LLINKS Law Offices
通力律师事务所

The Impact of New Registration and Filing Measures on Private Securities Investment Funds

By Sandra Lu | Lily Luo | Jill Lu

On 30 December 2022, Asset Management Association of China ("**AMAC**") released the *Measures for Registration and Filing of Private Investment Funds (Consultation Paper)* (私募投资基金登记备案办法(征求意见稿), the "**Registration and Filing Measures**") and the implementing guidelines, seeking public comments till 10 January 2023. The *Registration and Filing Measures* and the implementation guidelines aim to revise and optimize some key matters, such as the standards and procedures, for the registration of private fund managers ("**PFMs**") and the filing of private funds, and to formulate a comprehensive rule on the level of fundamental self-disciplinary rules.

It is worth noting that the *Registration and Filing Measures* would not supersede the prevailing self-disciplinary rules and regulatory documents relating to the private fund filing, including the *Instructions for Private Investment Fund Filing (2019 Edition)* (私募投资基金备案须知(2019 年版), the "**Filing Instructions**") and the documents checklist of private fund filing. This article briefly introduces the impact of the *Registration and Filing Measures* on private securities investment funds in combination with the existing requirements.

I. Addition of Must-have Elements in Fund Documents

The *Registration and Filing Measures* provide the must-have clauses in the fund documents, including the fund contract, prospectus (marketing materials) and risk disclosure statement. Compared with the previously released guidelines for the private fund contract, the risk disclosure statement template, the *Key Points for Filing of Private Securities Investment Funds* (私募证券投资基金备案关注要点, the "**Key Points for Fund Filing**") issued in June 2022 and relevant rules on information disclosure and fundraising of private funds, we note that the *Registration and Filing Measures* provide several additional must-have elements in the fund contract and the risk disclosure statement. However, in terms of the prospectus (marketing materials), the *Registration and Filing Measures* merely emphasize and reiterate certain must-have elements required in the existing rules, rather than requiring any new contents in addition to those set out in the existing rules.

1. Fund Contract

Article 29 of the *Registration and Filing Measures* provides the must-have clauses in the private fund contract. In particular, Item (2) provides that the fund contract shall contain the must-have elements relating to related-party transactions as provided in Article 38 of the *Registration and Filing Measures*. Compared with the previous rules, the *Registration and Filing Measures* add a new requirement that the fund contract shall contain the clauses on the identification of related-party transactions and the mechanism of determining the consideration of the related-party transactions.

It is worth noting that Item (5) of Article 29 of the *Registration and Filing Measures* is not a completely new requirement. In fact, AMAC has already stipulated in the *Filing Instructions* issued in 2019 that the fund contract shall expressly provide the emergency response plans and dispute resolution mechanisms to safeguard fund assets and maintain the fund operation or liquidate the fund in case that the PFM is objectively incapable to continue to manage the private fund. Based on our experience, after the issuance of the *Filing Instructions*, most PFMs have agreed in the fund contracts that, if the PFM is objectively incapable to continue to manage the private fund, the unitholders may hold a meeting to decide to replace the manager or liquidate the fund.

In addition to the above, according to Article 58 of the *Registration and Filing Measures*, the fund contract shall also set forth a market-oriented exit plan in case that the private fund is unable to exit normally due to the PFM's failure to perform duties or having risks. Please see Section IV below for details.

2. Risk Disclosure Statement

Article 28 of the *Registration and Filing Measures* stipulates the terms that shall be included in the risk disclosure statement. Based on the risk disclosure statement template issued by AMAC through the AMBERS system, the *Registration and Filing Measures* also require that special disclosures shall be made to investors in the risk disclosure statement under the circumstances where "(6) the fund assets are invested overseas", "(9) the actual controller of the PFM is changed, but the formalities for such change have not been completed with AMAC" or "(10) there are other major investment risks or risks of conflict of interests". With respect to Item (6), the *Key Points for Fund Filing* only requires that a risk disclosure shall be made in the part of special risk disclosure if "the fund is mainly invested overseas", while the *Registration and Filing Measures* provide that special risk disclosure shall be made for any overseas investment, regardless of the proportion of such overseas investment. Items (9) and (10) are newly added elements for special risk disclosures.

In addition, Article 44 of the *Registration and Filing Measures* lists several circumstances under which AMAC may adopt prudent treatment on the fund filing, including where the funds are involved in innovative business or have complex structures. Please refer to Section V below for details. Under such circumstances, AMAC may request the PFM to take measures, such as disclosing the special risks of such circumstances.

