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母基金（FOF）迷局

中国首个全国性股权投资基金管理规范——国家发改委于2011年11月发布的“2864号文”——针对非法集资常用手段而采用的“非法人打通原则”和“股权投资母基金”豁免，会对中国市场化母基金的发展带来怎样的影响?

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中国合伙制私募基金法律在过去的六年发展中经历了几个里程碑：第一个里程碑是2006年10月中国修改了《合伙企业法》，推出了有限合伙这一国际私募基金主流的法律形式，使中国私募基金更接近国际惯例。自此，合伙制私募基金如雨后春笋般地在全国各地发展起来。第二个里程碑是2009年12月合伙企业被首次正式允许开立证券账户，标志着合伙企业可以在所投资公司上市后名正言顺地作为股东持有上市后的股票，解决了合伙制基金投资的上市退出。但中国的私募基金监管环境仍处于一种粗放的状态，其中最重要的是全国性私募基金立法缺位。

首个全国性股权投资基金规范出台

作为目前中国私募基金设立和运作的主要监管机构，国家发改委于2011年11月发布的《关于促进股权投资企业规范发展的通知》（“2864号文”），将全国大小规模的股权投资基金均纳入备案监管的范畴，标志着中国首个全国性股权投资基金管理规范的出台，这可以算是私募基金法律发展的又一个里程碑。

2864号文的核心在于打击以私募基金为名向社会大众进行的非法集资活动，规范私募融资市场。为此，2864号文的相关指引文件将私募基金的单个投资人的最低投资金额从之前某些省级地方规定中几百万元人民币的最低金额（如天津的200万和上海的500万元人民币）提高到了1000万元人民币。以私募基金为名的非法集资者为规避《合伙企业法》和《公司法》对于合伙人和有限公司股东不得超过50人的限制，除直接采用代持来规避外，往往将多个投资者集中起来设立一个实体（特殊目的公司或SPV）间接投入基金。对此，2864号文祭起的利器是“非法人机构穿透原则”：即如果一个基金的合伙人或股东是一个合伙企业或信托等非法人机构，需要打通该非法人机构，核查其背后的法人或自然人，来计算投资者人数，且该等被打通后的最终投资人亦需满足单个投资人1000万元的最低出资要求。非法人机构穿透原则目前唯一的例外是在发改委备案的“股权投资母基金”。由于国内绝大多数的私募基金无法满足每个投资者1000万元的最低出资额要求，因而“股权投资母基金”成为最后的救命稻草。业界有不少人预测，2864号文将使得母基金作为机构投资者在中国迎来飞速发展的春天。

欧美市场化FOF简介

正确地理解2864号文中的“股权投资母基金”(Private Equity Fund of Funds，简称FOF）及其对FOF发展的影响，需要对FOF这一源于欧美的概念及2864号文中的“股权投资母基金”与欧美FOF的异同有一个深入的了解。

欧美的FOF即投资于其它基金的基金，由专业的团队管理，收取管理费和绩效分成（通常低于直投基金）作为团队的回报。第一批FOF分别在上个世纪80年代末和90年代初在美国和欧洲出现。经过二十年的发展，FOF已经成为私募基金市场中重要的机构投资者之一，其投资额约占全球私募基金市场的15%。

欧美FOF的存在和发展是因其具有的下述三大基本功能：

（一）集合资金以获取投资优秀基金的通行证。通常业绩优秀的基金在募资时会供大于求、超额认购（oversubscribed）,因而对投资人有较高的要求（包括最低投资额、投资者的资信、投资者在FOF领域的经验和声誉、对基金提供的附加值贡献等），美国法律对某类基金（即下述的3(c)(1)基金） 投资者人数亦有限制。FOF通过将单独无法达到业绩优秀基金的投资者要求的资金集合起来，设立一个FOF基金，使得这些投资者能够通过FOF投资到业绩优秀的基金，而FOF基金管理人则向投资人收取管理费和绩效分成(carried interest)，比例通常远低于直投基金。

