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FINANCING & PE INVESTMENTS / 融资和私募股权投资

CBRC Updated Regulations on Entrusted Loans 银监会发布委贷新规

为了引导委托贷款资金回归本源，弥补对影子银行的监管短板，防范相关金融风险，2018年1月6日，银监会发布《商业银行委托贷款管理办法》（“《办法》”）。《办法》重点从以下几点规范委托贷款：

- (a) **限制资金来源：** 商业银行不得接受受托管理的他人资金、银行的授信资金、具有特定用途的各类专项基金、其他债务性资金和无法证明来源的资金等发放委托贷款；
- (b) **限制资金用途：** 贷款资金不得用于生产、经营或投资国家禁止的领域和用途，不得从事债券、期货、金融衍生品、资产管理产品等投资，不得作为注册资本金、注册验资，不得用于股本权益性投资或增资扩股等；
- (c) **进一步明确商业银行的地位：** 作为受托人，不得要求代委托人确定借款人，不得参与贷款决策，不得提供各种形式担保，也不承担信用风险；以及
- (d) **进一步加强商业银行的风险管理职责和监管责任：** 如要求银行登记委托贷款的资金投向，并报送银监会；定期分析委托贷款业务风险，并开展业务调查等。

就对于PE基金的影响而言，《办法》未明确PE管理的资金是否属于“受托管理的他人资金”，因此PE能否发放委托贷款并不明确。值得注意的是，与此相关，中基协于近日发布相关《须知》，明确指出私募基金不得通过委托贷款、信托贷款等方式直接或间接从事借贷活动（见本期Newsletter第二则新闻）。此外，《办法》规定，委托贷款不得用于股本权益性投资，因此，PE日后可能将难以通过委托贷款的方式筹措用于股权投资的资金。

AMAC Announced Notices to Curb Debt-Nature Investments 投资

1月12日，中基协在其“资产管理业务综合报送平台”发布《须知》，明确指出私募基金的投资不应是借贷活动，并列举了以下不属于私募基金范围的情形：(a)底层标的为民间借贷、小额贷款、保理资产等《私募基金登记备案相关问题解答（七）》所提及的属于借贷性质的资产或其收（受）益权；(b)通过委托贷款、信托贷款等方式直接或间接从事借贷活动的；(c)通过特殊目的载体、投资类企业等方式变相从事上述活动的。为促进私募投资基金回归投资本源，中基协将于2月12日起，不再办理不属于私募投资基金范围的产品的新增申请和在审申请。

《须知》明确了私募基金不得直接或间接从事借贷活动，但该等限制是否会波及“股+债”结构的业务，引发了市场的担忧。从近期中基协和其他政府部门的一些政策发展来看（包括但不限于中基协于1月23日在

In order to manage credit risks involved in entrusted loans, on January 6, 2018, the China Banking Regulatory Commission (or CBRC) issued the *Administrative Measures for Entrusted Loans of Commercial Banks* (the “Measures”), according to which:

- (a) banks must not accept entrusted funds, their own credit funds, funds with other specific purposes or unproven sources from trustors, to grant entrusted loans;
- (b) entrusted loans shall not be used for investments in equities, bonds, futures, derivatives, asset management products or otherwise in the areas or purposes prohibited by the applicable laws;
- (c) it is further clarified that banks should only act as a trustee, and must not choose borrowers on behalf of the trustors, participate in loan decision-makings, or provide any form of guarantee or assume credit risks, and
- (d) banks are further required to enhance responsibilities on risk management and *ex post* supervisions involving entrusted loans, e.g., banks should record use of proceeds for the entrusted loans and report the same to CBRC, periodically analyze potential risk exposure of their entrusted loan business and etc.

In terms of their impact on the PE investments, it's not crystal clear whether PE managed funds will be considered as “*entrusted funds*” in (a) above and are thus prohibited from being extended as entrusted loans from CBRC's perspective. Note that AMAC (the administrative arm of the PE funds) tends to adopt a view that PE funds should not engage in entrusted loans if they are debt in nature (see the next alert of this monthly newsletter for details). Besides, the prohibited use of proceeds on equity investments with entrusted loans may also curb PE's abilities from raising funds through entrusted loans.

