

资本市场法律热点问题

基金业协会发布私募基金募集管理办法

“合规”已经代替“创新”成为2016年金融行业的主旋律。从年初若干大城市的工商局陆续暂停注册新的“投资类企业”，到私募行业颁布一系列旨在严格监管的自律规则，再到4月初国务院决定对互联网金融进行为期一年的联合整治，无一不体现出政府整顿金融乱象的决心。对于私募行业而言，可以预见的是，经过这一轮清理留下来的私募业者将成为私募行业的主力军，并引领整个行业的健康发展。

在基金业协会的努力下，酝酿多时的私募基金募集规则应时而出。从短期看，募集规则的出台有打击违法推介、虚假宣传或保本保收益承诺等非法金融活动之意，但从长期看，完善的募集规则是私募行业健康发展的必备前提条件，将开启私募行业规范发展的新时代。

2016年4月15日，《私募投资基金募集行为管理办法》（以下简称“《管理办法》”）由中国证券投资基金业协会（以下简称“基金业协会”）发布，并将于2016年7月15日实施。《管理办法》适用的范围是所有在中国境内以非公开方式募集的基金，其旨在规范私募基金管理人的自行销售和委托基金销售机构代销两种方式，涵盖了募集行为的主要组成部分，即推介私募基金、发售基金份额，以及办理基金份额的申购赎回，完整地规定了整个募集流程以及募集机构在各个环节的法定义务和责任。以下拟对《管理办法》的重点内容作一梳理。

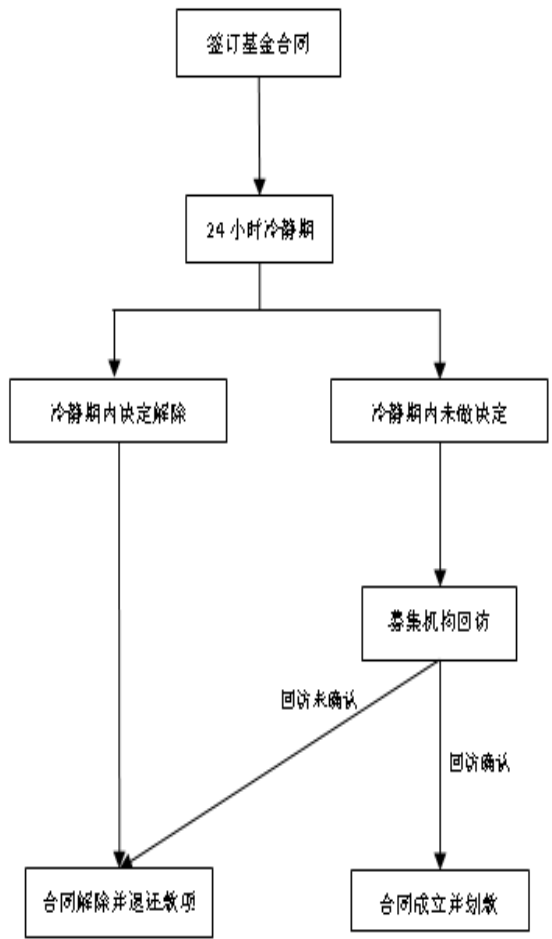
一、募集机构的法定义务和责任

募集机构的法定义务和责任是《管理办法》的核心条款。正如基金业协会发布的起草说明所指出，《管理办法》一方面规定私募基金管理人的受托人义务不因委托销售而转移；另一方面列明了募集机构的具体义务，即防止利益冲突的义务、说明和信息披露义务、反洗钱义务。同时要求募集机构承担私募基金募集四个主要环节，即：特定对象确定、宣传推介、投资者适当性管理、合格投资者确认的法定责任。相比原征求意见稿，《管理办法》增加了基金销售机构对投资者的信息披露义务，即基金销售机构应向投资者说明基金销售协议中关于私募基金管理人与基金销售机构的权利义务划分，以及其他涉及投资者利益的内容。

二、募集过程六大步骤

《管理办法》列明了私募基金募集过程的必备六大步骤：特定对象确定、投资者适当性管理、风险揭示和说明、合格投资者确认、投资冷静期及回访确认。首先，募集机构应当在不特定对象群体中，通过投资者风险识别能力和风险承受能力调查筛选出特定对象作为潜在客户；其次，募集机构应当完成投资者适当性管理，即针对特定对象推介与其风险识别和承受能力相匹配的私募基金产品；再次，募集机构应揭示基金产品的风险并履行签约前的说明义务；然后，经合格投资者实质审查后，募集机构与投资者签署合同；签署合同后，设置投资冷