这里要强调的是，上述FOF的集资功能与国内非法集资者使用的SPV有本质的区别。因为：首先，FOF和直投基金一样，其投资和管理权在一个专业的管理团队，而对于一个SPV， 是由SPV背后的投资者来决定投资特定的基金；其二，FOF投资于多个直投基金，以达到分散风险的作用，而非仅投资于一个特定基金的SPV。

（二）分散投资风险。由于私募基金的投资领域、策略、地域、团队风格、业绩表现等的区别，每个基金

的风险敞口（risk exposure）都不一样。根据现代投资组合理论，一个投资人（如FOF）需要投资于至少6–8个PE基金才能获得一个风险较分散的PE基金组合。通过FOF，投资者可以较小的资金间接投资于多个基金，风险得以分散。

（三）专业化管理。在一个较成熟的私募基金市场，私募基金的种类繁多，有广义的PE基金（包括杠杆并购基金（leveraged buyout fund或LBO fund）和风险投资基金（venture capital fund或VC fund））、介于股权和债权投资的夹层基金（mezzanine fund）、对冲基金（hedge fund）和专门投资特定行业的基金（如地产基金（real estate fund）、基建基金（infrastructure fund）、能源基金（energy fund）、清洁技术基金（cleantech fund））等，每类基金的不同管理团队在投资策略、风格、业绩表现等方面也往往有较大的不同，要对市场上为数众多的基金团队进行深入的了解和调查，需要非常专业的投资人员。即使对于一个拥有1亿美元可投资资产的富有家族，按照现代投资组合理论可以将其中10%（即1000万美元）配置到PE基金，专门设立一个内部的FOF团队从成本角度也是不合算的。

“股权投资母基金”vs.市场化母基金

目前中国私募基金市场上机构投资者十分匮乏，主要是全国社保基金和保险资金，但两者都设有较高门槛，绝大多数的私募基金机构都无缘获得两者的眷顾，因此，类似欧美的FOF在中国拥有很大的市场需求，能起到提高中国私募基金市场的机构化程度、推动市场规范发展的作用。

但2864号文中的“股权投资母基金”与欧美的FOF有着本质的区别。根据2864号文，所有在中国境内设立的从事非公开交易企业股权投资业务的股权投资企业（包括以股权投资企业为投资对象的“股权投资母基金”），除已经根据《创业投资企业管理暂行办法》备案的创投企业和由一家机构独资设立的股权投资企业），均须按照其规模是否达到5亿元人民币（或等值外币）在国家发改委或省级备案管理部门进行备案。2864号文的相关指引则“建议”（在实践中实际上是“要求”）所有新设的股权投资企业的单个投资人出资额不低于1000万元人民币。在目前的备案实践中，成功备案的“股权投资母基金” 主要是专门设立用于投资某一特定基金的特殊目的载体（这与欧美FOF的概念相去甚远，不具有前述的市场化FOF三大功能），只要该“股权投资母基金”本身亦满足直投基金备案的要求，主要包括：（a）单个投资人出资额不低于1000万元人民币，（b）投资者人数不超过50个（如投资者为非法人机构则需如直投基金一样打通核查）,以及（c）不存在其他非法集资的情形。因此，目前的备案管理实际上具有实质性审查的性质。在2864号文要求所有股权投资企业均须进行备案的背景下，除了鼎晖、弘毅、中信产业之类知名的一线基金外，尚有至少数以千计的基金和其背后数以万计甚至十万计的投资人，由备案管理部门对数目如此众多的基金和投资人进行实质性的审查，将从人力资源和专业水平等方面对各级备案管理部门提出极大的挑战，也可能为相关备案官员提供寻租的空间。另外，备案管理部门目前并不对备案基金或对外出具任何“股权投资母基金”资格认定的证明，所以对于潜在投资人而言，除了基金本身的承诺保证外，无法确认该基金是否已被认定为2864号中的“股权投资母基金”。

