

Financial

The CSRC's New Public Fund Measures - Highlights of the New Regulations

The Measures for Administration and Supervision on Publicly Raised Securities Investment Fund Managers ("Measures") and its implementing rules will take effect on June 20, 2022. The Measures will replace the original *Administrative Measures for Securities Investment Fund Management Companies* and the *Interim Provisions on the Public Securities Investment Fund Management Business Operated by Asset Management Entities*.

Highlights of the Measures include: (1) Its application scope covers both publicly raised securities investment fund management companies (FMCs) and other asset management institutions engaged in public fund management business. The Measures strengthen the consistency of public fund management business rules, that is, other asset management institutions are now subject to the same regulatory requirements as FMCs in terms of compliance and internal control, personnel qualifications and operation management related to public fund management business. (2) The Measures provide full-chain rules for public fund managers regarding "access - internal control - operation - corporate governance - exit - supervision" and promote the "regulation by business types (*Gong Neng Jian Guan*)" under the current framework titled "regulation by institutional types (*Ji Gou Jian*

Guan)."

The key points of these requirements are summarized as follows:

I. Application Scope

Public fund managers include (i) fund management companies (FMCs) and (ii) other asset management institutions approved by the China Securities Regulatory Commission (CSRC) for public fund management business. A fund management company refers to a profit-making legal person approved by the CSRC to engage in public fund management business and other businesses approved or recognized by the CSRC. Other asset management institutions refer to asset management subsidiaries of securities companies, insurance asset management companies, bank wealth management subsidiaries ("Bank WMS"), institutions registered with the Asset Management Association of China (AMAC) that specialize in private securities-type investment fund management business, and any other institutions stipulated by the CSRC.

Among other asset management institutions, at present, only securities companies, asset management subsidiaries of securities companies, and two insurance asset management companies have ever obtained a

public fund management business license, and no Bank WMSs have ever applied or been approved for a public fund management business license. The current regulatory framework for publicly raised bank wealth management products is different from that for publicly raised funds issued by FMCs, i.e., there are certain restrictions or a lack of explicit provisions regarding the permissible investment scope, unitholders' meetings and business operations for public bank wealth management products. Bank WMSs that apply for a public fund management business license need to transform their existing public wealth management products to fully comply with the CSRC regulatory requirements on public fund management business, which is burdensome. It remains to be seen whether Bank WMSs have the motivation to apply for a public fund management business license. Moreover, it is uncertain whether the China Banking and Insurance Regulatory Commission (CBIRC), the regulator of Bank WMSs, will allow a Bank WMS to apply for a public fund management business license.

II. Threshold for Shareholders and De Facto Controllers

According to the *Opinions on Accelerating the Promotion of High-quality Development of the Public Fund Management Industry* ("Public Fund Opinions"), the CSRC will strengthen the examination of the ethics, reputation, and professional competence of the sponsors of FMCs. In line with the previous regulations, the Measures set differentiated thresholds by categorizing the shareholders of an FMC into major shareholders, non-major shareholders holding 5% or more equity interest, and shareholders holding less than 5% equity interest. It is worth noting that,

- (1) As a major shareholder, an institution shall have been profitable for at least the last three consecutive years, and be a licensed financial institution (or an institution that

manages at least one licensed financial institution for at least one consecutive fiscal year). A licensed financial institution includes securities companies, futures companies, commercial banks, trust companies, insurance companies, insurance asset management companies, and other financial institutions recognized by the CSRC. Additionally, a licensed financial institution shall maintain the sound operation and management of its main business, with at least one indicator (such as its business scale, income, profit, or market share) being above the average level of the industry.

- (2) For an institutional shareholder holding 5% or more equity interest, the requirement for its net assets over the last year has increased from RMB 50 million to RMB 100 million.
- (3) Except for the employee stock ownership plan (ESOP), a limited partnership enterprise is not allowed to be the shareholder of an FMC, nor is an asset management product allowed to be a direct or indirect shareholder of an FMC, unless otherwise recognized by the CSRC.

The Measures set forth higher thresholds for natural persons to set up an FMC. The Measures enhance the qualification requirements for natural person sponsors, highlighting the requirements regarding their ethics, reputation, and professional competence. In addition, the transfer of equity interest by a natural person who is the major shareholder of an FMC is restricted to a certain extent.