静期，投资冷静期内募集机构不得主动联系投资者；最后安排回访确认。根据《管理办法》，基金合同签订以及认购款项支付完成并不意味着募集程序结束，募集机构必须经过以下流程方能确认募集程序的完整性：



三、对推介行为的限制

《管理办法》区分了向不特定对象的推介和向特定对象的推介。如果是向不特定对象进行宣传，宣传的内容只限于私募基金管理人的品牌、发展战略、投资策略、管理团队、高管信息和经基金业协会公示的基金信息，不得包含具体基金产品的内容。如果是推介具体产品，则必须针对特定对象，并在进行推介前完成“特定对象确认”程序。私募基金管理人应自行或委托第三方对私募基金进行风险评级并根据风险评级结果，向投资者推介与其风险识别能力和风险承担能力相匹配的私募基金。

《管理办法》还规定私募基金的推介材料应由私募基金管理人制作，且其使用仅限于私募基金管理人和基金销售机构。私募基金管理人需要对推介材料的真实性、完整性、准确性负责。

四、说明义务和合格投资者确认程序

《管理办法》规定了募集机构在投资者签署基金合同之前对投资者的说明义务，说明的内容除了冷静期和回访安排等程序性安排以及投资者的权利外，还包括对基金风险的揭示。《管理办法》还要求募集机构确保投资者知悉私募基金转让的条件。就合格投资者确认程序而言，募集机构应要求投资者提供必要的资产证明文件或收入证明并履行反洗钱义务（目前尚不清楚基金业协会要求募集机构的反洗钱调查进行到何种程度）。《管理办法》也规定了可豁免募集机构的合格投资者确认程序的情形，其确认的“当然合格投资者”包括养老基金、社会公益基金、在基金业协会备案的私募基金、其他金融监管机构监管的金融产品以及投资于所管理私募基金的私募基金管理人及其从业人员。

五、禁止拆分

《管理办法》禁止将私募基金份额或其收益权进行拆分转让，变相突破合格投资者标准，并禁止任何机构和个人为规避合格投资者标准而募集以私募基金份额或其收益权为投资标的的金融产品。

六、募集资金监管

相比于原征求意见稿，《管理办法》取消了要求私募基金管理人应当与中国证券登记结算有限责任公司，或取得基金销售业务资格的商业银行，或证券公司等监督机构联名开立私募基金募集结算资金专用账户的要求。但为了保障基金募集过程中投资者的资金安全，《管理办法》要求所有募集机构开立私募基金募集结算资金专用账户，并对募集机构增加了“确保资金原路返回”的义务和“保证资金划转安全”的要求。

七、募集机构和人员的资质

《管理办法》规定除了私募基金管理人可以自行募集其设立的私募基金外，只有在证监会注册取得基金销售业务资格并已成为基金业协会会员的机构，方可接受私募基金管理人的委托募集私募基金。这意味着，除非获得基金销售资格，私募基金管理人不能为其他管理人设立的私募产品进行募集；基金销售机构受私募基金管理人委托募集的，

该销售机构不能将其权限转委托第三人进行基金募集。此外，《管理办法》要求从事私募基金募集业务的人员必须具备基金从业资格（包括原基金销售资格）。

我们的观察。从内容上看，《管理办法》全面地规范了募集行为，为构建完善的私募监管体系迈出了重要的一步。我们期待私募行业在《管理办法》及其它自律规则的指引下赢得健康发展的机遇。

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Capital Markets

AMAC issued Administrative Measures on Private Fundraising

“Compliance” is replacing “innovation” as the new theme of 2016 in the financial industry. Local AICs (Administration of Industry and Commerce) in several major cities blocked the registration of “investment-type companies”; a set of self-regulations were published to strictly regulate the private fund industry; and in early April 2016, the State Council announced it would be undertaking a special year-long campaign to standardize “internet financing”. All these activities indicate the government is determined to rein in a chaotic financial industry. Predictably, the survivors of this crackdown will play an essential role in the future of the private fund industry and will lead the entire industry back onto a healthy track.