再有，“股权投资母基金”的备案实际上使得部分基金突破了《合伙企业法》和《公司法》对于合伙人和有限公司股东人数不得超过50人的限制。备案管理部门认可的基金可以通过设置多个平行的或多层的“股权投资母基金”并将其备案的方式，事实上使得其投资人数没有任何的上限。这种通过一个部委的部门规章对全国人大制定的《合伙企业法》和《公司法》进行的突破是否合法，似乎值得商榷。

私募合格投资人资格：美国 vs. 中国

根据美国的《证券法》（Securities Act）和《投资基金法》（Investment Company Act）私募基金分两种形式：一种为针对包含较小投资人的基金（“3(c)(1)基金”），要求自然人投资人的收入水平或净身家、机构投资人的总资产达到一定的水平 (满足该要求者称为“accredited investor”),投资人的人数不超过100人；第二种为针对较大投资人的基金（“3(c)(7)基金”），要求每个自然人投资人拥有不低于500万美元的金融资产、机构投资人拥有不低于2500万美元的金融资产(满足该要求者称为“qualified purchaser”)，如果每个投资人都满足上述条件，则对基金投资者总人数没有上限。美国法律对单个投资人在上述两种基金中的最低投资额不作强制性要求，尽管基金发起人通常会有最低投资额的要求。

如前所述，2864号文的规定和目前的备案实践，实质上使得所有投资人均满足1000万元最低投资额的基金可以通过设立多个或多层的备案“股权投资母基金”的方式，使得其投资者人数不受任何的上限，这与美国的3(c)(7)基金不设置人数限制有些相近，但单笔投资1000万的要求即使按照美国投资人的标准也是过高的。根据现代组合投资理论和实践，在一个风险较充分分散的投资组合中，股票和固定收益类投资大约占三分之二，另类投资（主要包括PE、对冲基金和地产）大约占三分之一，其中PE基金投资约占整个投资组合的10%。而对于一个PE基金的投资组合中，需要投资于6–8个基金才能达到较大的风险分散。照这样计算，一个能够在单个基金中投资1000万元人民币的投资人，至少应拥有6–8亿元人民币（约相当于1–1.3亿美元）的可投资资产。尽管高风险、高收益的PE基金仅适合能够承受相应风险的富有人群和机构投资者，但将PE基金的合格投资者限于如此小的人群，则实在过于严苛。同时，由于对单笔投资不少于1000万元人民币的要求，对于绝大多数可投资资产不足的投资者，只能减少所投资基金的数量，这样会人为地增加投资者的PE基金投资组合集中度过高的风险。

2864号文将使市场化FOF迅速迎来春天？

2864号文及其指引出台后，不少评论者认为，由于只有极少的个人投资者能够满足1000万元的单笔投资要求，这势必很快地催生很多机构投资者 – FOF的发展。笔者认为这个判断可能为时过早。

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按照目前发改委备案的实践，不需要打通计算的“股权投资母基金”也需要满足单个投资人1000万元的最低出资额，这使得“股权投资母基金”不具备前面所述的FOF集合较小投资额以获得投资优秀基金通行证的功能。如果一个投资人能够单笔出资1000万元，则基本不需要通过真正的FOF去投资，因为其成本会增加（除直投基金层面通常的管理分和绩效分成之外，在FOF层面还需额外交纳的管理费和绩效分成）。对于真正的FOF，如果其中包括单笔出资低于1000万元的投资人，除非适用一套不同的判定规则，否则需要打通计算投资者人数，从而可能导致FOF本身或其被投资基金的合伙人超过50人而无法完成备案。当然,FOF也可以通过设立为公司制来避免被打通计算，但其带来的税务成本是绝大多数FOF所无法接受的。

综上所述，目前2864号文对于“股权投资母基金”的规定和备案实践，给予了监管机关认可的部分基金突破《合伙企业法》和《公司法》对于合伙人和有限公司股东人数不超过50人限制的一个途径，造成了大型基金和中小型基金游戏规则的差异和不平等的对待，而并不能直接实质性地催生市场化的FOF。

