

金融法律热点问题

私募资管细则若干要点简评

中国证监会(以下简称“证监会”)于2018年10月22日公布并实施《证券期货经营机构私募资产管理业务管理办法》和《证券期货经营机构私募资产管理计划运作管理规定》(以下统称“《新规》”),该两份文件与中国银行保险监督管理委员会(以下简称“银保监会”)于2018年9月28日发布的《商业银行理财业务监督管理办法》(以下简称“《理财办法》”),共同构成《关于规范金融机构资产管理业务的指导意见》¹(以下简称“《指导意见》”)的实施细则。正如证监会在同日公布的起草说明(以下简称“《起草说明》”)中所指出,《新规》是2016年以来私募资管业务监管政策的延续,保留了现有的监管框架和主要规定,一方面确保与《指导意见》的原则性规定相一致,另一方面细化了具体操作性要求。由于《新规》涉及的内容非常广泛,我们仅挑选某些值得重点关注的条款进行简要分析和点评:

一、适用范围

《新规》适用于证券期货经营机构及其发行的私募资产管理产品(以下简称“资管计划”)。证券期货经营机构指证券公司、基金管理公司、期货公司及其设立的从事私募资产管理业务的子公司。《新规》既适用于投资于标准化资产的私募资管业务,也适用于投资于非标准化资产的私募资管业

务。如我们之前所预期,和银保监会的表态一致,证监会就《新规》所作的《起草说明》指出,考虑到证监会对于QDII业务已有专门规定,证券期货经营机构主要根据现行监管规定开展QDII业务,《新规》的实施不对现有QDII业务模式产生影响。

此外,《新规》不适用私募基金管理人,但由于私募资管计划可能通过私募基金投资于底层资产,我们认为《新规》相关限制性规定仍将对私募基金业务产生重大影响。

二、资管合同的基础法律关系

不同于《理财办法》,《新规》明确各类资管计划均依据信托法律关系设立。《起草说明》中特别指出了落实信托法律关系体现在以下三个方面:一是明确资管计划财产独立于管理人、托管人的固有财产;二是规定资产管理人应履行各项主动管理职责;三是在资管计划的证券账户、期货账户名称,以及资管计划所持证券的权利行使方面应明确区别于投资者所有的证券。

三、基本原则

1、**向上穿透** 资管计划接受其他资管产品参与的,无需合并计算其他资管产品的投资者人数,但资管计划的管理人仍有义务有效识别资管计划的实际投资者与最终资金来源。

2、**向下穿透** 《新规》在以下三个方面针对资管计划组合投资细化了监管要求:一是资管计划

¹ 中国人民银行、中国银行保险监督管理委员会、中国证券监督管理委员会和 国家外汇管理局 2018年4月28日共同发布

必须穿透到其投资的底层资产进行分类并适用相关比例要求；二是资管计划必须采用分散组合投资的方式并对组合投资的比例提出细化要求；三是对非标底层资产提出特别的确权登记要求。

(1) **类别认定**：资管计划应根据最终投向资产类别确定资管计划所属类别，即固定收益类产品、权益类产品、商品及金融衍生品类产品、混合类产品四种类别之一。《新规》考虑到实际可行性，规定了两类特殊情形可豁免适用有关就类别资产投资不得低于 80% 的比例要求：(i) 为规避特定风险并经全体投资者同意的情形，但低于比例的情形不得持续 6 个月；(ii) 建仓期内的投资活动。

(2) **双 25% 的组合投资要求**：一个集合资管计划投资于同一资产的资金，不得超过该计划资产净值的 25%；同一证券期货经营机构管理的全部集合资管计划投资于同一资产的资金，不得超过该资产的 25%，银行活期存款、国债、中央银行票据、政策性金融债、地方政府债券等证监会认可的投资品种除外。全部投资者均为符合证监会规定的专业投资者且单个投资者投资金额不低于 1000 万元的封闭式集合资管计划，以及完全按照有关指数的构成比例进行证券投资的资管计划等证监会认可的其他集合资管计划，不受前款规定限制。

我们理解，上述限制中的“同一资产”并不仅指底层资产，还包括资管产品，因此，上述规定实际上限制了某一资管计划作为某一私募基金的唯一募资通道，其实质是要求资管计划作为真正的基金进行分散组合投资，而不是仅仅作为募资通道。此外，此条规定也可能在很大程度上使得为某一非标项目募资的目的成立单只子基金的业务难以为继，从而可能限制非标业务的开展。

(3) **对非标资产的特别规定**：《新规》还要求资管计划底层资产是非标准化资产的，原则上应当由有权机关进行确权登记。

3、 **禁止多层嵌套** 与《指导意见》一致，资管计划投资于其他资管产品的，应当明确约定所投资的资管产品不再投资除公募基金以外的其他资管产品。对于禁止多层嵌套的要求，《新规》并没有规定任何例外。

