSSF Within the PRC Securities Market* (collectively, the “Old Policy”). The Implementation Plans outlined a new framework for allocation of state-owned assets to enrich the NSSF from such perspectives as the scope of assets to be allocated, the targets and asset ratio, the parties to undertake the assets and post-transaction management requirements, among others.

Under the Old Policy, any stated-owned enterprise (or SOE) shareholder of a listing company, regardless of its size or business scope, is required to transfer certain portion of its shares in the listing company at the point of offshore IPO, stock placement or onshore IPO. To the contrary, the Implementation Plans set its focus on the origin of the state-owned assets, asking the equity allocation to be made at the ultimate parent company of a large or mid-sized SOE group.

Pursuant to the Implementation Plans, only large and mid-sized SOEs and financial institutions, excluding any social enterprise, cultural enterprise, policy-making and development financial institution and any other enterprise as specified by the State Council, are required to perform assets allocation. In addition, the Implementation Plans provided timetables for SOEs based on whether they have completed corporate reforms. For SOEs under central government administration and local SOE groups which have completed corporate reform, the equity allocation should be implemented immediately, while for those whose corporate reform isn’t completed yet, they should accomplish the reform in a timely manner first, and implement the equity allocation promptly thereafter. It is also required that the SOE groups which have not completed the corporate reform to explore the feasibility of equity allocation at their first layer subsidiaries. The rule of thumb is that the equity allocation will be taken on an “experimenting first, organizing by grades and propelling step-by-step” basis. In 2017, selected SOEs under central government administration and SOEs in selected local areas will start the experiment first, while in 2018 and thereafter, all other eligible SOEs will complete equity allocation in accordance with the experiment experiences in batches.

- Potential Impact on Private Equity Funds with SOE Background

  Under the Old Policy, since it is not clear as to (i) how to identify the nature of a private equity or PE fund (especially a partnership PE fund) involving SOE funding, namely, whether such a PE fund would be deemed an *SOE shareholder* liable for equity allocation as a result of having SOE as its general partner, or having certain portion of funding coming from SOE as its limited partner; and (ii) whether the portfolio companies of such a PE fund should therefore fulfill the equity allocation obligation when going IPO, the SOE-related equity allocation had been a controversial issue for PE fund raising and exiting through portfolio IPO. Now under the new Implementation Plans, since the equity allocation will be conducted at the ultimate parent company level of a large or mid-sized SOE group, generally speaking, PE funds with SOE funding will not need to make equity allocation anymore upon portfolio IPOs.

要求划转的是集团层面的公司股权，因此除非已上市的是集团公司，否则应该不会涉及直接划转上市公司的股份，因而对证券市场的影响也较小。

- Potential Impact on Capital Market

  For the capital market, it seems to be not bad news if taking into consideration that the SOE-related equity allocation is no longer required to be performed concurrently with IPOs.

PE INVESTMENT / 私募股权投资

Draft New Rule on Asset Management Products Released for Public Comments 资管新规（征求意见稿）发布

为统一资管产品的监管标准，2017年11月17日，中国人民银行、银监会、证监会、保监会、外汇局联合发布了《关于规范金融机构资产管理业务的指导意见（征求意见稿）》（“《指导意见》”），向社会公开征求意见，重点针对金融机构资管业务中的多层嵌套、杠杆不清、套利严重、投机频繁等问题，设定了统一的监管标准。尽管《指导意见》并未就私募股权投资基金作出直接规定，但是从规定条文及监管层公开答复来看，新规仍可能会对私募股权投资行业产生一定的影响。

《指导意见》规定，非金融机构不得发行、销售资管产品，国家另有规定的除外。非金融机构依照国家规定发行、销售资管产品的，应当严格遵守相关规定以及《指导意见》关于投资者适当性管理的要求。央行发言人在公开答记者问中说明，此处的“国家另有规定的除外”主要指私募基金的发行和销售，国家法律法规另有规定的，从其规定，没有规定的，适用本《指导意见》的要求。