In addition to the above common requirements for institutional shareholders, a foreign shareholder of an FMC shall be highly ranked internationally in terms of its financial assets, assets under management, income, profit and market share for the last three consecutive years. The financial institution or its parent company shall satisfy any

one of the following requirements: (i) the relevant indicators of securities investment funds or publicly raised securities investment funds under its management shall rank at the forefront internationally, or (ii) the relevant indicators of stocks, bonds, ETFs, REITs, pensions, insurance funds and other single-class assets under its management, or the relevant indicators of discretionary management or ESG shall rank globally at the forefront; or (iii) other circumstances recognized by the CSRC.

III. Limitations on the Maximum Number of Licenses

An institution or institutions controlled by the same entity shall not invest in more than two independent FMCs, and shall only control up to one of the two independent FMCs in which they invest in. Other asset management institutions under the same control may apply for a public fund management business license, and there is no limitation on the number of asset management institutions obtaining public fund management business licenses.

IV. Obligations and Liabilities of Shareholders and De Facto Controllers

(1) General Obligations

The Measures set general requirements for the shareholders and de facto controllers of an FMC, that is, they shall uphold the investment philosophy, exercise their rights and perform their duties in accordance with the law. They shall improve the corporate governance, risk management and internal control of the FMC, ensure the compliant operating of the FMC, and protect the interests of the fund unitholders. The shareholders of an FMC shall maintain the stability of the shareholding structure and undertake in writing not to transfer the equity interests of the FMC within a certain time period, unless otherwise stipulated by the

CSRC. When disposing of their equity interests in the FMC, the shareholders shall act in good faith, abide by the commitment made in their subscription or purchase of equity interests and the relevant provisions of the CSRC, and shall not impair the lawful rights and interests of fund unitholders.

(2) Requirements for Independent Operation and Information Segregation

The CSRC strictly prohibits major shareholders and de facto controllers from abusing their controlling rights to interfere with the normal operation and management of the FMC and prevents over-control by the management team due to a lack of supervision by the shareholders. The Measures set forth the prohibited acts of the shareholder and the de facto controller, including the failure to adopt effective measures to prevent improper competition between the FMC and the shareholder or de facto controller or any companies under their control, and interfering with the normal operation and management of the FMC or the investment fund operation. As the previous regulations, the Measures only provide the foregoing principles regarding independent operation for all public fund managers, including FMCs and other public fund managers. In practice, foreign shareholders need to strictly observe these requirements and strike a balance between the independent operation of the FMC and the application of its global internal control policy, to avoid being regarded as intervening in the FMC's operations in an inappropriate or unlawful manner. In addition, all public fund managers shall establish a system to segregate key business and customer information between themselves and their shareholders. The Measures only provide for information segregation requirements in principle. Public fund managers need to establish internal policies to meet these

requirements.

It is worth noting that the above requirements apply to both FMCs and other public fund managers. If the shareholder or de facto controller of a public fund manager intervenes in the operation and management of a public fund manager, or the investment operation of the fund, the CSRC may order it to make rectifications within a certain time limit, and may, depending on the circumstances, order it to transfer the equity interests of the public fund manager. It may restrict the exercise of the shareholders' rights before it corrects the illegal acts or transfers the equity interests. Moreover, the CSRC may impose administrative penalties on it and the relevant responsible persons, such as issuing regulatory warnings, confiscating any illegal gains, and issuing fines.

(3) Obligations Related to Risk Resolution

The Measures stipulate that the major shareholders and de facto controllers of an FMC shall have the ability to replenish capital on an ongoing basis and shall formulate risk resolution plans. If a public fund manager is subject to risk resolution measures, the major shareholders of the public fund manager shall convene with other shareholders and relevant parties to properly handle the relevant matters based on benefiting the interests of the fund's unitholders. A public fund manager and its shareholders, directors, supervisors, senior management personnel, and persons in key positions shall perform the relevant duties and shall not arbitrarily be absent from duty, resign from their jobs or leave the country without approval.

(4) Obligations to Provide Information

The CSRC and its local branch offices may

conduct extended inspections on the shareholders and the de facto controllers of such shareholders of public fund managers and may require them to provide information and materials within a specified time period.

