

金融法律热点问题

证监会征求意见稿重塑基金销售规范

时隔六年，中国证监会(简称“证监会”)拟对基金销售相关规则作出重大修改。2019年2月22日，证监会公布《公开募集证券投资基金销售机构监督管理办法(征求意见稿)》(以下简称“《管理办法》”)、《关于实施<公开募集证券投资基金销售机构监督管理办法>的规定(征求意见稿)》(以下简称“《实施规定》”)、《公开募集证券投资基金宣传推介材料管理暂行规定(征求意见稿)》(除特别指明外，上述三个法规统称“《征求意见稿》”)，旨在重塑基金销售监管架构并厘清基金销售活动的一些基本概念。以下我们对《征求意见稿》关键点作一总结。

一、相关定义和分类

1、基金

《管理办法》第六十六条第(四)项指出，除明确表述为“私募基金”外，该办法中的基金均为“公开募集证券投资基金”的简称。《管理办法》另设专章规范私募基金，但需要注意的是，不同于过往证监会相关法规或规定将私募基金限定为私募基金管理人发行的私募基金，《管理办法》所指的私募基金既包括私募基金管理人发行的私募基金，也包括证券期货经营机构设立的私募资产管理计划。

2、基金销售活动

《征求意见稿》还定义了基金销售，即为基金投资人开立基金交易账户，宣传推介基金，办理基金份额发售、申购、赎回及账户信息查询等活动。

相比旧规，《征求意见稿》增加了“开立基金交易账户”及“账户信息查询”两项内容，完善了基金销售的定义。除基金销售活动的定义外，《征求意见稿》还界定了与基金销售相关的活动，即基金销售支付、销售结算资金监督、基金份额登记、信息技术服务活动，并将从事该等活动的机构统称为“其他基金服务机构”，与基金管理人和基金销售机构同受《征求意见稿》的规范。

3、独立基金销售机构

基金管理人销售自身产品需要遵循《征求意见稿》。对于销售基金的第三方机构，《征求意见稿》将其划分为金融机构基金销售机构和独立基金销售机构。商业银行、证券公司、期货公司、保险公司等金融机构在取得基金销售业务资格并领取《经营证券期货业务许可证》后可从事基金销售。上述所列金融机构之外的其他机构也可申请基金销售业务资格。尽管《管理办法》所列金融机构未包括“证券投资咨询机构”，但结合《实施规定》第六条的规定，我们理解证监会实际将从事基金销售业务的证券投资咨询机构、保险经纪公司、保险代理公司归类为“独立基金销售机构”。

4、基金宣传推介

《征求意见稿》第一次将基金宣传推介界定为基金管理人、基金销售机构及其从业人员以促成交易为目的，向投资人介绍基金产品的行为。由上述定义可见，“促成交易为目的”以及“向投资人介

绍基金产品”是构成基金宣传推介的两大要素。证监会明确界定基金宣传推介活动对境外基金机构在境内的市场活动也有相当的指导意义。

二、注册条件和程序

相比旧规,《征求意见稿》提高了基金销售机构的注册条件门槛,例如,要求申请机构最近1年未因相近业务被采取行政监管措施;其未因违法违规正在被监管机构调查或正处于整改期间;其取得基金从业资格的人员不少于30人;独立基金销售机构的最低注册资本要求从人民币2000万增加到5000万元;独立基金销售机构持股比例5%以上的股东的注册资本或者出资、净资产不低于1亿元人民币。

《征求意见稿》第一次列举了独立基金销售机构的境外股东应当具备的条件,即(1)依所在国家或者地区法律设立、合法存续并具有金融资产管理或者金融投资顾问经验的金融机构,财务状况良好,资信良好;(2)所在国家或者地区具有完善的证券基金法律和监管制度,其证券监管机构已与证监会或者证监会认可的其他机构签订监管合作谅解备忘录,并保持有效的监管合作关系;(3)证监会规定的其他条件。

《征求意见稿》还对独立基金销售机构控股股东和实际控制人提出了要求,例如未从事与基金销售业务存在或者潜在利益冲突的其他业务;财务状况良好等,并规定了“一参一控”的原则,即一家机构或受同一实际控制人控制的多家机构参股独立基金销售机构的数量不得超过2家,其中控股独立基金销售机构的数量不得超过1家。