II. Specifying the Initial Offering AUM

Article 33 of the *Registration and Filing Measures* provides that the initial offering AUM of a private securities investment fund shall be no less than RMB 10 million, unless otherwise provided.

Previously, AMAC has not expressly provided requirements regarding the initial offering AUM of a private securities investment fund. In the foreign-invested PFM industry, usually the initial offering AUM at RMB 2 million would be sufficient in order to successfully complete the fund filing.

If the *Registration and Filing Measures* are finally effective with such requirement, any newly launched private securities investment fund may be successfully filed with AMAC only if its initial offering AUM reaches at least RMB 10 million.

We note that AMAC has also left a flexibility - "unless otherwise provided". Therefore, the initial offering AUM for special pilot funds such as a QDLP fund is pending further stipulation or clarification by AMAC.

III. Reporting of Changes in Filing Items and Major Events

Article 55 of the *Registration and Filing Measures* provides that any changes to a private fund listed in this Article shall be filed with AMAC within five (5) working days. As the *Registration and Filing Measures* would not supersede the existing *Filing Instructions*, Article 55 of the *Registration and Filing Measures* and Article (26) in Part I of the *Filing Instructions* about reporting of major events shall both apply.

In addition, Article 62 of the *Registration and Filing Measures* provides that under certain circumstances, a PFM shall report the major events within ten (10) working days to AMAC, and such events include those at the PFM level and the private fund level. We note that the events to be reported under this Article partially overlap with the major events to be reported under Article (26) in Part I of the existing *Filing Instructions*, but the reporting timelines required in these two provisions conflict with each other. Below is a comparison table:

Filing Instructions	***Registration and Filing Measures***
(26) [Reporting of major events] If any of the following major events occur to a private investment fund, the PFM shall, <u>within five (5) working days, report the relevant event to AMAC</u> and disclose to the investors:	Article 62 [Reporting of major events] Under any of the following circumstances, the PFM shall <u>report to AMAC within ten (10) working days</u>:
4. major litigation, arbitration and disputes involving property relating to the fund management business, fund assets and fund custody business;	(1) the PFM and the private fund under its management are involved in major litigation, arbitration, or other legal disputes, which may affect its normal operation or damage the interests of investors;

3. large redemption occurs to the fund; 5. the project to which the investment amount accounts for 50% or more of the net assets of the fund is unable to be exited normally;	(3) large redemption occurs to the private fund, or the project to which the investment amount accounts for 50% or more of the net assets of the fund is unable to be exited normally;
6. any other event that has a material impact on the continuous operation of the fund, *interests of investors* or NAV of the fund.	(2) there is significant negative public opinion, which may have a serious impact on the market order or *the interests of investors*; (4) there is any material change in the business operation or financial status of the PFM and its controlling shareholder, actual controller, general partner or major investor, which may lead to operating risks to the PFM and seriously *damage the interests of investors*;

We note that there are different reporting timeline requirements for the same event in the two provisions. Could it be reasonably interpreted that the ten-working-day requirement shall apply under the principle of "new laws prevail over old laws"?

IV. Introduction of Market-oriented Exit Mechanism

The *Registration and Filing Measures* put forward the requirement of "living will", aimed at solving the problems that in recent years disputes have arisen from PFMs' failure to perform duties in the process of fund operation. Article 58 of the *Registration and Filing Measures* provides the market-oriented exit methods of private funds, that is, when a private fund is unable to exit normally due to the PFM's failure to perform duties, having risks, etc., the unitholders' meeting, the PFM, the custodian or a certain percentage of investors may, by establishing a special institution or engaging an accounting firm, law firm or other intermediaries in accordance with the fund contract, properly dispose of fund assets, protect the legitimate rights and interests of investors and exercise the relevant authorities. If such mechanism is adopted, relevant information shall be submitted to AMAC in a timely manner.

According to this provision, the fund contract shall expressly provide such market-oriented exit mechanism and relevant arrangements.

V. Clarification on the Standards and Measures of Prudent Treatment on Fund Filing

Article 44 of the *Registration and Filing Measures* sets forth for the first time the standards for prudent treatment on fund filing and relevant measures that may be adopted by AMAC during its review process. Where private funds are involved in innovative business, the fund structure is complex, the types of investment instruments of the funds are special or have relatively high risks, the investors are mainly natural persons and the fund invests in single target, the fund assets are mainly invested overseas, the PFMs have relatively high and potential risks, or the AUM of the PFM at the end of each quarter over the past two years is less than RMB 5 million, AMAC may, as the case may be, take the following measures: increasing requirements on investors, raising the requirement on fund AUM, requiring the fund to be under custody, requiring the custodian to issue due diligence reports, requiring to strengthen the information disclosure, requiring to make special risk disclosures, quota management, restricting related-party transactions, requiring PFMs to issue internal compliance opinions, submitting legal opinion or financial reports, etc. In addition, AMAC may also take the aforesaid prudent treatment measures against the new fund filing submitted by a PFM whose capital, personnel staffing, investment management capability, risk control level, internal control policies, business premises and facilities are not compatible with the business orientation or the AUM of the PFM.