(5) Liability for Violations

Where the shareholders of a public fund manager or the de facto controller of a shareholder violates laws, administrative regulations, the Measures or any other CSRC rules, the CSRC and its local branch offices may take regulatory measures such as : (1) impose a regulatory talk or issue a warning letter to the manager, order it to make a public statement, order it to report periodically, order it to rectify the matter, suspend part or all of its business, and suspend the acceptance of its application documents, (2) impose a regulatory talk or issue a warning letter to the responsible directors, supervisors, senior managers and persons-in-charge as well as any other directly responsible persons, determining them as inappropriate candidates.

V. Corporate Governance

According to the Public Fund Opinions, the CSRC is hoping to establish a Chinese-specific and modern corporate governance regime of asset management institutions and improve the corporate governance of FMCs by proposing to (1) adhere to the principle of prioritizing the investors' interests; (2) improve the "three meetings and one layer"¹ system; (3) give full play to the supervisory functions of independent directors, supervisors and chief inspectors; (4) reinforce senior management personnel to fully perform their duties; and (5) comprehensively strengthen the Party construction of FMCs, fitting the leadership of the Party into all aspects of the corporate governance of state-owned FMCs.

¹ This means shareholder meetings, board of directors, board of supervisors, and senior management personnel.

VI. Business Operation Management

The Measures strengthen the regulations on investment and trading activities. Public fund managers are required to establish and improve investment management policies and procedures, enhance the management of moving in-and-out of securities, reasonably set limits on the authority of investment managers, and set up a mechanism for pre-control, in-process monitoring, and post analysis and the review of trading orders.

The Measures require that FMCs shall engage in public fund management business and may engage in private asset management business or other related business only upon the approval or recognition of the CSRC. In addition, if an FMC establishes a subsidiary in China, it shall in principle hold 100% equity interest of such subsidiary. It is worth noting that the Public Fund Opinions support FMCs with prominent public fund management businesses, stable and compliant operations, and appropriate professional capabilities to set up subsidiaries that specialize in businesses such as publicly listed infrastructure real estate investment trusts (REITs), private equity investments, fund investment consultancy, or pension financial services. FMCs can no longer establish a “full-function” subsidiary to engage in asset

management business.

VII. Staff Remuneration and Performance Reviews

The Measures require the board of directors of an FMC to conduct performance reviews on the management team for a three-year or more time period. They require an FMC take long-term investment performance and compliance and risk control as important parameters for the performance reviews of key personnel, implement systems regarding deferred remuneration, claw-backs and follow-up bonuses, and prohibit any short-term appraisals or excessive incentives. We believe this echoes the general principles previously established in the Public Fund Opinions whereby an FMC shall establish a long-term appraisal mechanism, with full coverage of all management team members and key staff such as portfolio managers. It takes into account compliance and risk control status, long-term investment performance (a period longer than three years) as well as the actual returns to investors. The Measures require FMCs to strictly implement a system of deferred remuneration as well as a system of bonus claw-back for staff that breach laws, regulations, and norms, and prohibit any short-term or excessive incentive schemes.

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金融法律热点问题

公募基金新规亮点

《公开募集证券投资基金管理人监督管理办法》(“《新规》”)及其配套规定将于2022年6月20日实施。《新规》取代了原《证券投资基金管理公司管理办法》(证监会令第166号)和《资产管理机构开展公募证券投资基金管理业务暂行规定》(证监会公告〔2013〕10号)。

《新规》的主要亮点在于：(1)其适用范围涵盖证券基金管理公司和从事公募基金业务的其他资管机构，强化了公募业务规则一致性，即从事公募基金业务的其他资管机构应在公募业务相关合规内控、人员资质、运作管理等方面对标证券基金管理公司的监管要求；(2)对公募基金管理人从“准入-内控-经营-治理-退出-监管”做出了全链条梳理，在机构监管的基础上兼顾了功能监管。

下面我们择其要点进行分析：

一、适用范围

公募基金管理人包括基金管理公司和经证监会核准取得公募基金管理业务资格的其他资产管理机构。其中，基金管理公司指经证监会批准从事公募基金管理业务和证监会批准或认可的其他业务的营利法人，即证券基金管理公司(以下简称“证券基金管理公司”或“基金管理公司”)。其他资产管理机构则指证券公司资产管理子公司、保险资产管理公司、商业银行理财子公司、在中国证券投资基金业协会(以下简称基金业协会)登记的专门从事非公开募集证券投资基金管理业务的机构以及中