值得注意的是,《征求意见稿》将独立基金销售机构的注册从向证监会派出机构注册改为向证监会申请注册,体现了对基金销售机构注册的审慎态度。

三、合规风控和产品销售

1、合规风控

《征求意见稿》增加了合规风控管理保障的规定,要求确保合规风控人员独立、有效履行职责。合规风控人员不得兼任负责经营管理的职务。合规风控人员发现公司存在重大风险或者有违法违规行为,应当及时告知基金销售业务负责人,提出处理意见,督促整改,并应当同时督促公司及时向证监会派出机构报告;公司未及时报告的,应当直接向证监会派出机构报告。

2、私募基金的销售

从总体而言,《征求意见稿》体现了从严监管的倾向,例如限制独立基金销售机构销售私募基金管理人发行的基金、增加了销售协议的必备条款要求、限制非标资管计划的销售方式等。

特别值得注意的是,《管理办法》第十五条第二款规定,独立基金销售机构不得违规从事基金、证券期货经营机构私募资产管理计划以外的其他资产管理产品的销售业务;未经中国证监会许可或认可,独立基金销售机构不得开展其他业务。按照上述规定的字面含义,如果没有满足证监会额外设定的条件并获得相关认可,独立基金销售机构不得销售私募基金管理人发行的私募基金,但问题在于目前证监会并未公布该等额外设定条件和认可流程。

由于目前实践中私募基金管理人发行的私募基金的销售在很大程度上依赖独立基金销售机构的销售渠道,这一限制将对私募基金销售的现有业务模式产生较大影响。在证监会明确相关条件和程序之前,独立基金销售机构私募基金销售业务是否可以存续将处于很不确定的状态,这引发业内的极大关注,建议证监会尽早明确何种情况下独立基金销售机构可以合规地开展私募基金代销业务,增加政策的可预期性。

3、销售协议必备条款

就销售协议必备条款而言，除对基金投资人持续服务以及反洗钱的责任划分外，还增加了应约定基金销售机构与基金管理人之间就信息披露服务以及反恐怖融资及非居民金融账户涉税信息尽职调查义务履行及责任划分，并要求明确约定基金销售机构业务终止时的基金投资人服务安排。《征求意见稿》还第一次界定了客户持续信息服务的内容。

4、非标资管计划的销售

就非标资管计划的销售而言，《征求意见稿》要求独立基金销售机构必须通过向基金管理人介绍购买人的方式开展投资于非标准化资产的私募资产管理计划的销售。独立基金销售机构应对基金管理人情况进行审慎调查，向投资人充分披露，并由基金管理人直接与合格投资者履行产品信息确认程序并签署资产管理合同、接收投资人参与资金。

5、基金组合销售服务

《征求意见稿》的一大亮点是允许基金管理人和基金销售机构向基金投资人提供基金组合销售服务。我们期待证监会能够尽快就基金组合销售服务出台细则。

四、基金销售相关服务活动外包

《征求意见稿》要求接受基金管理人和基金销售机构委托提供基金销售相关服务的机构，即基金销售服务机构，必须符合证监会规定的资质要求，并在业务开展前报其工商注册登记所在地证监会派出机构备案。基金管理人、基金销售机构也可以委托其他基金销售机构办理基金销售交易中后台处理、基金销售数据交换等活动，但具体规则仍由证监会另行规定。

就基金销售服务机构中从事信息技术服务的机构而言，特别需要注意的是，基金管理人、基金销售机构的基金销售活动只能通过其自身基金销售业务信息管理平台完成，而不能通过信息技术服务机构的平台完成，信息技术服务机构不得收集、传输、留存投资人任何基金交易信息。

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Financial

CSRC Reshapes the Fund Distribution Regulatory Landscape by Issuing New Consultation Papers

After a six year hiatus in which the regulatory landscape remained relatively unchanged, the China Securities Regulatory Commission (CSRC) has recently proposed substantial amendments to various fund distribution regulations. On February 22, 2019, the CSRC released three inter-related items, the *Measures for Supervision and Administration of Fund Distributors of Publicly-Raised Securities Investment Funds (Consultation Paper)* (“Administrative Measures”), the *Provisions on Issues Concerning the Implementation of the Measures for the Supervision and Administration of Fund Distributors of Publicly-Raised Securities Investment Funds (Consultation Paper)* (the “Implementing Provisions”), and the *Interim Measures for the Administration of Promotional Materials of Publicly-Raised Securities Investment Funds (Consultation Paper)* (the “Interim Measures”). These three items, (collectively the “Consultation Papers”), have the aim of reshaping the regulatory landscape for fund distribution and providing clarification on some important aspects of fund distribution activities. Key elements of the Consultation Papers are summarized below.

