

Legal and Practical Analysis of Wholly Foreign Owned Enterprises (“WFOE”) Commencing Private Securities Investment Fund Management Business in the People’s Republic of China

By Sandra Lu

On 30 June 2016, Asset Management Association of China (“AMAC”) released the *FAQs regarding Registration and Record-Filing of Private Funds (No. 10)* (“**FAQ No.10**”) under the permission of the China Securities Regulatory Commission (“CSRC”). FAQ No. 10 confirms that foreign financial institutions may engage in private securities investment fund management business by establishing wholly foreign owned enterprise (“WFOE”) in the People’s Republic of China (“China” or “PRC”) and also sheds light on issues regarding the procedures of private securities fund manager registration. The release of FAQ No. 10 is the most determined gesture made by the Chinese regulator to further open up its funds market ever since 2002, when China allowed foreign financial institutions to set up joint venture companies to carry out publicly offered securities investment fund management business.

This article integrates the background information of the release of FAQ No. 10 with its content and introduces, in a practical approach, the conditions of establishing WFOE and engaging in private securities fund management business in China and the requirements of applying to register as a private securities fund manager in the hope of providing assistance to foreign financial institutions that are planning to establish WFOE and engage in private securities fund management business in China.

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I. FAQ No. 10 as an important step realizing China’s commitment to open up its funds market

Prior to the release of FAQ No. 10, the maximum foreign shareholding ratio of a publicly offered securities investment fund manager or a private securities investment fund manager had been 49% according to the *Catalogue of Industries for Guiding Foreign Investment (2015 Revision)*.

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On the other hand, there had been no restriction on the proportion of foreign investment in non-securities private fund managers, such as private equity fund manager and venture capital fund manager, etc. Namely, foreign ownership in these managers could reach 100%.

In order to further open-up the Chinese funds industry and facilitate market competition, the Chinese government has made a series of commitments regarding the opening-up of the Chinese market since 2015:

1. The Seventh China-U.S. Strategic and Economic Dialogue (2015.6.23)

The PRC government committed to increase participation of foreign financial services firms and investors in the PRC capital market, for which policies include allowing qualified WFOE or joint venture private fund management institutions to establish private securities fund management business in China that includes secondary market securities transactions according to regulations.

2. The Seventh China-UK Economic and Financial Dialogue (2015.9.21)

Both the Chinese and British governments realized the great opportunities in the cross-national cooperation of asset management and agreed to further facilitate the investment and capital flow in the markets of the two nations. For this, the Chinese government agreed to allow qualified WFOE or joint venture private fund management institutions to commence private fund management business, including secondary market securities transactions, in China provided that all relevant PRC regulations were complied with.

3. The Eighth China-U.S. Strategic and Economic Dialogue (2016.6.6)

Following its 2015 S&ED commitment, China is soon to issue regulatory and qualification requirements to allow wholly foreign owned firms to engage in private securities fund management.

FAQ No. 10 implements the above policy achievements. It is a concrete measure and an important step to fulfill China’s commitment to open-up its funds industry. After the release of FAQ No.10, a qualified WFOE may engage in private securities investment fund management business in China.

II. The business scope of a WFOE as a private securities investment fund manager and the regulations thereof

Alike with a domestic private securities investment fund manager, a WFOE registered with AMAC may engage in private securities investment fund management business in China. According to the *Law of the People’s Republic of China on Securities Investment Law*, other laws and regulations and the self-disciplinary rules of AMAC, the major regulations on aspects such as fundraising and investment operations of the private securities investment fund management business are as follows:

1. Legal relationship: Trust

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The manager and the custodian join as the co-trustees of the private securities investment fund.

The most common legal form of a private securities investment fund is a trust. The WFOE as the private fund manager, the custodian and the investors form a legal trust, and the manager and the custodian are the co-trustees of the private fund.

2. Fundraising method: Non-public

The fundraising and management of the private securities investment fund shall be carried out in China. The fundraising method shall be conducted on a non-public basis. Publicity and promotion to non-specified targets through newspaper, periodicals, radio, television, the internet and other public media, or by way of lectures, seminars or analysis forums, etc. are prohibited.

3. Fundraising targets: Shall not exceed 200 qualified investors

An investor of a private securities investment fund shall be a qualified investor and the number of qualified investors investing in the fund shall not exceed 200 in case of a contractual private fund. Qualified investors include:

- (a) A qualified institutional investor: an institution with net asset of RMB 10 million or above;
- (b) A qualified individual investor: an individual with financial assets worth RMB 3,000,000 or above or an individual with an average annual income of RMB 500,000 or above in the recent three (3) years.

