君合研究简讯

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金融法律热点问题

“一行两会”联合发布非金融企业投资金融机构的指导意见

4月27日，中国人民银行、中国银保监会、中国证监会联合发布了《关于加强非金融企业投资金融机构监管的指导意见》（银发[2018]107号，以下简称“**《指导意见》**”）。该《指导意见》系针对金融机构的非金融企业股东制定的专门规范性文件，为后续金融监管部门开展金融机构股东和股权管理监管划定了一条统一的监管底线，必将对金融行业产生深远影响。

本次出台《指导意见》的主要目的是为了解决过去几年出现的部分非金融企业盲目向金融业扩张、“脱实向虚”、杠杆率高企、虚假注资、循环注资、不当干预所投资金融机构正常经营等问题，以加强实业与金融业的风险隔离，防范风险跨机构、跨业态传递。针对非金融企业成为金融机构主要股东（特别是控股股东）的情形，《指导意见》从股东资质、资金来源、公司治理、关联交易等方面进行了严格规范，要点如下：

一、强化对主要股东和控股股东的资质要求

《指导意见》旨在规范金融机构的主要股东和控股股东，对一般性财务投资不作过多限制。需要注意的是，《指导意见》中的“主要股东”是指持有金融机构股份超过5%的投资人，“控股股东”是指持有金融机构股份超过50%或虽不足50%但具有实质控制权的投资人，法律法规和规章另有规定的从其规定。

对股东资质要求的正面清单包括：（1）金融机构的主要股东和控股股东应当核心主业突出、资本实力雄厚、公司治理规范、股权结构清晰、管理能力达标、财务状况良好、资产负债和杠杆水平适度，制定合理明晰的投资金融业的商业计划；（2）控股股东原则上还需符合连续3个会计年度盈利、年终分配后净资产不低于总资产40%、权益性投资余额不超过本企业净资产的40%等要求，股东、实际控制人、受益所有人结构及变动透明，并拥有金融专业人才。

对股东资质要求的负面清单包括：（1）非金融企业脱离主业盲目向金融业扩张、风险管控薄弱、进行高杠杆投资、股权关系复杂不透明、关联企业众多、关联交易频繁且异常、滥用市场垄断地位或技术优势开展不正当竞争扰乱市场的，不得成为金融机构的控股股东；（2）对所投资金融机构经营失败或重大违规行为负有重大责任的非金融企业，5年内不得再成为金融机构的控股股东。

此外，《指导意见》针对主要股东和控股股东质押、转让和拍卖金融机构股权等行为，加强了出让方和金融机构的告知及报告义务，并明确要求成为金融机构主要股东或控股股东的股权受让方、竞买人也应当符合主要股东或控股股东的资质条件。

二、要求以真实合法的自有资金出资

《指导意见》明确要求，非金融企业投资金融

机构应当以自有资金出资，资金来源真实合法，不得以委托资金、负债资金、“名股实债”等非自有资金投资金融机构，不得虚假注资、循环注资和抽逃资本，不得以理财资金、投资基金或其他金融产品等形式成为金融机构主要股东或控股股东。

同时，监管部门将对实际控制人和最终受益人进行穿透识别，禁止以代持、违规关联等方式持有金融机构股权。需要提请关注的是，近期最高人民法院在一起保险公司股权代持纠纷案中以代持保险公司股权违反相关监管规定、破坏金融管理秩序、损害社会公共利益为由而认定代持协议无效，也反映出目前司法部门对金融机构股权代持行为的否定性态度。

三、完善对金融机构公司治理的要求

针对非金融企业投资的金融机构的公司治理要求，《指导意见》规定：

（1）企业与其所控股金融机构之间不得交叉持股；

（2）强化金融机构董事会决策机制，避免大股东或实际控制人滥用控制权；

（3）企业与其所投资金融机构之间、企业所控股金融机构之间的高级管理人员不得交叉任职；

（4）成为金融机构控股股东的非金融企业，应当建立实业板块与金融板块在法人、资金、财务、交易、信息、人员等方面的防火墙，对业务往来、共同营销、信息共享、共用营业设施等行为进行有效规范；

