

Financial

New Electronic Contract Rules Offer Solutions to the Signing of Private Fund Contracts in Person

On June 2, 2022, the Asset Management Association of China ("AMAC") issued the *Administrative Measures for Electronic Contract Business for Private Investment Funds (Trial)* (the "Measures"), which aims to regulate and promote the practice of electronic contracts in the private fund industry. The Measures came into effect on the date of promulgation.

The private fund industry has long been dominated by paper contracts, which are inefficient and prone to tampering. Electronic contracts have been promoted in recent years and the demand for electronic contracts has further increased during the epidemic. Some electronic contract service agencies have accelerated the rollout of electronic contract business. The Measures not only regulate and promote electronic contracts for private funds, but also provide for scenarios whereby custodians perform the investment supervision functions, fund distribution agencies implement the investor suitability requirements, and the fund unit registration agencies register the ownership of fund units. This lays a foundation for strengthening the use of technology in supervision and promotes the stable and healthy development of the private fund industry. The Measures consist of 32 articles in five chapters. The key points of the Measures are summarized

as follows:

I. Clarifying the Definition and Scope of Electronic Contracts for Private Funds

The Measures specify that electronic contracts shall include not only the private fund contract and its supplementary agreement, but also the risk disclosure statement, subscription form, service agreement, custody agreement, economic operation agreement and other documents. It further recognizes that electronic contracts shall have the same legal force as paper contracts. In terms of the scope of application, the Measures apply not only to the signing of electronic contracts, but also to the identity management of the parties, data inquiries and other electronic contract business services.

II. Specifying the Rights and Obligations of the Parties to Private Fund Electronic Contracts

The Measures clarify the rights and obligations between the parties involved in a private fund relationship (including investors, fund managers, custodians and other private fund service agencies, the "Private Fund

Parties”) and the electronic contract business service agencies. In particular, private fund parties shall, before entrusting an electronic contract business service agency, conduct due diligence on the backup of human resources, business segregation measures, software and hardware equipment, professional competence, integrity, and other conditions of such service agency, and assess its operational capacity and service levels on an ongoing and regular basis. Private fund parties shall not be exempt from liability in accordance with the law by virtue of the use of electronic contract services. Electronic contract business service agencies and their practitioners shall fulfill their duties, compete fairly, and perform their obligations in good faith and with prudence and diligence, and shall not disclose, tamper with, damage or lose the relevant data of the private fund parties.

III. Specifying the Requirements on the Registration and Submission of Materials by Private Fund Electronic Contract Business Service Agencies

The Measures explicitly require electronic contract business service agencies to register with AMAC. They must submit the relevant materials specified in the Measures to AMAC by referencing the provisions of the *Administrative Measures for Private Investment Fund Services (Trial)* that require information technology system service agencies to register with AMAC to carry out their business.

IV. Allowing Qualified Fund Distribution Agencies to Build Electronic Contract Business Systems

The Measures stipulate that electronic contract business service agencies and the parties to the contracts it serves in principle, shall not be the same one. As an exception,

fund distribution agencies that meet the conditions set out in the Measures may build an electronic contract business system on their own. Such fund distribution agencies are further required to properly handle risk isolation between the electronic contract business and other businesses such as custodian business and ensure the safety of the data.

V. Providing the Requirements on the Operation, Internal Control and Data Management for Electronic Contract Business

Pursuant to the Measures, before providing private fund electronic contract business services, an electronic contract business service agency shall sign a service agreement with the relevant private fund parties to clarify the scope and contents of the service, the rights and obligations of each party, the methods and standards of fees, the methods of information interaction and data storage. In addition, the Measures specifically provide for requirements on the data security of electronic contract business service agencies. It is worth mentioning that the Measures require that data such as client information and business materials obtained in the process of business carried out by electronic contract business service agencies shall be retained and stored within the territory of China. The Measures also require that the relevant data shall be stored for at least 20 years from the date of the closing of the fund accounts and be submitted to the Asset Management Business Electronic Registration System of AMAC and the designated platform provided by core institutions in the securities and futures industry in a timely manner.

VI. Clarifying the Requirements on Self-Discipline

The Measures stipulate that AMAC shall publicize the qualified electronic contract business service agencies and conduct self-discipline on these agencies and their electronic contract business activities in accordance with the laws, regulations and self-disciplinary rules. Electronic contract business service agencies can join AMAC as a member.