Through the effort of AMAC, the self-disciplinary rules on private fundraising have emerged in this new environment of compliance. In the short run, the introduction of new rules on private fundraising is meant to combat illegal financial activities such as illegal marketing and promotion, false advertising, or illegal guarantees for principals and returns. In the long run, comprehensive regulations on private fundraising are necessary to ensure the development of China's private funds industry, and it will usher in a new era for private fund industry's regulatory development.

On April 15, 2016, *the Administrative Measures on Private Investment Fundraising Activities* (“**Administrative Measures**”) was issued by the Asset Management Association of China (“**AMAC**”), which will become effective on July 15, 2016. The Administrative Measures applies to all funds raised through non-public means within the territory of China. Aiming to regulate both self-distribution by Private Fund Managers (“**PFMs**”) and agency distribution delegated by PFMs, the Administrative Measures covers the major parts of fundraising, i.e., fund promotion, fund distribution, fund subscription and redemption, involves the entire fundraising process, and stipulates the regulatory obligations and liabilities of Fundraising Institutions (“**FIs**”) under each step. Below is an outline of key points of the Administrative Measures.

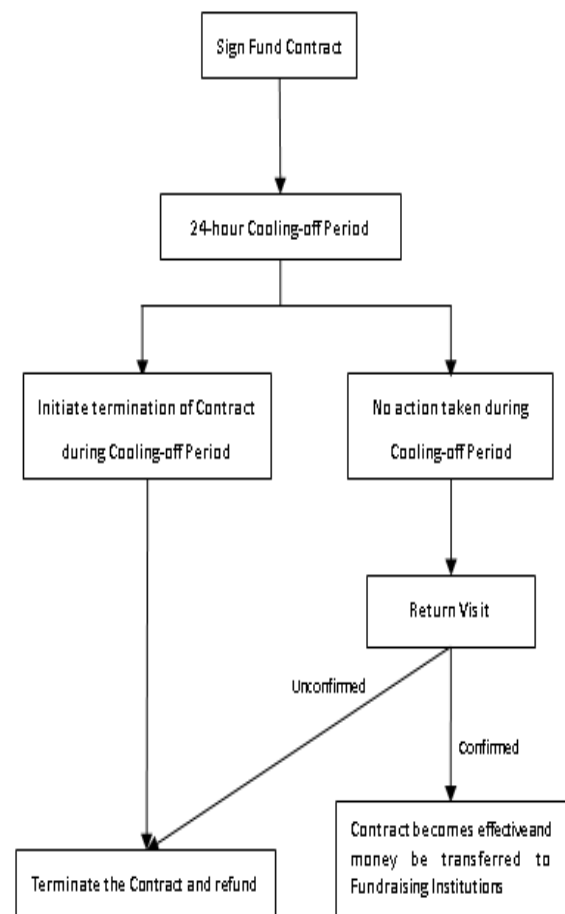
Regulatory Obligations and Liabilities of FIs.

Regulatory obligations and liabilities of FIs are key articles of the Administrative Measures. As pointed out by the Drafting Statement issued by the AMAC, the Administrative Measures stipulate that the regulatory obligations owed by PFMs to investors shall not be transferred by delegation of distribution, while on the other hand, it also sets out specific regulatory obligations borne by FIs, i.e. obligations to

prevent conflict of interest, duties of explanation and information disclosure, and duty of anti-money laundry. FIs shall also bear the statutory obligations from four aspects of fundraising, i.e. a) completing “specific target confirmation”; b) complying with marketing and promotion restrictions; c) undertaking “investor suitability management”; and d) completing “qualified investor confirmation”. Compared to the Consultation Paper of the Administrative Measures, the Administrative Measures stipulates additional information disclosure obligations of DIs that DIs shall explain to the investors regarding the allocation of obligations and liabilities between the PFMs and the DIs as well as any other content that may impact investors’ interests under the fund distribution agreements.