根据该等规定及央行答记者问，总体看来，监管层可能意图将私募股权投资基金管理人（为非金融机构）发起设立私募股权投资基金的活动也纳入新规的统一监管，并将私募股权投资基金也视作资管产品；但并未明确私募股权投资基金的投资、退出等环节的活动是否应受新规调整、及在多大程度上适用新规等问题。对于该等模糊之处，有待于监管部门在正式发布的新规中予以明确。

此外，《指导意见》明确资管产品仅可以投资一层资管产品，其所投资的资管产品不得再投资其他资管产品（投资公募证券投资基金除外），并要求金融机构不得为其他金融机构的资管产品提供规避监管要求的通道服务。这意味着，如私募股权投资基金本身被视作资管产品，则其上只能有一层资管产品，此前实务中银行理财资金借道信托及券商资管产品认购私募基金股权等多层嵌套的模式将不再可行；而基金中的基金（FOF）的资金来源不得是任何资管产品。可见该等规定将会限制私募股权投资基金的资金来源。

To unify regulatory standards on asset management products, the People's Bank of China, the China Banking Regulatory Commission, the China Securities Regulatory Commission, the China Insurance Regulatory Commission and the State Administration of Foreign Exchange jointly issued the *Guidance on Regulating the Asset Management Business of Financial Institutions* (the "Draft Guidance") for public comments on November 27, 2017. The Draft Guidance proposed integrated rules to deal with such hot issues as multi-layer product nesting, misuse of leverage, over betting on arbitrage and speculations.

Although the Draft Guidance does not mention PE fund specifically, based on its provisions and the public comments made by the regulatory agencies, potential influence on PE industry can still be anticipated to some extent. For example, the Draft Guidance stipulates that unless otherwise specified by law, non-financial institutions shall not launch or sell any asset management product; if it is permitted, the non-financial institution should strictly follow all applicable regulations as well as the requirements of investor eligibility management under the Draft Guidance. According to a spokesman for the central bank, when referring to *unless otherwise specified by law,* it mainly refers to the issuance and placement of PE funds. The Draft Guidance will apply if the state's laws or regulations do not regulate otherwise.

In general, it seems that the PRC regulatory authorities are willing to use this Draft Guidance to govern PE fund raising as well, viewing fund managers as non-financial institutions and their funds as asset management products. However, it is not clear as to whether PE funds' investment, exit and other activities will also become subject to the Draft Guidance.

In addition, the Draft Guidance clarifies that an asset management product can only invest in one layer of other asset management products, and the investee asset management product should not invest further in any other asset management product (unless it is a public securities investment fund). Financial institutions are required not to provide any channel for asset management products to circumvent any regulatory requirement. From this point of view, if PE funds will be regarded as asset management products, they can only invest in one level of other asset management products, which means the multi-layer nesting product model currently adopted by some banks, trust companies and securities brokers will no longer work. Moreover, fund of funds or FOF will not be allowed to source funding from asset management product any more. As a result, source of funding seemingly becomes more restricted for PE funds.

ANTI-UNFAIR COMPETITION / 反不正当竞争

Amended Anti-Unfair Competition Law Revises Commercial Bribery Definition 全国人大常委会修订《反不正当竞争法》，修改商业贿赂的认定标准

2017年11月4日，全国人大常委会修订通过《中华人

On November 4, 2017, the Standing Committee of the PRC National People's Congress amended the *Anti-Unfair*

民共和国反不正当竞争法》（“新《反不正当竞争法》”），自2018年1月1日起施行。相比1993年颁布的现行有效的《反不正当竞争法》，新法修改了商业贿赂的认定标准。鉴于商业贿赂系私募股权投资中传统的合规审查事项，我们对新法涉及商业贿赂的认定以及对私募基金的影响等作出一些初步解读。

现行有效的《反不正当竞争法》规定商业贿赂的收受主体为“交易对方单位或个人”，新《反不正当竞争法》将其调整为：交易相对方的工作人员；受交易相对方委托办理相关事务的单位或者个人；或利用职权或者影响力影响交易的单位或者个人。现行的《反不正当竞争法》将直接交易相对方列入监管范围的做法，一直以来饱受争议，被认为商业贿赂认定的范围过于宽泛。新法将直接的交易对方排除在商业贿赂的认定范围之外，而是将其以外的三类人纳入了监管的范围。商业贿赂的本质是作为代理人的受贿人因收受他人给予的好处，背离其应负的忠实义务，对交易产生了不正当的影响。我们理解，上述交易相对方以外的两类人的具体认定也应以是否违反其应负的忠实义务为标准，从而更好地把握商业贿赂的实质。