In 2014, AMAC issued the *Operation Guidelines on Electronic Signature Contracts for Asset Management Business for Specific*

Client by Fund Management Companies and Their Subsidiaries (Trial) to implement the operational procedures and rules for electronic signatures in public fund business. Since then, electronic signatures in the private fund industry have experienced eight years of development. With the promulgation of the Measures, the private fund industry has officially entered the era of electronic contracts. This is an inevitable result of the development of this industry and a practice of the green ESG development in the fund industry.

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金融法律热点问题

电子签约新规落地，私募基金面签难题有新解

2022年6月2日，中国证券投资基金业协会（简称“中基协”）发布《私募投资基金电子合同业务管理办法（试行）》（简称“《办法》”），旨在规范、推广私募基金行业电子合同业务发展。该《办法》于发布之日起实施。

一直以来，私募基金行业以纸质合同签约方式为主，存在效率低、容易被篡改等问题。近年来行业内开始推行电子合同签约方式，疫情期间，电子签约的需求进一步加大，一些市场电子合同服务机构加快电子合同业务的布局。《办法》的出台在规范、推广私募基金电子合同业务的同时，为托管人开展投资监管、募集机构落实销售适当性要求、份额登记机构进行份额确权等法定职责提供落地场景，为私募基金行业加强科技监管、稳定健康发展奠定基础。《办法》共计5个章节32条，包含以下主要内容。

一、明确私募基金电子合同业务的内涵及外延

《办法》明确了电子合同不仅包括私募基金合同及其补充协议，还包括风险揭示书、认申购单、服务业务协议、托管协议、经纪操作协议等文件，并确认了电子合同与纸质合同具有同等法律效力。在适用范围方面，《办法》不仅适用于电子合同签署，还适用于私募基金当事人的身份管理、电子合同数据查询等电子合同业务服务。

二、明确私募基金电子合同业务各方的权利义务

《办法》厘清了私募基金当事人（包括私募基金投资者、私募基金管理人、私募基金托管人及其他私募基金服务机构）与电子合同业务服务机构的权利和义务。其中，私募基金当事人在委托电子合同业务服务机构之前，对服务机构的人员储备、业务隔离措施、软硬件设备、专业能力、诚信状况等情况进行尽职调查，并对其运营能力和服务水平持续关注 and 定期评估。私募基金当事人依法应当承担的责任不因使用电子合同业务服务而免除。同时，电子合同业务服务机构及其从业人员应当恪尽职守、公平竞争、履行诚实信用、谨慎勤勉义务，不得泄露、篡改、毁损、丢失私募基金当事人数据。

三、明确私募基金电子合同业务服务机构的登记和材料报送要求

《办法》参照《私募投资基金服务业务管理办法（试行）》中有关信息技术系统服务机构展业的规定，也明确要求电子合同业务服务机构必须向中基协进行登记，并向中基协递交《办法》规定的相关材料。

四、提出符合要求的基金代销机构可以自建电子合同业务系统

《办法》规定，电子合同业务服务机构与其服务的合同当事人原则上不得为同一机构，但基金销售机构在符合《办法》规定的条件下，可以自建电子合同业务系统，同时应当做好与托管等其他业务

间的风险隔离，保证数据安全。

五、明确电子合同业务运营、内控及数据管理要求

根据《办法》的规定，电子合同业务服务机构提供私募基金电子合同业务服务前，应与相关私募基金当事人签订服务协议，明确服务范围、服务内容、各方权利和义务、收费方式、费用标准、信息交互方式及数据存储等。此外，《办法》对电子合同业务服务机构的数据安全提出了特别的要求。值得一提的是，《办法》要求电子合同业务服务机构在业务开展过程中所获取的客户信息、业务资料等数据的储存与备份在中国境内完成。《办法》还要求相关数据自基金账户销户之日起存储至少二十年，并及时报送至协会资产管理业务综合报送平台和证券期货行业核心机构提供的存储平台。

六、明确自律管理要求

《办法》规定，协会对外公示符合规定的电子合同业务服务机构，并依据法律法规和自律规则，对电子合同业务服务机构及其电子合同业务活动进行自律管理。电子合同业务服务机构可以加入协会成为会员。

自 2014 年中基协发布《基金管理公司及其子公司特定客户资产管理业务电子签名合同操作指引（试行）》，落实公募基金的电子签名操作流程和规范以来，私募基金行业的“电子签约”之路经历了 8 年的发展。如今，私募基金正式进入电子合同签约时代。这是行业发展的必然结果，也实际践行基金行业 ESG 的绿色发展理念。

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