国证监会规定的其他机构。

目前获得公募牌照的其他资产管理机构除了券商和券商资管子公司以及两家保险资管公司¹外，尚无银行理财子公司申请公募牌照。银行公募理财产品的现有法律和监管框架不同于证券基金管理公司的公募基金产品，在可投资范围、份额持有人大会机制、业务规范等方面，或存在一定限制，或暂无相关规定。考虑到银行理财子公司申请公募牌照需要改造现有公募理财产品且全面符合证监会有关公募业务监管要求，这对银行理财子公司而言也是不小的负担，银行理财子公司是否有动力和迫切性申请公募牌照尚有待评估。此外，银保监会是否允许其监管的银行理财子公司申请公募基金牌照也有待观察。

二、股东和实际控制人准入

根据《关于加快推进公募基金行业高质量发展的意见》(“《公募意见十六条》”)，证监会将强化证券基金管理公司发起人道德操守、执业声誉与专业胜任能力的审核。沿用原有规定，《新规》对基金管理公司股东实施差异化准入要求，即分为主要股东、持股5%以上非主要股东和持股5%以下股东。其中值得注意的是，

(1) 机构作为主要股东需最近三年连续盈利，且需

¹ 泰康资管(泰康资产管理有限责任公司，获批日期：2015年2月6日)、人保资管(中国人保资产管理有限公司，获批日期：2017年1月11日)

为持牌金融机构或者管理至少一家持牌金融机构且持续管理至少满一个会计年度的机构。此处的持牌金融机构包括证券公司、期货公司、商业银行、信托公司、保险公司、保险资产管理公司以及中国证监会认可的其他金融机构，且该持牌机构应当保持主营业务经营管理状况良好，规模、收入、利润、市场占有率等指标至少一项居于行业中等水平以上。

- (2) 持股 5%以上的机构股东的最近 1 年净资产要求从 5000 万元提高到 1 亿元。
- (3) 除员工持股平台外，不得通过有限合伙企业形式成为基金管理公司股东。基金管理公司股东的股权结构中亦不得存在资产管理产品，中国证监会认可的情形除外。

《新规》对自然人作为专业人士发起设立基金管理公司提出了更高的要求，一方面提高了自然人股东的资质条件，更加强调发起人的道德操守、执业声誉与专业胜任能力，另一方面合理约束自然人主要股东的股权转让行为。

除了适用机构股东的其他要求外，《新规》要求基金管理公司的境外股东最近 3 年金融资产、管理业务规模、收入、利润、市场占有率等指标居于国际前列，即该金融机构或其集团母公司符合下列情形之一：管理的证券投资基金或者公开募集证券投资基金的相关指标居于国际前列；或管理的股票、债券、ETF、REITs、养老金、保险资金等单一类别资产或者主动管理、ESG 等资产管理相关指标居于国际前列；或中国证监会认可的其他情形。

三、 同一主体持有公募牌照数量限制

同一主体或者受同一主体控制的不同主体参股基金管理公司的数量不得超过 2 家，其中控制基金管理公司的数量不得超过 1 家。但同一主体内的其他资管机构可以申请公募基金管理业务资格，且《新规》未对同一主体内的其他资管机构申请公募资格的数量做出限制。

四、 股东和实际控制人的义务和责任

(1) 概括性义务

《新规》对基金管理公司的股东、实际控制人提出了概括性的要求，即应当秉承投资理念，依法行使权利、履行义务，推动完善公司治理、风险管理与内部控制，保障基金管理公司合规经营，保护基金份额持有人利益。基金管理公司的股东应当保持公司股权结构稳定，股权相关方应当书面承诺在一定期限内不转让持有的基金管理公司股权，中国证监会另有规定的除外。基金管理公司的股东处分其股权，应当诚实守信，遵守在认购、受让股权时所做的承诺及中国证监会的有关规定，不得损害基金份额持有人的合法权益。

