

## 金融法律热点问题

### 证监会修订私募资管业务规则

2020年10月23日，中国证券投资基金监督管理委员会(以下简称“**证监会**”)发布《关于修改<证券期货经营机构私募资产管理业务管理办法>的决定》(征求意见稿)(以下简称“**《办法征求意见稿》**”)、《关于修改<证券期货经营机构私募资产管理计划运作管理规定>的决定》(征求意见稿)(以下简称“**《规定征求意见稿》**”) (以下统称“**《征求意见稿》**”) 及其起草说明(以下简称“**《起草说明》**”)。根据《起草说明》，本次修改主要是对现行规定的查漏补缺和小幅完善，同时，根据实践需要对个别规定进行适度松绑，并落实新《证券法》的要求，进一步完善规则体系，确保规则公开透明。

以下我们对本次主要修改的内容进行了梳理。

#### 一、完善私募资管计划负债杠杆的比例限制

《办法征求意见稿》第四十二条新增规定，要求资产管理计划应当设定合理的负债比例上限，确保其投资杠杆水平与投资者风险承受能力相匹配，并保持充足的现金或者其他高流动性金融资产偿还到期债务。

#### 二、加强逆回购风险管理

如果资产管理计划参与证券逆回购交易的，《规定征求意见稿》要求证券期货经营机构加强流动性风险和交易对手风险的管理；要求集合资产管理计划合理分散逆回购交易的到期日、交易对手及回购证券的集中度，并按照穿透原则强化交易对手管理，健全质押品管理制度。

#### 三、明确对高比例投资单一资产、高杠杆产品的相关规范

《规定征求意见稿》新增规定，资产管理计划投资于同一资产的比例超过其净资产50%的，该资产管理计划的总资产不得超过其净资产的120%，但资产管理计划投资于银行活期存款、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不受前述规定限制。

#### 四、优化私募股权投资基金相关制度安排

《征求意见稿》结合私募股权投资基金的运作特征，完善相关制度安排，以满足私募股权投资基金的投资需要。

##### 1、完善分期缴付安排

《规定征求意见稿》第五条规定，采用资产组合方式进行投资的封闭式资产管理计划的投资者可以分期缴付委托资金，但单个投资者首期缴付金额不得低于合格投资者参与单个资产管理计划的最低投资金额；所有投资者首期缴付金额合计不得少于1000万元。为确保分期缴付的履行，《规定征求意见稿》要求资产管理合同订明投资者未按约定缴付资金时的处理原则与方式，约定严格的违约责任。

##### 2、新增开放参与安排

《规定征求意见稿》新增第六条，明确可以扩大募集规模的私募资产管理计划需要符合的条件，即：(1) 资产管理计划成立已满一年且运作规范，

证券期货经营机构、托管人未违反法律、行政法规、证监会规定和资产管理合同的约定；(2) 资产管理计划采用资产组合的方式进行投资；(3) 证券期货经营机构按照资产管理合同约定的方式事先取得全体投资者和托管人的同意；(4) 不存在未按规定进行合理估值、通过扩大募集规模向新参与投资者转移风险、亏损或者输送利益的情形；(5) 前次扩大募集规模已满 1 年；(6) 证监会规定的其他条件。

《办法征求意见稿》进一步规定，封闭式集合资产管理计划扩大募集规模的，证券期货经营机构应当依法履行信息披露义务，向投资者披露扩募资金的来源、规模、用途等信息。

### 3、豁免 25% 投资限制

《规定征求意见稿》豁免了私募股权投资基金适用“同一证券期货经营机构管理的全部集合资产管理计划投资于同一资产的资金不得超过该资产的 25%”的限制，具体而言，以收购公司为目的设立的资产管理计划、专门投资于未上市企业股权的资产管理计划可以不适用前述 25% 的限制要求。根据《规定征求意见稿》，“专门投资于未上市企业股权的资产管理计划”是指投资于未上市企业股权的比例不低于其总资产 80% 的资产管理计划。

《规定征求意见稿》第二十一条进一步规定，设立专门投资于未上市企业股权的集合资产管理计划采用资产组合的方式进行投资的，可以通过特殊目的载体间接投资于未上市企业股权。但特殊目的载体应当为直接投资于未上市企业股权的公司或者合伙企业，不得承担资金募集功能，不得收取管理费及业绩报酬。

根据《起草说明》，前述修订考虑到将《征求意见稿》与现行关于创业投资基金、政府产业投资基金的特殊规定进行衔接，同时为通过特殊目的载体间接投资未上市企业股权留出空间。