4. Investment scope of the fund

A private securities investment fund can invest in securities issued in China, including stocks of companies limited by shares issued publicly in China, bonds, fund units and other securities and derivatives thereof recognized by the CSRC. A private securities investment fund shall not invest in securities issued outside China except for sale and purchase of specified foreign stocks through stock connect programs such as the Shanghai-Hong Kong Stock Connect program and QDII qualification and quota issued by regulatory authorities to private fund managers in future.

5. The possibility of applying for publicly offered fund management business qualification

Pursuant to Article 96 of the *Law of the People's Republic of China on Securities Investment Funds*, a fund manager specialized in non-publicly-raised fund management business, if satisfies the conditions regulating its shareholders, senior management personnel, business period, fund assets under the management, etc., may carry out publicly offered fund management business under the approval of the CSRC. Despite the current restrictions imposed on publicly offered securities investment fund management companies limiting foreign investment proportion to a maximum ratio of 49%, there is in fact a possibility that, in future, a WFOE which satisfies specified conditions will be allowed to carry out publicly offered fund management business under approval in view of the increased level of opening-up of the PRC market.

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III. The qualification requirements to be satisfied by a WFOE in order to engage in private securities fund management business

The most concerned question of foreign investment institutions is what conditions a WFOE has to satisfy in order to engage in private securities fund management business in China. On the whole, the qualification requirements are largely divided into two different parts: the first part consists of special requirements to be satisfied by a WFOE, as known as “**Special Requirements**”; the other part consists of conditions that all domestic and foreign private fund management institutions engaging in private fund raising business in China have to satisfy, as known as “**Common Requirements**”. The two large parts of the qualification requirements are discussed in below.

1. Special Requirements

According to FAQ No. 10, a WFOE that satisfies the conditions below may engage in private securities investment fund management business in China:

(a) The WFOE shall be a company incorporated in China

The WFOE established by the foreign institution shall be a company incorporated in China, instead of operating as a partnership enterprise. Although two or above foreign enterprises may establish partnership WFOEs in China according to Article 2 of the *Provisions on the Registration of Foreign Invested Partnership Enterprises*, as limited by the requirements in FAQ No. 10, a WFOE that carries out private fund management business shall only be incorporated as a limited liability company.

(b) The securities regulatory authority of the country or region where the shareholder of a WFOE domiciles shall have entered into the Memorandum of Understanding for Securities Regulatory Cooperation (“**MOU**”) with the CSRC or other institutions recognized by the CSRC

Up till June 2016, the CSRC has entered into the MOU with the securities regulatory authorities of the following countries or regions:

Hong Kong, the United States, Singapore, Australia, the United Kingdom, Japan, Malaysia, Brazil, France, Germany, Italy, Egypt, Korea, Romania, South Africa, the Netherlands, Belgium, Canada, Switzerland, Indonesia, New Zealand, Portugal, Nigeria, Vietnam, India, Argentina, Jordan, Norway, Turkey, United Arab Emirates, Thailand, Liechtenstein, Mongolia, Russia, Dubai, Ireland, Austria, Spain, Taiwan, Malta, Kuwait, Pakistan, Israel, Qatar, Laos, Sweden, Luxembourg, Cyprus, Ukraine, Lithuania, Guernsey, Belarus, Brunei, Jersey, Isle of Man, Poland, Kazakhstan, Azerbaijan.

In practice, we have observed that many foreign financial institutions wish to use companies set up in jurisdictions where there are tax advantages, such as Cayman Islands, Virgin Islands and Bermuda, as the shareholder of the WFOEs for various reasons. Nevertheless, as the securities regulatory authorities of those countries or regions have not entered into the MOU with the CSRC, those companies do not satisfy the requirements of a WFOE’s shareholder in FAQ No. 10.

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- (c) The foreign shareholder of the WFOE shall be a financial institution duly approved or licensed by the financial regulator of the country or region where it domiciles

FAQ No. 10 does not only realize the Chinese government’s commitments to the U.S. and the UK, but also allows a WFOE incorporated in China with a foreign shareholder established in other country or region that has entered into the MOU with the CSRC to apply to become a private securities investment fund manager. However, the foreign shareholder of the WFOE has to be a licensed financial institution. A non-licensed institution, such as a holding company of the other types, an SPV, etc., shall not be qualified as a foreign shareholder of the WFOE.