I. Definitions and Classifications

1.1 Fund

Paragraph (iv) of Article 66 of the Administrative Measures stipulates that unless explicitly described as a “private fund”, all “funds” referred to thereof shall be taken to mean an abbreviation of a “publicly-raised securities investment fund.” The Administrative Measures include a separate chapter specifically focused on the regulation of private funds. However, it is worth noting that, unlike earlier CSRC rules or regulations that define private funds as those issued by private fund managers, the private funds defined under the Administrative Measures include privately-raised asset management plans established by any securities and futures business, in addition to private funds issued by private fund managers.

1.2 Fund Distribution Activity

The Consultation Papers also provide a definition of what might constitute a “fund distribution” activity, such as opening a fund trading account for a fund investor, promoting a fund, dealing with offering, subscription and redemption of fund units, and the acceptance of an enquiry concerning account information. Two of the items listed in the Consultation Papers - “account opening” and “account information enquiry” -

were not in the previous definition of fund distribution. In addition to fund distribution activities themselves, the Consultation Papers also provide clarification of various activities related to fund distribution, namely fund distribution payment, supervision on fund distribution settlement capitals, fund unit registration and information and technology services, and collectively define the institutions that engage in the above activities as “other fund servicing institutions”, which, together with fund managers and fund distributors, all fall within the remit of the Consultation Papers.

1.3 Independent Fund Distributor

Fund managers who sell their own products shall be subject to the Consultation Papers’ regulations. The Consultation Papers define third-party institutions that distribute funds for fund managers into two main categories: (i) financial institution fund distributors (ii) independent fund distributors. Financial institutions such as commercial banks, securities companies, futures companies and insurance companies shall only engage in fund distribution activities after obtaining the requisite qualification for fund distribution and a License for Operating Securities and Futures Business. Institutions other than those aforementioned may also apply for fund distribution qualification. Although the financial institutions mentioned in the Administrative Measures do not include “securities investment advisory institutions”, on the basis of Article 6 of the Implementing Provisions we understand that the CSRC shall, in fact, categorize securities investment advisory institutions, insurance brokerage companies and insurance agencies that engage in fund distribution activity as an “independent fund distributors.”

1.4 Fund Promotion

The Consultation Papers for the first time provides a definition of fund promotion. Fund promotion is defined as an act where a fund manager, fund distributor, or any of their practitioners, for the purpose of concluding a transaction, introduces a fund product to an investor. From the above definition, it can be inferred that “for the purpose of concluding transactions” and “introducing fund products to investors” constitute two major elements of fund promotion. The clear definition of fund promotion as proposed by the CSRC provides meaningful guidance for foreign fund institutions to take into account as they engage in any onshore marketing activities.

II. Registration Requirements and Procedures

Compared to the existing regulations, the Consultation Papers have increased the threshold of registration requirements for fund distributors. Some of the requirements are that the applicant shall:

- not have been subject to any administrative regulatory measures for a business that is closely related to fund distribution in the last 12 months;
- not currently be under investigation by any regulatory authorities or be within the period of rectification ordered by regulatory authorities due to violation of laws or regulations;
- have at least 30 personnel who qualify as fund practitioners.

In addition, the minimum registered capital requirement for independent fund distributors increases from RMB 20 million to RMB 50 million. For a shareholder of an independent fund distributor that holds more than 5%, the

shareholder's registered capital, capital contribution or net asset value shall be no less than RMB 100 million.

The Consultation Papers set forth, for the first time, various requirements for a foreign shareholder of an independent fund distributor, namely that (i) it shall be a financial institution duly incorporated and legally existing in accordance with the laws of the country or region of its domicile, with the financial asset management or advisory experience, and be in strong financial health; (ii) the country or region where it is domiciled has well-established laws and regulatory systems in respect of securities and fund management, and the securities regulatory authorities of the country or region of its domicile shall have signed a memorandum of understanding on cooperation regarding the securities regulation with the CSRC or other institution as recognized by the CSRC, and have maintained an effective regulatory cooperation relationship with the CSRC; and (iii) it shall satisfy other conditions as stipulated by the CSRC.

The Consultation Papers also set out the requirements for the controlling shareholders and de facto controllers of independent fund distributors. For example, such entities shall not engage in other businesses which have or potentially may have conflicts of interest with the fund distribution business, and shall be in strong financial health. The Consultation Papers also prescribe the principle of "Yi Can Yi Kong", (literally, "One Minority, One Control") meaning that an institution or the institutions controlled by the same de facto controller shall not invest in more than two independent fund distributors, and shall only control up to one of the two independent fund distributors in which it/they invest in.