四、有关“去通道”的禁止性规定

《新规》明确了如下有关通道业务的禁止性规定：

1、 禁止提供规避监管要求的通道服务，比如提供规避投资范围、杠杆约束等监管要求的通道服务。

2、 禁止在资产管理合同中约定由委托人或其指定第三方自行负责尽职调查或者投资运作。

3、 禁止在资产管理合同中约定由委托人或其指定第三方下达投资指令或者提供投资建议，或者在资产管理合同中约定管理人根据委托人或其指定第三方的意见行使资管计划所持证券的权利。

五、投资顾问

《新规》延续了此前证监会对于资管计划投资顾问的资质要求，规定资管计划的投资顾问应当为依法可以从事资产管理业务的证券期货经营机构、商业银行资产管理机构、保险资产管理机构以及证监会认可的其他金融机构，或者同时符合以下条件的私募证券投资基金管理人：

(1) 在证券投资基金业协会登记满 1 年、无重大违法违规记录的会员；

(2) 具备 3 年以上连续可追溯证券、期货投资管理业绩且无不良从业记录的投资管理人员不少于 3 人；

(3) 证监会规定的其他条件。

此外，与《指导意见》和《理财办法》的规定一致，《新规》禁止由投资顾问直接执行投资指令，并就分级资管计划，禁止投资顾问及其关联方以其

自有资金或者募集资金投资于分级资管计划的劣后级份额。

六、过渡期

《新规》设置了与《指导意见》相同的过渡期，即 2020 年 12 月 31 日，并允许过渡期内各证券期

货经营机构自行制定整改计划，不统一限定过渡期内的整改进度；过渡期结束后，对于确因特殊原因难以规范的存量非标准化债权类资产，以及未到期的存量非标准化股权类资产，经证监会同意，采取适当安排妥善处理。

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Financial

Key Points of the CSRC Detailed Rules on Private Asset Management

On October 22, 2018, the China Securities Regulatory Commission (CSRC) issued and implemented the *Administrative Measures on the Private Asset Management Business of Securities and Futures Operation Institutions* and the *Provisions for Administration of the Operation of Private Asset Management Plans of Securities and Futures Operation Institutions* (collectively, “**New Measures**”). The New Measures, together with the *Measures for Supervision and Administration of Wealth Management Business of Commercial Banks* (“**Wealth Management Regulations**”) promulgated by the China Banking and Insurance Commission (CBIRC) on September 28, 2018, constitute the detailed rules for the implementation of the *Guiding Opinions on Regulating the Asset Management Business of Financial Institutions* (“**Guiding Opinions**”).

As the CSRC points out in its draft statement published on the same day (“**Draft Statement**”), the New Measures provide continuity with the regulatory policies governing the private asset management sector introduced in 2016, and follow the existing regulatory framework and other major regulations. They are consistent with the principle provisions of the Guiding Opinions, while also detailing various specific operational requirements.

The contents of the New Measures are extensive, so for our clients’ benefit, we have analyzed and

commented on what we believe to be the key elements of interest.

1. Scope of Application

The New Measures are applicable to securities and futures operation institutions and to the private asset management plans (“**AMP**”) issued by such institutions. In this context, securities and futures operation institutions refer to securities companies, fund management companies, futures companies, and subsidiaries established by the aforementioned institutions to undertake private asset management activities. The New Measures apply to AMPs investing in standardized assets and also to those investing in non-standardized assets.

In terms of the Qualified Domestic Institutional Investor (QDII) activities, as we had anticipated that CSRC may adopt the same approach of CBIRC, the CSRC clarifies in its Draft Statement that since the CSRC has provided specific rules according to which securities and futures operation institutions may run QDII businesses, the implementation of the New Measures will not influence the current business model of QDII.

It is worth noting that while the New Measures do not apply to private fund managers per se, given that AMPs may invest in underlying assets through private funds, we are of the view that certain restrictions included in the New Measures

will still impact significantly on private fund businesses.

2. Underlying Trust Relationship of Asset Management Contracts

In contrast to the Wealth Management Regulations, the New Measures explicitly stipulate that all types of AMPs shall be established based on a trust relationship. The Draft Statement specifically sets forth the following three aspects that shall have reflected the nature of a trust relationship: (i) clarifying that the asset of an AMP is independent of the proprietary properties of its manager and custodian; (ii) stipulating that the asset managers shall perform all active management responsibilities; and (iii) requiring that both the account names of the securities account and futures account of an AMP and the exercise of the rights of the relevant securities held by such AMP shall be clearly differentiated from the situation where the relevant securities are held by the investors directly.

3. Basic Principles

3.1 Look Through Up To Ultimate Investors:

Where an AMP accepts investments by other asset management products, there is no need to calculate the total number of the investors of such asset management products on a consolidated basis. However, the manager of the AMP will still be required to identify the actual investors and the ultimate sources of funding of the AMP.