Regarding the requirements in FAQ No. 10, although the business to be carried out by a WFOE is fund management business, it is not necessary for the WFOE’s shareholder to have an asset management license. An institution with banking license, securities trading license, securities consulting license and other financial licenses will satisfy the industry category requirement for a foreign shareholder of a WFOE.

- (d) Neither the WFOE itself nor its foreign shareholder has been imposed with any material punishment by any regulatory authority or judicial authority in the preceding three (3) years

This is a qualification requirement for both the WFOE and its shareholder. In practice, different regulatory departments, administrative or self-disciplinary proceedings have different standards towards the meaning of “material punishment”. The “materialness” is not only manifested in the fines, but also in the nature, the degree of seriousness, the social impact, etc., of the action against the laws and regulations. All of these shall be taken into account in order to conduct a comprehensive evaluation on whether the punishment is “material” or not.

To ensure that the WFOE can successfully register as a private securities investment fund manager and engage in its business accordingly, our suggestion is that the foreign financial institution shall endeavor to choose a foreign shareholder which has not been imposed with any regulatory penalty in the preceding three (3) years.

- (e) For a WFOE that has an actual controller outside China, such actual controller shall also fulfill the above-mentioned requirements (b), (c) and (d). Namely, the securities regulatory authority of the country or region where the foreign actual controller domiciles must have entered into the MOU with the CSRC and the foreign actual controller shall also be a licensed financial institution which has not been imposed with any material regulatory penalty in the preceding three (3) years

According to the *Company Law of the People’s Republic of China*, an actual controller refers to a natural person or a legal person or an entity that may control the corporate behavior of the WFOE despite the fact that it isn’t a direct shareholder of the WFOE. In view of the fact that, financial institutions’ controlling methods and arrangements with subsidiary companies may vary in different jurisdictions, to identify a foreign actual controller, not only the PRC laws and regulations shall be referred to, but relevant foreign laws and regulations and the actual circumstances of the control that the foreign institution exercises on the WFOE shall also be taken into full consideration.

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The *Explanation of the Private Fund Manager Registration and Information Update* published by AMAC in 2015 states that, to identify the actual controller, one shall trace to the ultimate natural person, or state holding enterprise/collective enterprise, or a foreign institution regulated by foreign financial regulators. To consider whether or not a WFOE has a foreign actual controller and, if yes, the identity of the actual controller, we suggest that the abovementioned definition could be taken as a reference.

2. Common Requirements

Pursuant to Article 89 of the *Law of the People's Republic of China on Securities Investment Funds*, anyone who acts as the manager of a non-publicly-raised fund shall register with AMAC according to relevant rules. Accordingly, a WFOE shall complete its registration with AMAC before it engages in private fund management business in China. A WFOE shall not engage in any fund raising or management activities with respect to any private fund before it completes the registration with AMAC.

In consideration of all the relevant self-disciplinary rules that came into force from the year of 2014, and the *Notice on Relevant Matters Regarding the Further Standardization of Private Fund Manager Registration*, an important rule that came into force upon 5 February 2016, generally speaking, a WFOE applying to AMAC for the private securities fund manager registration shall satisfy the following requirements:

(a) Company name

Relevant Chinese characters such as “fund management (基金管理)”, “investment management (投资管理)”, “asset management (资产管理)” shall be included in the company name of the WFOE.

(b) Business scope

The permitted business scope of the WFOE only includes “investment fund”, “fund management”, “investment management”, “asset management” or the like. Other items that are irrelevant to the private fund management business such as “business information consulting”, “corporate management consulting”, “international economy information consulting” shall not be included in the business scope of the WFOE.

The business scope of a private securities investment fund manager that consists of only two items: “investment management” and “asset management” is typical and precise qualified business scope of a WFOE.

(c) Capital

The shareholder of the WFOE shall give consideration to the following matters when determining the capital of the WFOE:

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- (i) Even though there is no specific requirement imposed by AMAC on minimum registered capital of a private fund manager, a private fund manager shall ensure that its actual paid-in capital is capable of covering all the operating cost before its obtained management fee could meet its operating expenses.
- (ii) Where the paid-in capital funds of a private fund manager come under 25% of its subscribed registered capital or under RMB 1 million, the private fund manager shall be “expressly marked up” and disclosed on the website of AMAC.
- (d) Business premises

Currently, AMAC has no compulsory requirement on the site selection and floor area of the private fund manager’s business premise, but the site selection and floor area shall be suitable for its private fund management business. Please also note that, it is permissible from AMAC’s perspective that the private fund manager may have business premises different from its domicile, however in which case, the WFOE shall carefully assess the potential risks it may encounter from the Administration for Industry and Commerce (“AIC”).