新《反不正当竞争法》实施后，私募投资基金在对拟投资目标公司进行合规审查时，我们建议交易或合规团队需重新审视商业贿赂的认定问题，并考虑要求目标公司通过新的、符合新法规定的企业合规政策，在交易文件中加入调整后的协议条款，以免目标公司未来出现问题，对投资人的利益产生影响。

Competition Law (the “New Rule”), which will take effect on January 1, 2018. Compared to the currently effective *Anti-Unfair Competition Law* promulgated in 1993 (the “Old Rule”), the New Rule seriously revised the definition of commercial bribery. Considering commercial bribery has always been a concern for investments and corporate legal compliance, we hereby would like to share some of our preliminary observations and analyses for your general reference.

With respect to receiving commercial bribery, a person might be held liable under the Old Rule is the deal counterparty itself (either a natural person or an institution), while pursuant to the New Rule, employees of the deal counterparty, any institution or individual entrusted by the deal counterparty to take care of relevant matters, or any institution or individual who used his authority or power to influence the deal might all become subject to penalties. As it is believed that the essential problem of commercial bribery is when any representative or agent of a party takes bribe, he will most likely breach his duty of loyalty and improperly influence the potential deal which is against the spirit of fair market competition, for a long it has been deemed inappropriate that the Old Rule makes the deal counterparty itself rather than its representative or agent as the target. From this point of view, breach or not of the duty of loyalty should be carefully viewed when taking commercial bribery or not is being examined.

After the New Rule becomes effective in 2018, it would be advisable for investors to re-examine the commercial bribery issue, asking deal partners and portfolio companies to comply with the new regulations.

OUTBOUND INVESTMENTS / 对外投资

NDRC Released Draft Measures Governing Outbound Investments for Public Comments 国家发改委发布《企业境外投资管理办法（征求意见稿）》

国家发展和改革委员会（“国家发改委”）于2017年11月3日发布了《企业境外投资管理办法（征求意见稿）》（“《征求意见稿》”），向社会征求意见。《征求意见稿》对国家发改委于2014年4月发布、2014年12月修订的《境外投资项目核准和备案管理办法》（“9号令”）进行了大幅修改和补充，其中以下内容值得投资者特别关注：

1. 拓宽投资主体的适用范围：9号令仅适用于境内各类法人，其他组织和自然人的境外投资需另行制定具体办法（*但截至目前并尚未制定*）；《征求意见稿》将投资主体拓宽至境内各类型的金融企业和非金融企业，非企业组织参照执行，境内自然人通过其控制的境外企业对外投资也参照执行。
2. 取消“小路条”制度：在9号令下，中方投资额达到3亿美元的境外投资项目，投资主体在对外开展实质性工作之前，应向国家发改委报送项目信息报告。对符合国家境外投资政策的项目，国家发改委将在7个工作日内出具确认函（即“小路条”）。为投资主体的境外投资节省时间，并增加交易确定性，《征求意见稿》取消了该规定。
3. 降低审批层级：《征求意见稿》取消了国务院

On November 3, 2017, the National Development and Reform Commission (the “NDRC”) released for public comments the draft *Administrative Measures for Overseas Investment by Enterprises* (the “Draft”), to significantly modify and beef up the *Administrative Measures for the Approval and Filing of Outbound Investment Projects* promulgated by it in 2014 (the “Circular No. 9”). Highlights of the Draft include, among others:

1. Scope of eligible investment entities to be expanded: Under Circular No. 9, only onshore legal persons are specifically permitted to make overseas investments, leaving such other entities as non-legal person organization and natural person individuals unattended. The Draft for the first time makes it clear that all kinds of onshore financial enterprises and non-financial enterprises, non-enterprise organizations and natural persons (via offshore investment vehicles) should follow the requirements of the Draft when invest overseas.
2. The “Small Road Ticket” to be cancelled: Under Circular No. 9, where any outbound investment involving PRC entity's investment exceeding US$300 million, a project information report is required to submit for NDRC review before any substantive work can be carried out. NDRC will issue a confirmation letter, or the so-called “Small Road Ticket”, within seven business days if it believes the project is consistent with the nation’s outbound investment policies. To save time and enhance the deal certainty, the Draft proposes to cancel this pre-investment filing requirement.