打通原则的法律实践：中国 vs. 美国

在美国法下,同样需要解决投资人是否需要打通的问题：3(c)(1)基金和3(c)(7)基金均需要确保每一个背后的最终投资人满足accredited investor或qualified purchaser的要求；3(c)(1)基金同时需要确保其最终投资人人数不超过100人。但美国相关法律并没有作法人与非法人之类的区分，而是采用实质重于形式的原则,判断该投资实体是否专门为投资本基金而设立，具体依据包括：该投资实体是否将其相当大的一部分资产投资于本基金（40%是一个警戒线），以及该投资实体背后的投资人是否拥有决定投资的权限等。建议中国的有关监管部门可以参照美国私募基金监管的相关做法，制定合理、公平的游戏规则。

结语

在中国，发展不到六年的合伙制私募基金是一个拥有巨大潜力的朝阳产业，不断改善的法律环境将有效地推动国内私募基金的良性发展，而过于苛严或过于宽松的监管政策则可能抑制私募基金的发展或导致其野蛮生长。中国私募基金法律发展之路仍然任重道远，基金界的有识之士仍需上下求索，以寻找到一条既与国际惯例接轨又符合中国国情的发展之途。

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Legal Commentary

CHINA PRACTICE • GLOBAL VISION

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Private Equity Law

The "FoF" Conundrum

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November 2011 marked the birth of China's first national regulation governing the formation and operation of equity investment funds ("EIFs"), i.e., Circular 2864 promulgated by China's National Development and Reform Commission ("NDRC"). Created for the primary purpose of cracking down on illegal fundraising activities prevalent in China, the regulation adopts non-legal-person look-through rules and creates an exemption for "equity investment funds of funds" ("EIFoF"). What implications will it have for the growth of the funds of funds ("FoF") market in China?

The regulatory framework for private equity funds in the form of partnership in China has reached several milestones in the past six years. The first milestone is the amendment of China's Partnership Enterprises Law in October 2006, which allows, for the first time, the establishment of private equity funds in the form of limited partnership ("LP-funds") in China, thus moving China's private equity industry closer towards international common practice. Since then, thousands of LP-funds have sprung up all over the country. The second milestone occurred in December 2009, when partnerships began to be allowed to open securities accounts for the first time. This provides LP-funds with a new exit option, since a partnership is now entitled to hold stock of its investee company as its shareholder after the company goes public. Despite such favorable developments, however, private equity funds in China remain loosely regulated, most importantly due to the absence of national private equity laws.

Issuance of First National Regulation Governing EIFs

As the lead government agency supervising the formation and operation of EIFs in China at this time, NDRC promulgated the NDRC Notice on Promoting the Healthy Development of Equity Investment Enterprises ("Circular 2864"), which requires all EIFs to conduct a mandatory record-filing regardless of their size. Circular 2864 marked the birth of China's first national regulation governing EIFs and may be considered the third milestone for the evolving regulatory landscape of private equity funds in China.

The primary purpose of Circular 2864 is to regulate the private equity fundraising market by cracking down on illegal fundraising activities in the name of private equity funds. Therefore, the accompanying guidelines for Circular 2864 increased the minimum investment amount by a single investor in a private equity fund from several million yuan as required under some provincial rules (e.g., RMB2 million in Tianjin and RMB5 million in Shanghai) to RMB10 million. In order to circumvent the 50-partner/shareholder limit set by the Partnership Enterprises Law and the Company Law, respectively, illegal fundraisers often resort to nominee shareholding arrangements or cause multiple investors to indirectly invest in the fund through an entity specifically created for that purpose (an "SPV"). To combat such circumvention mechanisms, Circular 2864 adopts non-legal-person look-through rules where, if the partner or shareholder of a fund is a partnership, a trust or any other non-legal person entity, such partner or shareholder will be looked through for purposes of calculating the number of investors in the fund and for satisfying the minimum investment amount requirement of RMB10 million. The only exemption from the non-legal-person look-through rules under Circular 2864 is the so-called EIFoFs that have duly filed with the NDRC or provincial filing authorities. Since most domestic private equity funds are unable to satisfy such high minimum investment amount requirement, EIFoF appears to be their last resort, leading to a popular prediction by many industry commentators that Circular 2864 will boost the growth of FoFs as institutional investors in China. How much truth is there in such prediction?