3.2 Look Through Down To Underlying Assets: The New Measures refine the regulatory requirements that apply to an AMP's portfolio investments in the following three aspects:

- (i) An AMP shall look through the underlying assets in order to classify and apply the relevant ratio requirements on different types of assets;

- (ii) An AMP must adopt a method of diversification of portfolio investment and follow the detailed rules on the relevant proportion requirements for portfolios;

- (iii) Non-standardized underlying assets are particularly required to complete the title registration.

3.2.1 Classification: AMPs shall be classified into one of four categories according to their underlying asset class: fixed-income-type products; equity-type products; commodity and financial-derivatives-type products; and mixed-type products. Taking into account the feasibility of their practical application, the New Measures provide for two special circumstances for exemption from the 80% minimum ratio requirement applying to certain type of products: (i) if remaining below the required ratio is in order to avoid specific risks, and such circumstance has been agreed by all the investors, provided that the time for which the proportion remains below the required ratio shall not last consecutively for more than 6 months; or (ii) if it is within the defined "building position" time period.

3.2.2 Diversification on Portfolio Investments – Maximum 25%: The proportion of the funds invested by a collective AMP in the same asset shall be no more than 25% of the net value of such AMP; and the proportion of funds invested by all collective AMPs managed by the same securities and futures operation institution in the same asset shall be no more than 25% of such asset, except for those assets such as bank deposits, treasury bonds, central-bank bills, policy-related financial bonds, local government bonds and other investment products

recognized by the CSRC. Other collective AMPs as recognized by the CSRC shall be exempted from the aforementioned requirement such as, for example, close-ended collective AMPs whose investors are all professional investors as prescribed by the CSRC and for which the minimum investment threshold for a single investor is no less than RMB 10 million, and AMPs whose securities investments are made entirely in proportion to the composition of relevant indexes.

It is our understanding that “the same asset” referred to in the aforementioned restriction includes underlying asset, and also extends to asset management product. Hence, the aforementioned requirement actually restricts an AMP from being the sole fundraising channel for a private fund. The essence of such requirement is to require AMPs to make diversified portfolio investments as a real fund rather than acting as a fundraising channel only. Besides, these restrictions may to large extent make it difficult to develop a feeder fund business to finance non-standardized asset project and therefore might restrict the development of business with underlying assets being non-standardized.

3.2.3 Special Requirement on Non-standardized Assets: The New Measures also require that, if the underlying assets of an AMP are non-standardized assets, the titles of the underlying assets should in principle have been registered with the competent authorities.

3.3 Prohibiting Multi-Level Nesting: Consistent with the Guiding Opinions, if an AMP invests in other AMPs, it shall be explicitly agreed that the AMP invested shall not then invest in any other asset management product, other than publicly-raised funds. The New Measures do not provide any exemptions to the multi-level nesting requirement.

4. Prohibitive Regulations related to “Channel” Business

The New Measures clarify that in relation to the “channel” business:

- (i) It is prohibited to provide “channel” services to evade regulations, such as circumventing the regulatory requirements on investment scope, leverage restrictions and so on.
- (ii) It is prohibited for an asset management contract to allow an investor or its designated third party to be solely responsible for the due diligence or investment.
- (iii) It is prohibited for the asset management contract to allow an investor or its designated third party to place investment orders or provide investment recommendations, or to require the manager to exercise the rights of the relevant securities held by the AMP according to the instruction of the investor or its designated third party.

5. Investment Advisors

The New Measures continue the previous qualification requirements of investment advisors of AMPs as prescribed by the CSRC. They stipulate that an investment advisor of an AMP shall be a securities and futures operation institution, commercial bank asset management institution, insurance asset management institution or other financial institution recognized by the CSRC that can engage in asset management activities in accordance with the law, or private securities fund manager that comply with the following requirements simultaneously:

- (i) Having been a member registered with the Asset Management Association of China for more than one year without any record of material violation against any laws or regulations;
- (ii) Having at least three investment management personnel with three or more consecutive years of traceable securities or futures investment management experience, with no records of bad practice; and
- (iii) Other requirements as prescribed by the CSRC.

Furthermore, in line with the Guiding Opinions and the Wealth Management Regulations, the New Measures prohibit investment advisors from executing investment orders directly, and prohibit an investment advisor and its affiliate from using

its proprietary funds or the funds raised to invest in a junior class of a structured AMP.

6. Transition Period

The New Measures provide the same transition period as the Guiding Opinions, i.e., up until December 31, 2020. The regulator does not prescribe in the New Measures a uniform timetable of rectification for the transition period and each institution may lay out its rectification schedule based on its own situation. The New Measures further stipulate that after the transition period, any remaining non-standardized credit assets that are difficult to rectify for specified reasons or non-standardized equity assets that have not expired shall be properly handled with the consent of the CSRC.

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