AMAC Announced Notices to Curb Debt-Nature Investments 中基协发布相关规定限制PE基金纯债务

Echoing CBRC's new regulations on the entrusted loans (see the above alert of this monthly newsletter for details), on January 12, 2018, AMAC released relevant notes (the “Notes”) on its online asset management submission platform that privately-placed funds should not engage in the following debt products: (i) private loans, small-amount loans, factoring assets or relevant beneficial rights set forth in the *Answers to Questions Related to the Record-Filing for Privately-Placed Funds (7th Series)* whose ultimate goal is to provide loans; (ii) lending activities through entrusted loans, trust loans and etc.; and (iii) other debt-in-nature products in various disguised forms through SPVs or other instruments. AMAC will stop new or under-review applications of such unqualified PE products from February 12.

It is not clear whether the above-mentioned prohibition of debt-nature investments will also extend to the more commonly used investment structures combining debt and equity elements (such as convertible debt). However, based on our observations of

北京召开的“类REITs业务专题研讨会”上表示，私募基金可以在类REITs业务中综合运用股权、夹层、可转债、符合资本弱化限制的股东借款，以及多部委于近日联合发文鼓励PE参与市场化债转股（详见下一篇Newsletter等），部分“股+债”结构的业务依然是被允许的，但具体适用范围如何，还有待进一步观察。

recent regulatory updates (including, for example, AMAC has welcomed debt and stock combination structures in PE-related Quasi-REITs businesses according to a recent real estate seminar hosted by AMAC, and the government has recently allowed PEs' participation in debt-to-equity restructurings of relevant entities (see the next alert of this monthly newsletter for details)), we tend to think that the debt/equity structures are at least permitted in certain circumstances, though a more clear guidance is yet to be spelt out by AMAC in the future.

PE Funds May Participate in Market Oriented Debt-to-Equity Restructurings 多部委联合发布通知允许PE参与市场化债转股

为降低企业杠杆率，解决市场化银行债权转股权（通常是指银行向实施机构（主要是金融资产管理公司、保险资产管理机构、国有资本投资运营公司、银行符合条件的所属机构等）转让银行对对象企业的债权，由实施机构将该等债权转为对象企业的股权）工作中遇到的具体问题和困难，发改委、中国人民银行、财政部、国有资产监督管理委员会、银监会、证监会和保监会于1月19日联合发布《关于市场化银行债权转股权实施中有关具体政策问题的通知》（“《通知》”）。

On January 19, the National Development and Reform Commission (or NDRC), the People's Bank of China (or PBOC), the Ministry of Finance (or MOF), the State-Owned Assets Supervision and Administration Commission (or SASAC), CBRC, the China Securities Regulatory Commission (or CSRC) and the China Insurance Regulatory Commission (or CIRC) jointly issued the *Circular on Certain Policies for the Implementation of Market-Oriented Debt-to-Equity Conversions* (the “Circular”), to help convert qualified debts to equity interests and reduce leverage of the relevant entities (mostly state-owned ones), an effort initiated back in 2016 by the State Council.

2016年10月，国务院发布了《国务院关于积极稳妥降低企业杠杆率的意见》及其附件《关于市场化银行债权转股权的指导意见》，启动本轮市场化债转股于；随后，虽然多家央企发布市场化债转股方案，但实施情况并不理想。《通知》从多方面鼓励落实市场化债转股，包括允许实施机构发起或联合PE合作发起设立开展市场化债转股的PE，允许银行理财产品对该等PE出资。此外，《通知》允许实施机构采用股债结合、以股为主的综合性方案降低企业杠杆率，而不再限于于债转股的方式；明确转股企业的类型不限于国有企业，还包括民营企业、外商投资企业在内的各类所有制企业；并且列举了除银行债权之外的可转股的其他类型的债权（包括但不限于财务公司贷款债权、委托贷款债权、融资租赁债权、经营性债权等，但不包括民间借贷形成的债权）。

Compared with the previous one introduced in 2016, the Circular has tried to introduce a more market oriented scheme, such as allowing PE funds to work with the qualified implementing institutions (i.e., financial asset management companies, insurance asset management agencies, state-owned capital investment operating companies, qualified subsidiary institutions of banks and etc. who will buy debts from the banks and then convert such claims to the equity interest of the target entities) to restructure the subject debts, and permitting varied combinations of equity and debt restructurings instead of a single form of debt-to-equity conversion. Furthermore, the Circular further clarified that not only state-owned enterprises, but also private-owned enterprises and foreign-invested enterprises can be the targets of the debt restructurings, and debt claims by financial companies other than the banks, entrusted loan claims, finance lease claims, operating claims can also be restructured to equity interests.