Market FoF in the U.S. and Europe

To fully understand the EIFoF under Circular 2864 and its implications on the development of market FoFs, one needs to start with the concept of market FoF, which dates back to the U.S. and Europe and its differences from the seemingly similar brethren under Circular 2864.

In the U.S. and Europe, an FoF is a fund managed by a professional team that invests in multiple other funds An FoF manager collects a management fee and carried interest (usually significantly lower than that charged by the manager of a direct investment fund) as compensation for the manager. The first generation of FoFs emerged in the U.S. and

Europe in the late 1980s and early 1990s, respectively. Today, FoF has evolved to become one of the major types of institutional investor in the private equity market, accounting for about 15% of capital provided to private equity funds on a global basis.

The emergence and growth of FoF in the U.S and Europe are due to the following three fundamental functions that they perform:

I. Pooling Capital to Gain Access to Top-performing Funds

Top-performing funds are often oversubscribed and tend to impose high quantifiable and non-quantifiable criteria on their investors (such as minimum investment amount, investors' creditworthiness, experience and reputation in the industry and value-add to the GPs, etc.). Also, U.S. law limits the number of investors for one major type of funds (i.e., section 3(c)(1) funds discussed below) to no more than 100. By pooling together capital of investors who are not able to individually meet the investor criteria of top-performing funds and investing their capital through an FoF, those investors are able to gain access to such top funds, and FoF managers receive management fees and carried interest (usually significantly lower than that charged by the manager of a direct investment fund) in return.

It is worth noting that FoFs' fundraising function described above is fundamentally different from the SPV mechanism adopted by illegal fundraisers. Firstly, an FoF, just like a direct investment fund, is invested and managed by a professional investment team, while an SPV is controlled by the investors behind it, who have discretion as to which fund to invest in and how much to invest. Secondly, an FoF invests into multiple direct investment funds to achieve risk diversification as discussed below, while an SPV only invests into a specific fund.

II. Diversification of Investment Risk

Since different private equity funds have different strategies, industry/geographic focus, investment style, performance, etc, each fund has a different risk exposure. According to the modern portfolio investment theory and practice, each investor (such as an FoF) needs to invest into six to eight private equity funds in order to achieve most of the risk diversification. Through an FoF, investors are able to diversify their investment risk by indirectly investing into multiple funds, each with a relatively small amount of capital.

III. Professional Management

In a mature private equity market, there are many different types of private funds, such as private equity funds (broadly defined to include leveraged buyout funds and venture capital funds, mezzanine funds that invest between equity and debt on the capital structure, hedge funds, real estate funds and industry-focused funds (such as infrastructure funds, energy funds, clean-tech funds, media funds, etc.). Each type of funds may also differ significantly in terms of investment strategy, style, performance, etc. Skilled investment professional are needed in order to conduct a thorough due diligence on and gain a deep understanding of such a large fund manager universe. According to the modern portfolio investment theory, even for a wealthy family with investable assets of USD100 million, only about 10% (i.e., USD10 million) should be allocated to private equity funds, which is not a large enough amount to justify establishing an in-house FoF team.

EIFoF under Circular 2864 vs. Market Funds of Funds

So far there are only a very small number of institutional investors in China's private equity market. The national social security fund and insurance companies are the two major institutional investors, but their investment thresholds are too high for most private equity funds. Therefore, there is a large demand for market FoFs like those in the U.S. and Europe, the growth of which would help promote the institutionalization and healthy development of China's private equity industry.