层级的核准，而是明确凡属于“敏感类项目”（即，涉及敏感国家和地区或敏感行业的境外投资项目）的，无论是投资主体直接投资还是通过其控制的境外企业开展的投资、无论投资额大小，均需报国家发改委核准。

总体而言，《征求意见稿》的出现显示了中国政府拟在境外投资监管方面简政放权，以便利境内主体的境外投资的监管态度；但另一方面，其并未释放出2016年底以来“控流出”的宏观政策将发生转向的信号，我们理解，在可预见的未来特定行业和特定方式的境外投资（如房地产、在境外设立无具体实业项目的股权投资基金或投资平台等）仍将受到严格监管。

3. Government review and approval to be delegated to lower level authorities: According to the Draft, review and approval of the PRC State Council will no longer apply to overseas investments. Instead, NDRC will review and decide all *sensitive projects* that involve investments in *sensitive* nations and areas or in *sensitive* industries, regardless of the form or amount of investments.

In general, the Draft indicates the Chinese government's intention to further simplify the administration and regulation over outbound investments. However, it does not signal that the government will loosen its control of capital outflows since 2016. We understand that in the near future, overseas investments in certain industries or through certain methods (e.g., in real estate areas, or through offshore equity investment fund or platform without genuine industrial investments) will still be subject to stringent regulation.

FOREIGN INVESTMENTS / 外商投资

China Signals to Further Relax Market Access Restrictions for Foreign Investments in Financial Sector 监管层发出进一步放宽金融领域外资准入的讯号

基于中美元首在京会晤期间达成的共识，财政部发言人于2017年11月10日国务院新闻办公室举行的中美元首会晤经济成果吹风会上透露了我国拟进一步开放金融领域外资准入的信息：

1. 银行业：将取消对中资银行和金融资产管理公司的外资单一持股不超过20%、合计持股不超过25%的持股比例限制，实施内外一致的银行业股权投资比例规则；
2. 证券、基金业：将单个或多个外国投资者直接或间接投资证券公司、基金管理公司、期货公司的投资比例限制由目前规定的中方控股放宽至外资最多可持股51%，3年后，外资比例不受限制；以及
3. 保险业：3年后将单个或多个外国投资者投资设立经营人寿保险业务的保险公司的投资比例由目前不得超过50%放宽至51%，5年后外资比例不受限制。

以上措施让市场对金融领域外资准入的进一步放宽有所期待。不过，鉴于其目前还仅仅是中美元首会晤的初步共识，外资实际上何时能够享受到上述待遇还有待我国相应立法层面的进一步落实。

Based on the consensus reached by the presidents of China and the United States during their meeting in Beijing, a spokesman for the PRC Ministry of Finance revealed in November that China plans to further relax market access for foreign investments in several financial sectors.

1. Banking industry: The existing limitations on foreign investments in Chinese banks and other financial asset management companies, i.e., no more than 20% for any single foreign shareholder and in aggregate no more than 25% for all foreign shareholders, are planned to be lifted. Both foreign and domestic investors in banking industry will become subject to a unified equity ratio control.
2. Securities and fund industry: Foreign investors are expected to hold, directly or indirectly, up to 51% equity interests in securities firms, fund management companies and futures companies. No more limits on foreign shareholding ratio will be held 3 years later.
3. Insurance industry: Foreign investments by any single or multiple foreign investors in life insurance companies will be allowed up to 51% in the next 3 years, compared to the current ceiling of 50%. Any cap will be removed in 5 years.

The above statements signal encouraging policy direction for foreign investors interested in China's financial sector. It will however take time for the Chinese legislative body to write them into specific rules and regulations. As always, we will continue to monitor further developments in these areas.

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