OUTBOUND INVESTMENTS / 境外投资

Seven Ministries Set to Integrate Outbound Investment Administration Framework 七部门联合发文建立部门协作的境外投资监管框架

近日，商务部和中国人民银行、国有资产监督管理委员会、证监会、银监会、保监会、外管局联合发布了《对外投资备案（核准）报告暂行办法》（“《暂行办法》”），并于发布之日起生效。

Recently, the Ministry of Commerce (or MOFCOM), PBOC, SASAC, CBRC, CSRC, CIRC and the State Administration of Foreign Exchange jointly issued the *Interim Measures on the Filing, Approval, and Reporting of Outbound Investments* (the “Interim Measures”), effective upon release.

根据商务部随后的官方解读，作为引导和规范对外投资发展的一项重要基础性制度，《办法》拟建立“管理分级分类、信息统一归口、违规联合惩戒”的对外投资管理模式，《暂行办法》主要内容如下：(a)在国务院办公厅2017年8月4日转发国家发展改革委、商务部、人民银行外交部《关于进一步引导和规范境外投资方向指导意见的通知》（国办发〔2017〕74号）的基础上，明确对外投资备案/核准按照“鼓励发展+负面清单”进行管理，但负面清单（将明确限制类、禁

As an infrastructure type of rules governing outbound investments, the Interim Measures proposed to establish a joint administrative system with *differentiated management, unified information channel, and inter-department disciplinary system*, based on an official interpretation by MOFCOM. The Interim Measures reiterated that the current filing/approval system on outbound investments should be based on a *negative list* to be adopted, and the subject countries or regions for the outbound filing/approval should only be the ultimate ones where the

止类对外投资行业领域和方向)尚待出台;(b)明确对外投资备案/核准的对象是境外设立的最目的地(即境内投资主体投资最终用于项目建设或持续生产经营的所在地)企业,对于境内投资主体投资到最目的地企业的路径上设立的所有空壳公司,管理部门均不予备案或核准;(c)加强了企业的报告义务,需就备案/核准的项目定期报送关键环节信息(包括月底/年度信息、并购前期事项、在建项目进展情况等),但具体内容、途径和频率还需相关部门另行规定;另外,重大不利事件或突发安全事件需要一事一报;以及(d)强调七部门之间的协调统一、信息共享与联合监管,明确由商务部牵头,负责汇总其他部门的对外投资信息并定期反馈。下一步,商务部和其他有关部门应根据《办法》制定或修改相应的配套规定,以落实《办法》中的具体规定,包括现行的商务部于2014年发布的《境外投资管理办法》。

发改委并未参与此次《办法》的起草,《办法》也未改变企业境外投资需满足的商务部和发改委的“双线”体系监管(金融企业或国有企业,需符合特殊监管要求)。《办法》拟通过增强信息报告和共享,构建各部门对企业境外投资的联合监管(尤其是事中和事后监管),引导我国对外投资在一带一路的时代背景下健康有序发展。

investments are finally made (*instead of any intermediate destinations of SPVs*). The Interim Measures further strengthened information reporting obligations by the parent Chinese entities (*on pre-investment matters, monthly/annual-based regular reporting, key progresses, etc.*), and set to establish a unified information collecting and sharing system among the seven ministries (*to be led by MOFCOM*). Specific rules are expected to be adopted by the relevant government agencies in the near future to implement the Interim Measures, including that MOFCOM is reported to be revising its current *Measures for the Administration of Overseas Investments*, effective from October 2014.

Note that NDRC is not a party of the government agencies adopting the Interim Measures, and the Interim Measures have not changed the current dual-filing/approval management by NDRC and MOFCOM that the outbound investments are mainly subject to (*financial institutions or state-owned enterprises are subject to separate regulations*). The Interim Measures have generally focused on consolidating administrations among different government agencies to promote a collaborative in-process and post effect supervision, which will hopefully guide the country's outbound investments towards more healthy and orderly ones.

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