- (e) Senior management personnel and their practitioner qualification

Anyone acting as the senior management personnel of the WFOE shall satisfy the following requirements:

- (i) The senior management personnel of the WFOE shall include but without limitation to its legal representative, general manager, deputy general manager (if any) and compliance/risk control officer.
- (ii) There is no restriction imposed on the nationality of the senior management personnel of the WFOE.
- (iii) The WFOE shall have at least two (2) senior management personnel. The compliance/risk control officer is a must and shall not concurrently act in other positions with investment functions.
- (iv) All senior management personnel of the WFOE shall have fund practitioner qualification and may acquire the fund practitioner qualification if he/she satisfies any of the followings:

Having passed the fund practitioner qualification examination and the fund practitioner qualification examination includes Subject One (“Fund Laws and Regulations, Professional Ethics and Business Norm”) and Subject Two (“Basic Knowledge of Securities Investment Fund”).

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Having been engaged in the relevant investment management business in the most recent three (3) years, or having passed the securities practitioner qualification examination or the futures practitioner qualification examination or the banking practitioner qualification examination and satisfied certain conditions; or having passed relevant qualification examinations such as the certified public accountant qualification examination or the legal professional qualification examination or the public valuer qualification examination and satisfied certain conditions. Senior management personnel having satisfied those conditions will only be required to pass Subject One of the fund practitioner qualification examination, namely the “Fund Laws and Regulations, Professional Ethics and Business Norm”, and may be exempted from taking Subject Two of the fund practitioner qualification examination, namely the “Basic Knowledge of Securities Investment Fund”, to be deemed as having obtained the fund practitioner qualification.

It is our estimate that the foreign institution may need to designate persons that have asset management experience in the overseas market or foreign licensed persons to act as the senior management personnel of the WFOE. Whether such persons could be exempted from taking Subject Two of the fund practitioner qualification examination, namely the “Basic Knowledge of Securities Investment Fund” shall be further clarified and confirmed with AMAC.

(f) Identification of actual controller

When processing the private fund manager registration with AMAC, the WFOE shall provide a statement as to whether it has an actual controller and provide the relevant information of the actual controller if it does have one. For more information on the identification of actual controller as well as the qualification requirement for the actual controller, please refer to the “Special requirements” part of this article.

(g) Risk management and internal control systems

When applying to AMAC for the private fund manager registration, the WFOE shall formulate a complete set of risk management and internal control systems that cover key operational processes including but not limited to:

- Operational risk control system
- Information disclosure system
- System of record-keeping for internal transaction
- Investment and trading system to prevent insider dealing and conflicts of interests
- Risk disclosure system for qualified investors

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- Procedures and relevant system concerning the internal check of qualified investors
- Relevant standards and system concerning the marketing, promotion and fund-raising of a private fund
- Fair trade system
- Reporting system for the securities traded by the employees of the WFOE

Please note that all the above-mentioned risk management and internal control systems shall be in compliance with the *Guidelines on the Internal Control of Private Investment Fund Managers* released by AMAC and be duly approved by the internal decision-making organ of the WFOE (such as the board of directors of the WFOE). Besides, the WFOE shall be properly equipped with all the relevant practicality in respect of the above-mentioned systems and shall establish those systems which can fit in the organizational structure and staffing conditions as well as the actual operational needs of the WFOE.

Additionally, pursuant to FAQ No. 10, a WFOE engaging in private fund management business shall make investment decisions independently, and shall not place trading orders through foreign institution(s) or foreign-based system(s). This requirement may have profound impact on the foreign asset management institutions that have asset management business all over the world and might change the global trading systems and trading modes of these foreign institutions.

(h) Requirements for outsourcing service

The WFOE may choose a qualified outsourcing institution to provide services such as sales, settlement, TA, valuation and accounting, trading and IT system etc.

The outsourcing institution engaged by the WFOE shall have record-filed with AMAC as an outsourcing institution. The list of qualified institutions is available at <http://fo.amac.org.cn/amac/allNotice.do>.