However, EIFoFs under Circular 2864 are fundamentally different from their market brethrens in the U.S. and Europe. According to Circular 2864, all equity investment enterprises ("EIEs") established in China and engaged in equity investment in non-public enterprises (including EIFoFs that invest in EIEs), with the exception of venture capital enterprises already filed under the Interim Administrative Measures for Venture Capital Enterprises and funds established and funded by a sole person/institution, are all subject to record-filing with the NDRC or a provincial record-filing authority depending on whether the size of the fund reaches RMB500 million or its equivalent in foreign currency. The accompanying guidelines of Circular 2864 "suggests" (which in current practice actually means "requires") that each investor invest at least RMB10 million in an EIE. To date, of the EIFoFs that have successfully completed record-filing with the NDRC, almost all are SPVs specifically established for the purpose of investing in one fund, which is very different from FoFs in the U.S. and Europe. Such EIFoFs are not able to perform any of the three major functions of market FoFs discussed above. EIFoFs themselves are also required to satisfy the filing requirements just like direct investment funds, including: (a) a minimum investment amount of at least RMB10 million for any investor, (b) a maximum number of investors of 50 (investor that is a non-legal-person institution will be looked through just like a

direct investment fund), and (c) there are no other illegal fundraising circumstances. Therefore, the current record-filing practice has a substantive review element. Considering that all EIEs in China, regardless of size or geographic location, are now required to file under Circular 2864, except a small number of well-known first-tier funds such as CDH, Hony Capital and CITIC Mianyang Industrial Fund, there are thousands of other funds and tens of thousands (if not more) of investors behind them. Conducting a substantive review of such a large number of funds and investors would pose an almost insurmountable challenge to the record-filing authorities at all levels in terms of human resources, expertise, etc., and it may also lead to rent-seeking opportunities for officials involved in the record-filing process. In addition, the record-filing authorities currently do not issue any written verification of the EIFoF-status to the fund or anyone else, which makes it impossible for potential investors in such funds to verify (other than through an undertaking from the fund) whether a particular FoF investor of a direct investment fund has been granted EIFoF status under Circular 2864.

Furthermore, the current EIFoF record-filing practice allows larger and more established funds to circumvent the 50-partner/shareholder limit imposed by the Partnership Enterprise Law and the Company Law. Under the current record-filing practice, funds that are well-known to the record-filing authority would appear to be able to accept an unlimited number of investors by forming multiple SPVs or multiple layers of SPVs and filing such SPVs as EIFoFs. The legitimacy of the circumvention, through a ministerial regulation, of the 50-partner/shareholder limit set by laws promulgated by the National People's Congress is questionable.

Investor Qualification: U.S. vs. China

There are two forms of private funds under U.S. law. The first type is section 3(c)(1) fund, used by funds with some smaller investors. The number of investors of such funds is limited to 100, and each investor needs to meet a relatively low annual income test (US$200,000 for an individual and US$300,000 jointly with spouse) or net worth test (US$1 million for natural persons and US$5 million for entities) (a qualified investor in a section 3(c)(1) fund is termed an "accredited investor"). The second type is section 3(c)(7) fund, used by funds with large investors, which requires each natural person investor to have minimum financial asset of USD5 million and each entity investor to have minimum financial asset of USD25 million (a qualified investor is termed an "qualified purchaser"). There is no upper limit for the total number of investors in a section 3(c)(7) fund. U.S. law does not impose any mandatory requirement for the minimum investment amount of a single investor in either of the above two types of funds, even though as a common market practice, the fund sponsor usually imposes a minimum investment amount.

As discussed above, Circular 2864 and the current record-filing practice in effect enable larger and more established funds to accept as many investors as they want by forming multiple SPVs or multiple layers of SPVs and filing them as EIFoFs. Such funds may at first glance appear similar to section 3(c)(7) funds in the U.S., which also set no upper limit on the number of investors. However, section 3(c)(7) applies consistently to all funds with all investors qualifying as "qualified investors" without prejudice to smaller funds or granting preferred treatment to more established and well-known funds.