（5）金融机构出现风险时，其非金融企业控股股东应当承担股东义务和责任，积极配合风险处置。

四、加强关联交易监管

为防止非金融企业与其所投资金融机构通过关联交易进行风险转移和利益输送，《指导意见》对两者之间的关联交易提出了严格的监管要求。

对非金融企业股东而言，在其成为金融机构主要股东或控股股东时，应当向金融监督管理部门提交与关联方之外的其他股东无关联关系、不进行不当关联交易的承诺函。

对金融机构而言，应当建立有效的关联交易管理制度，准确识别关联方，并遵循穿透原则要求，将主要股东及其控股股东、实际控制人、关联方、一致行动人、最终受益人作为自身的关联方进行管理。

此外，《指导意见》还明确，按照“新老划断”的原则，对新发生的非金融企业投资金融机构行为应严格按《指导意见》执行，对《指导意见》发布之前的非金融企业投资金融机构的行为原则上不做追溯调整，但对于非金融企业以非自有资金出资和通过不当关联交易投资等两类行为仍需严格规范；同时，对不符合要求、确需市场退出的非金融企业，要求其积极稳妥地采用市场化的方式退出。

我们预期银保监会和证监会将根据《指导意见》进一步细化非金融企业投资金融机构的具体要求，后续的法规修改及相关执行情况值得密切关注。

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Financial

"*Yi Hang Liang Hui*" Jointly Issued Unified Guiding Opinions for Investment in Financial Institutions by Non-Financial Enterprises

On April 27, 2018, the People's Bank of China ("**PBOC**"), China Banking and Insurance Regulatory Commission ("**CBIRC**") and China Securities Regulatory Commission ("**CSRC**", PBOC, CBIRC and CSRC are hereinafter collectively referred to as "***Yi Hang Liang Hui***") jointly issued the *Guiding Opinions on Strengthening the Regulation on Investment in Financial Institutions by Non-Financial Enterprises* (Yin Fa [2018] No.107, "**Opinions**"). The Opinions are a normative document that specifically regulates the non-financial enterprise shareholders of financial institutions. The Opinions create a unified regulatory framework from which the financial regulatory departments can subsequently implement their regulations on the shareholders and the equity management of financial institutions, and thus will have a significant impact on the financial industry.

The main purposes of the Opinions are to solve the issues that occurred in recent years, namely that some non-financial enterprises aimlessly expand their businesses into the financial industry, causing an effect that separates the fictitious economy from the real economy, resulting in more highly leveraged investments, false capital contributions, repeated injections of capital with the same source of funding and improper interventions in the normal operation of the financial institutions invested. In order to address these issues, these Opinions attempt to reinforce the risk isolation between the non-financial industry and the financial industry, and prevent inter-institution and cross-industry risk from spreading. For any non-financial enterprise becoming a major shareholder (especially the controlling shareholder) of a financial institution, the Opinions propose strict requirements in terms of the shareholder's qualification, the source of its funding, its corporate governance structure, and any related-party transactions. The key points of these requirements are summarized as follows:

I. Intensifying the Shareholder Qualifications for Major Shareholders and Controlling Shareholders

The Opinions aim to regulate the major shareholders and controlling shareholders of financial institutions, and do not place too many restrictions on general financial investors. It should be noted that the "major shareholders" defined in the Opinions refer to any investor holding 5% or more shares in a financial institution, while the "controlling shareholder" refers to any investor holding 50% or more shares in a financial institution or holding less than 50% shares but having a substantial right of control on the financial institution, unless the laws,

regulations or department rules provide otherwise.

The must-have requirements for the shareholder qualification include, (i) any major shareholder or controlling shareholder of a financial institution shall have: a clearly defined core business, well-capitalized, good corporate governance standards, clear ownership structure, management capability that meets the relevant requirements, good financial status, a sensible debt leverage ratio, and shall have reasonable and clear business plans for the investment in the financial industry in place, (ii) the controlling shareholder is generally required as having made profits in the past three consecutive fiscal years, its net assets after distribution at the end of year shall be not less than 40% of the total assets, and the balance of equity investment shall not exceed 40% of its net assets, its ownership structure (including information of each shareholder, *de facto* controller and beneficiary owner and relevant changes thereof) is clear-cut, and it shall have professionals with a financial background.

The prohibited scenarios for the shareholder qualification include, (i) a non-financial enterprise shareholder shall be prohibited from being the controlling shareholder of a financial institution if it: is divorced from its main business and aimlessly expands to financial industry, has weak risk control capability, uses high leverage to invest, has a complicated and opaque ownership structure, has a large number of affiliated enterprises, conducts frequent and abnormal transactions, or conducts unfair competition to disrupt the market by abusing its dominant position or technical advantages, (ii) a non-financial enterprise that is found primarily responsible for the operation failure or major violation of a financial institution it invests shall be prohibited from being the controlling shareholder of a financial institution for five years thereafter.