QDLP managers may need to pay special attention to the above provisions. QDLP funds are mainly invested in overseas, and AMAC may adopt prudent treatment measures in respect of such QDLP fund filing on a case-by-case basis.

VI. Uniformly Regulating the Rejection and Suspension of Fund Filing

1. Rejection of Fund Filing

Article 41 of the *Registration and Filing Measures* uniformly provides the circumstances under which the fund filing will be rejected, by consolidating the situations that the fund's investment violates the prohibitive provisions and the activities inconsistent with the essence of "funds" as provided in the *Certain Provisions on Strengthening the Regulation of Private Investment Funds* (关于加强私募投资基金监管的若干规定) and the *Filing Instructions*. Item (9) of Paragraph 1 of Article 41 establishes a catch-all provision, recognizing the circumstances as provided in other prevailing rules under which the fund filing will be rejected , for example, it is provided in the *Administrative Measures on Fundraising Activities of Private Investment Funds* (私募投资基金募集行为管理办法) that if a PFM engages an entity without the fund distribution license to distribute the fund, or the fundraising institution(s) fails to set or perform the cooling-off period or revisit for confirmation, etc., AMAC may, as the case may be, reject the filing of the private fund.

2. Suspension of Fund Filing

The *Registration and Filing Measures* optimize and uniformly provide the circumstances under which the private fund filing will be suspended by AMAC, by consolidating the relevant provisions in the prevailing *Measures for the Registration of Private Fund Managers and the Filing of Funds (Trial)* (私募投资基金管理人登记和基金备案办法(试行)), the *Filing Instructions* and other relevant rules. The circumstances under which the fund filing may be suspended are mainly set out in Article 42 of the *Registration and Filing Measures*. Besides, where a PFM's capital, personnel staffing, investment management capability, risk control level, internal control policies, business premises and facilities are not compatible with the business orientation or the AUM of the PFM as mentioned above, which might result in AMAC to adopt prudent treatment on its fund filing, AMAC may also suspend its fund filing if the case is serious. Suspension of fund filing is also scattered in the liability clauses under Chapter V entitled "Self-discipline Management" of the *Registration and Filing Measures*. That is to say, suspension of fund filing can be taken as one of the self-discipline management measures of AMAC.

It is worth noting that, compared to the prevailing rules, the *Registration and Filing Measures* set out more circumstances under which the fund filing may be suspended. For example, private fund filing of a PFM may also be suspended if a controlling shareholder or the actual controller of the PFM is under investigation, is involved in pending litigation or arbitration that may affect its operation, violates laws or regulations, or is facing significant negative public opinions.

If you would like to know more information about the subjects covered in this publication, please contact:

Sandra Lu
+86 21 3135 8776
Sandra.lu@llinkslaw.com

Lily Luo
+86 21 3135 8732
lily.luo@llinkslaw.com

Jill Lu
+86 21 3135 8729
jill.lu@llinkslaw.com

SHANGHAI	BEIJING	SHENZHEN
19F, ONE LUJIAZUI 68 Yin Cheng Road Middle Shanghai 200120 P.R.China T: +86 21 3135 8666 F: +86 21 3135 8600	30F, Central Tower, China Overseas Plaza, 8 Guanghuadongli, Chaoyang District Beijing 100020 P.R.China T: +86 10 5081 3888 F: +86 10 5081 3866	18F, China Resources Tower 2666 Keyuan South Road, Nanshan District Shenzhen 518063 P.R.China T: +86 755 3391 7666 F: +86 755 3391 7668
HONG KONG	**LONDON**	
Room 3201, 32/F, Alexandra House 18 Chater Road Central, Hong Kong T: +852 2592 1978 F: +852 2868 0883	1/F, 3 More London Riverside London SE1 2RE United Kingdom T: +44 (0)20 3283 4337 D: +44 (0)20 3283 4323	

www.llinkslaw.com

Wechat: LlinksLaw

WE LINK LOCAL LEGAL INTELLIGENCE WITH THE WORLD