Furthermore, the RMB10 million minimum investment amount is extremely high even by U.S. standards. According to the modern portfolio investment theory and practice, in a well-diversified portfolio, roughly two-thirds of the portfolio should be allocated to stock and fixed income investments. Roughly one-third should be allocated to alternative investments (mainly including private equity, hedge funds and real estate), of which private equity should account for roughly one third. That translates into a roughly 10% allocation of the entire portfolio to private equity. A well-diversified private equity portfolio should have at least six to eight fund investments in order to sufficiently diversify the risk. Accordingly, an investor that is able to invest RMB10 million in one single fund should have investable assets of RMB600-800 million (or USD100-130 million). While private equity is a high risk, high return investment suited only for investors with a high risk tolerance, limiting qualified investors for private equity to such a small group is totally unnecessary. On the other hand, as each investor is required to put in at least RMB10 million in any single fund, investors with insufficient investable assets would have to invest in fewer funds, leading to imprudently high concentration level for their private equity portfolio.

Will Circular 2864 Boost Growth of Market FoFs?

After the issuance of Circular 2864 and its relevant guidelines, some commentators predict that since very few individual investors are able to satisfy the RMB10 million minimum investment requirement, the regulation will boost the growth of market FoFs as a major type of institutional investor. Such optimistic prediction is premature.

According to the current record-filing practice of the NDRC, EIFoFs that do not have to be looked through are required to satisfy the RMB10 million requirement with respect to each of their investors. Thus, EIFoFs are not able to perform the above-mentioned function I of FoFs (i.e., pooling capital together to gain access to top-performing funds). If a single investor is able to invest RMB10 million, there is almost no need for it to invest through a market FoF and pay an extra layer of management fee and carried interest at the FoF level. On the other hand, for a market FoF with investors whose investment amount is lower than RMB10 million, the look-through rules will be applied in calculating the number of the investors of the fund in which the FoF invests (unless the NDRC decides to come up with a

different set of rules for market FoFs). If the current look-through rules are applied, the number of partners/shareholders of the FoF itself or of its investee fund may exceed 50, and the FoF would fail the record-filing. In this sense, Circular 2864 actually impedes rather than encourages the growth of the FoF market. Of course, a FoF can be formed as a company to avoid look-through, but only at a significant tax cost most FoFs would find difficult to accept.

In conclusion, Circular 2864's provisions regarding EIFoFs and the current record-filing practice provide some larger and more established funds with a way to circumvent the 50-partner/shareholder limit under the Partnership Enterprise Law and the Company Law, which leads to the unfairly differentiated treatment of small-to-medium-sized funds versus their larger and more established brethrens. Circular 2864 has the effect of impeding rather than encouraging the growth of market FoFs.

Legal Practice of Look-through Rules: China vs. U.S.

Look-through issues are also implicated in forming a private fund under US law. Both managers of section 3(c)(1) funds and section 3(c)(7) funds need to ensure that each ultimate investor in such fund qualifies as an accredited investor or qualified purchaser, as applicable, and that the number of the ultimate investors in a section 3(c)(1) fund do not exceed 100. However, U.S. law does not make a distinction between legal-person and non-legal-person, but rather adopts a substance-over-form principle to determine whether the investing entity is formed specifically to invest in a particular fund. The specific tests include whether the investing entity invests a substantial part of its assets into one fund (40% is a dangerous line to cross) and whether the ultimate investors behind the SPVs retain the investment discretion with respect to which fund to invest in and how much to invest, etc. The Chinese legislators and regulators are well advised to take U.S. private fund rules and practice as a reference and create a set of fair and reasonable rules for China's private equity industry, leveling the playground for all types of private funds, big or small, established ones or newcomers.

Conclusion

Private equity funds in limited partnership form, with a history of less than six years, are an emerging industry in China with a great growth potential. An increasingly improving legal environment for private equity funds will help promote the healthy growth of domestic private equity funds, while too harsh or too loose regulations will impede such growth or lead to rampant growth of private equity funds.

Important Announcement

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