Providing an indication of the CSRC's cautious approach to the registration of independent fund

distributors, the Consultation Papers include a change in the location of the registration authorities for fund distributors, from the CSRC's local offices to the central CSRC.

III. Compliance Risk Control and Sale of Products

3.1 Compliance Risk Control

The Consultation Papers include some additional requirements on compliance risk control and management, for example requiring a fund distributor to ensure that any compliance and risk control personnel should perform their duties in an independent and effective way. Such personnel shall not concurrently hold both operational and management positions. Upon discovery that the company has any material risk or that there is any violation of the law or regulation, the compliance and risk control personnel shall in a timely manner inform the person in charge of fund distribution, provide advice and recommend the necessary rectifications, and shall at the same time encourage the company to report to the local office of the CSRC in a timely manner, or if the company fails to do so, themselves make a report directly to the local office of the CSRC.

3.2 Distribution of Private Funds

Generally speaking, the Consultation Papers reflect the tendency towards a tightening of regulation. For example, they restrict an independent fund distributor from distributing private funds issued by private fund managers, add some mandatory clauses to the distribution agreement, and restrict the distribution method for non-standardized asset management plans.

Of particular note, Article 15 Paragraph (ii) of the Administrative Measures stipulates that an independent fund distributor shall neither engage

in the distribution of any asset management products other than mutual funds or private asset management plans established by securities and futures business institutions, nor shall it carry on any other activities without the permission or recognition of the CSRC.

A literal interpretation of the above provision would mean that an independent fund distributor should not distribute any private funds issued by a private fund manager if such distributor fails to meet the additional requirements and does not obtain the relevant recognition of the CSRC. However, there is a problem in that the CSRC has not yet publicized any such additional requirements and recognition procedures. Since the distribution of private funds issued by private fund managers in practice largely relies upon independent fund distributors' distribution channels, we believe the above new provision may have a significant impact upon the existing business models used in the distribution of private funds. One unresolved issue that has drawn extensive attention from the industry is whether independent fund distributors will be able to retain their private fund distribution business, and there will be continuing uncertainty until the CSRC issues a clarification on the relevant requirements and procedures. In order to assist in the interpretation of the new regulations, we would suggest the CSRC provide some further explanation of the circumstances under which independent fund distributors may lawfully engage in the distribution of private funds as early as possible.

3.3 Mandatory Clauses for Distribution Agreements

The distribution agreement is required to include certain mandatory clauses relating to matters including the division of responsibilities for providing ongoing service to fund investors and anti-money laundering. Compared to the existing

regulations, newly added clauses are required regarding the division of obligations and responsibilities between the fund distributor and fund manager for information disclosure, due diligence investigations on anti-terrorist financing, and tax information relating to any non-residential financial accounts. There is also a new requirement to include in the distribution agreement details of the service arrangement that will apply upon the termination of businesses of the fund distributor. In addition, for the first time, the Consultation Papers specifies the requirements for providing a continuous information service to customers.

3.4 Distribution of Non-standardized Asset Management Plans

In terms of the distribution of non-standardized asset management plans (AMPs), the Consultation Papers require independent fund distributors to distribute the privately-raised AMPs investing in non-standardized assets only by referring the investors to the managers. Independent fund distributors shall conduct a due diligence investigation on the managers and fully disclose the outcomes to the investors. The managers will be required to directly perform the product information confirmation procedure, sign the asset management contracts with qualified investors, and receive the investors' capital funds.

3.5 Fund Portfolio Sale Services

A highlight of the Consultation Papers is that fund managers and fund distributors will be allowed to provide fund portfolio sale services to fund investors. We expect the CSRC to release the detailed rules on fund portfolio sales service shortly.

IV. Outsourcing Related to Fund Distribution

The Consultation Papers require that any institution that accepts entrustment from a fund manager or fund distributor shall provide services relating to fund distribution (i.e., they shall be a fund distribution servicing institution), and shall meet the qualification requirements prescribed by the CSRC. Such an institution shall be filed with the local offices of the CSRC where their registered office is domiciled before undertaking the relevant business.

Fund managers and fund distributors may also entrust other fund distributors to handle activities, such as mid- or back-office processing of the payments of fund distribution, or data exchange concerning fund distribution, etc. The detailed

rules relating to these items are yet to be stipulated by the CSRC.

For a fund distribution servicing institution that engages in information technology services, there is a requirement that the fund distribution activities of fund managers and fund distributors should be solely managed through their own internal information management platforms, rather than through an external platform provided by an information technology servicing institution. An information technology servicing institution is explicitly prohibited from collecting, transmitting, or retaining any information concerning fund transactions of any investor.

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