(i) Compliance status of the WFOE and its senior management personnel

In respect of the compliance status, the WFOE and its senior management personnel shall satisfy the following requirements:

- (i) The WFOE shall not be subject to any criminal penalty or any administrative penalty by any financial regulator or any administrative regulatory measure;
- (ii) The WFOE and its senior management personnel shall not be subject to any disciplinary punishment by AMAC or any associations of other industries;

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- (iii) The WFOE and its senior management personnel shall not bear any negative information contained in the Capital Market Integrity Database maintained by the CSRC;
- (iv) The WFOE and its senior management personnel shall not be included in the List of Dishonest Persons Subject to Enforcement maintained by the Supreme People’s Court of China;
- (v) The WFOE and its senior management personnel shall not be included in the List of Abnormal Operation Enterprises or the List of Enterprises Having Committed Serious Violation against the Law as disclosed via the National Enterprise Credit Information Publicity System maintained by the State AIC; and
- (vi) The WFOE and its senior management personnel shall not have any bad credit records posted on the “Credit China” website (www.creditchina.gov.cn).

The WFOE shall give full consideration to the above-mentioned requirements when employing senior management personnel.

- (j) Involvement in litigation or arbitration

When processing the registration, the WFOE shall provide information about its litigation or arbitration involvement in the recent three (3) years, and the PRC lawyer shall fully assess the information and confirm whether the situation would have any influence on the qualification required for the private fund manager registration when issuing legal opinion.

- (k) Please also note that a registered private fund manager, which fails to launch its first private fund with AMAC within six (6) months upon the completion of its private securities investment fund manager registration, will be deregistered from the registry of private fund managers by AMAC. This means that a WFOE has to formulate a stage-by-stage business strategy before it comes into existence and also has to commence preparation work to launch a fund as early as possible.

3. Issuance of PRC legal opinion

Pursuant to the *Notice on Relevant Matters Regarding the Standardization of Private Fund Manager Registration* and FAQ No.10, a competent PRC law firm and its lawyers shall issue a legal opinion on whether the WFOE satisfies all the registration requirements set out by AMAC. The legal opinion is one of the required documents that shall be submitted to AMAC for private fund manager registration purposes. Therefore, the PRC law firm and its lawyers shall conduct due diligence on the WFOE, keep and archive all the working papers and documents generated therewith, and give conclusive legal opinion as to whether the WFOE satisfies all the requirements regarding the private securities investment fund manager independently and objectively.

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4. AMAC’s examination of the applications for private fund manager registration

Where the materials for the application for registration provided by the WFOE are complete, AMAC will complete the registration procedures within twenty (20) working days upon the acceptance of all the required documents and make a public disclosure of the basic information of the private fund manager on its official website (<http://www.amac.org.cn>).

IV. Incorporation of WFOE

The WFOE shall first be incorporated in China before it could file an application to AMAC for the private fund manager registration. Along with the improvement of PRC laws and regulations in relation to foreign investment, the procedures for setting up a WFOE in China have become increasingly straightforward and transparent, and its corresponding workflow is stated as follows:

1. Acquiring the company name pre-approval from AIC
2. Acquiring the foreign investment approval from local Ministry of Commerce
3. Registering with local AIC

If the WFOE is to be set up in China (Shanghai) Free Trade Pilot Zone, the above-mentioned steps 2 and 3 will be combined.

During the WFOE set-up process, the following matters shall be fully considered and prepared in accordance with the above-mentioned AMAC requirements on the private fund manager registration:

1. Determining the board of directors/executive director, legal representative, general manager, deputy general manager, compliance/risk control officer, finance officer of the WFOE;
2. Determining the articles of association of the WFOE;
3. Determining the capital of the WFOE;
4. Determining the registered address and business premises; and
5. Preparing the documents required for the WFOE set-up such as the power of attorney that authorizes a handling person, the incorporation certificate or business license of the WFOE’s shareholder etc.

V. Outlook and suggestion

FAQ No.10 is not only a significant measure China took to meet its open-up commitment, but also a long-awaited major policy to foreign financial institutions. In the near future, China will definitely see many resourceful foreign financial institutions coming into the Chinese asset management and financial market through this channel.

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However, the selection of foreign shareholder, setting up the WFOE, application for the private fund manager registration as well as the commencement of the private securities investment fund management business together form a “systematic project”. We suggest that any foreign financial institution with interests should combine all the resources it has internally and acquired externally from its intermediary agents, and start early on its research and study of the relevant laws and regulations and self-disciplinary rules, conduct self-assessment and form practical plans for the private fund to be launched and managed in China, so as to complete the business layout in the area of private securities fund in China as early as possible.

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