Six Major Steps of Fundraising. The Administrative Measures sets out six required steps of the fundraising process: a) “specific target confirmation”, b) “investor suitability management”, c) risk disclosure and explanation, d) qualified investor confirmation, e) cooling-off period, and f) return visit. Firstly, among non-specified targets, FIs shall filter out specified targets as potential clients via investigating whether and to what extent they are capable of identifying and bearing risks; secondly, FIs shall complete the investors suitability management, which is to promote appropriate private fund products matching the investor’s capacity of identifying and bearing risks; thirdly, FIs shall implement risk disclosure and explanation duties before signing fund contracts, fourthly, FIs shall sign fund contracts with investors only after substantive examination of the status of qualified investors; after signing fund contracts, there will be a cooling-off period, during which FIs shall not

initiate a contact with investors; and a return visit will be the last step. In accordance with the Administrative Measures, completion of signing the fund contract and payment of subscribed amount does not mean the completion of fundraising, and FIs cannot confirm the completion of the fundraising process unless going through the following steps:



Restrictions on Marketing and Promotion.

The Administrative Measures distinguishes marketing and promotion to non-specified targets and specified targets. Contents promoting to non-specified targets shall be limited to the brand, development strategies, investment strategies, management team, senior management information of PFMs as

well as other information publicly published by the AMAC, but no content of any particular product, while marketing and promotion of particular product shall only be aimed to specified targets. The Administrative Measures also require, prior to the commencement of any marketing or promotional activities, the completion of “specific target confirmation” process. PFMs shall undertake or authorize a third party to assess the risk rating of private funds, and promote appropriate funds matching the investor’s capacity of identifying and bearing risks in accordance with such risk ratings. According to the Administrative Measures, the marketing and promotion materials for private funds shall be made by PFMs themselves only, and the use of such materials shall be limited to PFMs and DIs. PFMs shall be responsible for the authenticity, completion and accuracy of such materials.

Duties of Explanation and Process of Confirming Qualified Investors. The Administrative Measures impose duties of explanation on DIs prior to signing of the fund contract and in addition to the procedural arrangements such as the cooling-off period and return visit as well as relevant rights of investors, such explanations shall cover the risk disclosure of the funds. Specifically, the Administrative Measures also requires FIs to ensure investors’ acknowledgement of the conditions of transferring private funds. As for the process of confirming qualified investors, FIs shall ask investors to provide necessary asset certificates or proof of income and perform anti-money laundry obligations. Currently, it is unclear to what extent FIs shall conduct anti-money laundry investigation as required by the AMAC. The Administrative Measures also discharge a few investors from

“qualified investment confirmation” process. *Qualified investors by nature* as confirmed by the AMAC includes pension funds, social welfare funds, private funds registered with the AMAC, financial products regulated by other financial regulators and PFMs who invest in funds established by themselves and personnel of such PFMs.

No Splitting. The Administrative Measures explicitly prohibits splitting and transferring private fund units or their rights to earnings, which are deemed covertly eluding the statutory requirement that private funds can only be sold to qualified investors, and also prohibits any institutions or individuals from raising funds for financial products which are invested by private fund units or their rights to earnings to evade qualified investor requirements.

Custody of Funds. Compared to the Consultation Paper, the Administrative Measures no longer require PFMs to open special accounts for private fundraising and settlement under the joint names of the PFM and either (1) the China Securities Depository and Clearing Company Limited or (2) a commercial bank or securities company that is qualified to engage in the fund distribution business. But for the purpose of safeguarding funds during fundraising, the Administrative Measures still requires all FIs to open special accounts for private fundraising and settlement, and further require FIs to “ensure the funds are transferred back to the accounts where they are originally taken from” and the “safety of fund transfers.”

Qualifications of FIs and Their Personnel. Except for PFMs who may raise private funds

they themselves have established, only institutions that both are registered with the China Securities Regulatory Commission (“CSRC”) to carry on the private fund distribution business and are members of the AMAC are allowed to carry out fundraising delegated by PFMs. Meaning that, PFMs are not allowed to conduct fundraising for private funds established by other PFMs; and DIs who are delegated by PFMs shall not delegate their right of fundraising to a third party. Furthermore, individuals employed by FIs that are engaged in fundraising must have obtained

the requisite qualifications (include fund distribution qualifications granted previously) for conducting the fund business.

Our Observation. The content of the Administrative Measures regulates fundraising activities in all aspects, and it represents an important step toward consummating the regulation system of private funds. We expect the private fund industry will benefit from healthier development opportunities under the Administrative Measures and other self-disciplinary rules.

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