(2) 有关独立性和信息隔离的要求

证监会严禁大股东、实际控制人滥用控制权干预公司正常经营管理，防范股东缺位和内部人控制。《新规》列举了股东、实际控制人的禁止情形，包括未采取有效措施防范基金管理公司与其或者受其控制的其他企业之间发生不当业务竞争；擅自干预基金管理公司的经营管理、基金财产的投资运作等活动。与原有规定一样，《新规》对于公募基金管理人的独立性要求仍仅限于上述原则性规定。实践中，外资股东需要严格遵守上述独立性的要求，并实现独立性要求和执行全球统一内部控制政策需求之间的平衡，以避免监管机关认为外资股东对 FMC 经营的影响属于不适当或不合法的干预。此外，公募基金管理人应当建立与股东之间的业务和客户关键信息隔离制度。同样，《新规》对信息隔离也停留在原则性的规定，需要公募基金管理人建立内部制度以实现关键信息的隔离。

值得注意的是，上述要求同样适用于基金管理公司和其他公募基金管理人。公募基金管理人的股东、实际控制人擅自干预公募基金管理人的经营管理或者基金财产投资运作等活动的，证监会应当责令其限期改正，可视情节责令其转让所持有或者控制的基金管理人的股权，并可在其改正违法行为或转让股权前限制其行使股东权利，同时证监会还可对其和其相

关责任人员处以包括警告、没收违法所得、罚款在内的行政处罚措施。

(3) 风险处置相关的特殊责任

《新规》要求基金管理公司的主要股东、实际控制人具有持续资本补充能力，提前制定风险处置预案。如公募基金管理人被采取风险处置措施的，公募基金管理人的主要股东应当召集其他股东和相关当事人，按照有利于基金份额持有人利益的原则妥善处理相关事宜；公募基金管理人及其股东、董事、监事、高级管理人员和关键岗位人员应当履行相关职责，不得擅自离岗、离职、离境。

(4) 提供信息的义务

中国证监会及其派出机构可以对公募基金管理人的股东和股东的实际控制人进行延伸检查。中国证监会及其派出机构有权要求公募基金管理人的股东、股东的实际控制人等相关主体在指定期限内提供有关信息和资料。

(5) 股东和实际控制人违反规定的责任

公募基金管理人的股东、股东的实际控制人违反法律、行政法规、《新规》和中国证监会其他规定的，中国证监会及其派出机构可以采取的措施包括：(1)对管理人采取监管谈话、出具警示函、责令公开说明、责令定期报告、责令改正、暂停部分或者全部业务、暂不受理与行政许可有关的文件等措施；(2)对负有责任的董事、监事、高级管理人员、主管人员和直接责任人员，采取监管谈话、出具警示函、认定为不适当人选等措施。

五、 公司治理

根据《公募意见十六条》，证监会在探索建立符合中国特色的现代资产管理机构治理体系，切实提升基金管理公司的治理水平，其中包括：(1)坚持

投资者利益优先原则，(2)健全“三会一层”制度，(3)有效发挥独立董事、监事、督察长的监督功能，(4)强化高管人员履职尽责；(5)全面加强基金管理公司党建工作，将党的领导融入国有基金管理公司治理各个环节。

六、 业务管理

《新规》强化了对投资交易行为管控。要求公募基金管理人建立健全投资管理制度与流程，严格证券出入库管理，合理设定投资经理权限，建立交易指令事前管控、事中监测及事后分析与审查机制。

《新规》要求基金管理公司应当主要从事公募基金业务，经中国证监会批准或者认可方可以从事私募资产管理业务和其他相关业务。此外，基金管理公司设立境内子公司的，原则上应当全资持有。值得注意的是，根据《公募意见十六条》，证监会仅支持公募主业突出、合规运营稳健、专业能力适配的基金管理公司设立专业子公司，专门从事公募 REITs、私募股权投资基金管理、基金投资顾问、养老金融服务等细分领域的业务。由此可见，基金管理公司设立“万能”子公司从事资管业务的时代已经一去不回。

七、 人员薪酬及考核

《新规》要求董事会对经营层实行三年以上长周期考核，基金管理公司应将长期投资业绩、合规风控情况等作为关键岗位人员考核的重要依据，实施薪酬递延、追索扣回与奖金跟投制度，严禁短期考核与过度激励。这也呼应了《公募意见十六条》的原则性规定，即基金管理公司应建立健全覆盖经营管理层和基金经理等核心员工的长期考核机制，将合规风控水平、三年以上长期投资业绩、投资者实际盈利等纳入绩效考核范畴，并要求基金管理公司严格执行薪酬递延制度，实施违规责任人员奖金追索扣回制度，严禁短期激励和过度激励行为。

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