In addition, for behaviors of pledging, transferring or auctioning the shares of a financial institution by its major shareholder or controlling shareholder, the Opinions strengthen the duty to both inform and report of the transferor and the financial institution, and specify that the transferee or bidder who intends to become a major shareholder or controlling shareholder of a financial institution shall satisfy the shareholder qualification for becoming a major shareholder or controlling shareholder.

II. Requiring Investment with Genuine and Legitimate Proprietary Funds

The Opinions explicitly require that a non-financial enterprise shall use its proprietary funds to invest in a financial institution, the source of funding shall be genuine and legitimate, and it shall not use any non-proprietary funds, such as entrusted funds, debt funds or “providing a loan disguised as an equity investment.” Additionally, the enterprise may not make any false capital contributions, repeated injections of capital with the same source of funding or illegally withdraw capitals. Finally, it may not become a major shareholder or controlling shareholder of a financial institution through buying wealth management funds, investment funds or other financial products.

In the meantime, the regulatory departments will look through the identities of the de facto controller and find the ultimate beneficiary owner of the financial institution, and will forbid any shares to be held by a party on behalf of another or with an affiliated relationship. It should be noted that recently, in a case concerning a dispute over the entrustment of an insurance company’s shares, the Supreme People’s Court ruled that holding shares in an insurance company on behalf of others violates the relevant regulatory rules, disrupts the financial administrative order and damages the public

interest. In its holding, it invalidated the related share entrustment agreement, which reflects the current negative attitude of the judicial departments with respect to the activities of holding shares in financial institutions on behalf of others.

III. Perfecting Requirements for the Corporate Governance of the Financial Institutions

For the corporate governance of a financial institution invested by non-financial institution enterprise(s), the Opinions require that,

(i) no cross-shareholding is allowed between such enterprise and the financial institution controlled by it,

(ii) the decision making mechanism of the board of directors of the financial institution shall be intensified, so as to avoid the abuse of controlling power by the major shareholder or the de facto controller,

(iii) senior management personnel shall not concurrently hold positions in such enterprise and the financial institution invested or controlled by such enterprise,

(iv) any such enterprise becoming the controlling shareholder of a financial institution shall establish firewalls for the non-financial and financial businesses in respect of legal personhood, funding, finance, trading, information and staff, and shall effectively regulate the relevant activities, including business transactions, joint marketing, information sharing and business facilities jointly used between the staff responsible for the two lines of business,

(v) in case any risks are exposed, any such enterprise becoming the controlling shareholder of a financial institution shall undertake the relevant duties and responsibilities, and proactively cooperate to deal with the risks.

IV. Strengthening Regulations for Related-Party Transactions

To prevent risk any transfer or illegal interest transfer via related party transactions between a non-financial institution enterprise and the financial institution in which it invests, the Opinions provide strict regulatory requirements thereon.

For a non-financial enterprise shareholder, prior to becoming a major shareholder or controlling shareholder of a financial institution, it shall submit to the financial regulatory department a letter of undertaking, representing that there is no related party relation between it and any other shareholder (except for a disclosed related party) and undertaking not to conduct any related party transaction that could be deemed improper.

For the financial institution, it shall establish effective management policies for related party transactions, accurately identify the affiliated parties, and shall, in accordance with the principles of regulation by look-through, list its major shareholders (and their controlling shareholders), *de facto* controller, affiliated parties, parties acting in concert and ultimate beneficiary owner under the management regime for affiliation.

Additionally, the Opinions also specify that, in light of the principle of “new-old cut”, any new investment in a financial institution by a non-financial enterprise shall be proceeded in strict compliance with the Opinions, while no retrospective effect will be placed on any investment that occurred before the Opinions were issued, with the exception that those non-financial enterprises using non-proprietary funds to contribute capitals or making

investments through improper related party transactions shall be strictly regulated. In the meantime, for any unqualified non-financial enterprises that should be forced to exit from their investments in financial institutions, they should proactively and properly exit through a "method determined by the market" (which means an exit not through a takeover ordered by the regulator but by an agreement concluded through commercial negotiations). We anticipate that CBIRC and CSRC will, according to the Opinions, further elaborate upon the requirements for non-financial enterprises to invest in financial institutions, and it is advised to keep close attention to the subsequent amendments to regulations and their implementation.

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