## 五、放宽管理人自有资金参与比例限制

《规定征求意见稿》第十一条删除了证券期货经营机构以自有资金参与单个集合资产管理计划的份额不得超过该计划总份额的 20% 的限制，便于管理人以自有资金进行跟投。

## 六、适当放宽期货经营机构相关投资限制

《规定征求意见稿》第十八条允许最近两期分类评价为 A 类 AA 级的期货公司及其子公司设立投资标准仓单、场外衍生品等非标资产的资管产品。证监会在《征求意见稿》中明确其将选取头部期货公司进行试点。

## 七、其他修订建议

- 1、**完善管理人和托管人义务。**例如新增管理人义务，要求其保证向投资者支付的受托资金及收益返回其参与资产管理计划时使用的结算账户。
- 2、**多层嵌套的例外情形。**我们注意到，《办法征求意见稿》在第四十四条“资产管理计划接受其他资产管理产品参与，证券期货经营机构应当切实履行主动管理职责，不得进行转委托，不得再投资除公募基金以外的其他资产管理产品。”和四十五条“资产管理计划投资于其他资产管理产品的，应当明确约定所投资的资产管理产品不再投资除公募基金以外的其他资产管理产品。”都新增“中国证监会另有规定除外”。证监会何时以及如何允许多层嵌套的例外情形仍有待明确。
- 3、**精简备案和报告事项。**为落实简政放权，证监会就部分事项的报送和报备要求进行了简化。
- 4、**延长过渡期。**与《关于规范金融机构资产管理业务的指导意见》延长过渡期的安排保持一致，《征求意见稿》将过渡期同步延长至 2021 年底。

我们将持续关注并及时与我们的客户分享最新的进展。

谢青 合伙人 电话：86 21 2208 6238 邮箱地址：xieg@junhe.com  
秦天宇 律师 电话：86 21 2208 6140 邮箱地址：qinty@junhe.com

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## Financial

### CSRC Proposes Amendments to Private Asset Management Business Rules

On October 23, 2020, the China Securities Regulatory Commission (CSRC) issued the *Decision on Amending the Administrative Measures on Private Asset Management Business of Securities and Futures Operating Institutions (Consultation Paper)* (“Consultation Paper for Administrative Measures”), the *Decision on Amending the Administrative Provisions on the Operation of Private Assets Management Plans of Securities and Futures Operating Institutions (Consultation Paper)* (“Consultation Paper for Administrative Provisions”) (collectively, “Consultation Papers”) and their corresponding drafting statement (“Drafting Statement”). According to the Drafting Statement, the proposed amendments are mainly to supplement and slightly improve the current regulatory provisions, while simultaneously relaxing certain regulatory requirements due to practical demands and implementation of the requirements under the new *Securities Law*, so as to further improve the regulatory framework in this regard and ensure the publicity and transparency of relevant regulatory provisions.

We have summarized the key points of the proposed amendments below.

#### I. Refining the Limitation on the Debt

#### Leverage Ratio of Private AMPs

Article 42 of the Consultation Paper for Administrative Measures proposes a new rule that each asset management plan (AMP) shall set a reasonable maximum debt leverage ratio to ensure that both (i) the investment leverage matches its investors’ risk tolerance and, (ii) there is sufficient cash or other financial assets with high liquidity for repaying the due debts.

#### II. Strengthening Risk Management with Respect to Reverse Repo

If an APM enters into a securities reverse repo transaction, the Consultation Paper for Administrative Provisions requires that (i) the securities and futures operating institutions should strengthen their management of liquidity risks and counterparty risks; (ii) for a collective AMP’s investment in reverse repo transactions, it shall reasonably diversify the maturity dates, the counterparties and the concentration of repurchased securities for such transactions, as well as strengthen counterparty management in accordance with the look-through principle and improve the pledge management system.

#### III. Clarifying Relevant Limits for High Proportion of Investments in Single

## **Asset or High-Leverage Product**

The Consultation Paper for Administrative Provisions proposes a new rule that if the proportion of investments by an AMP in the same asset exceeds 50% of the net value of such AMP, the total assets of such AMP shall not exceed 120% of its net value, except for investments by such AMP in 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.

## **IV. Optimizing Relevant Rules on Private Equity Investment Funds**

Based on the operational characteristics of private equity investment funds, the Consultation Papers improve relevant rules to satisfy the investment demands of private equity investment funds through the following approaches:

### **4.1 Improving Relevant Arrangements for Payment by Installment**

Article 5 of the Consultation Paper for Administrative Provisions stipulates that investors of a closed-end AMP that adopts a portfolio investment approach may contribute capital by installment, provided that the amount of initial payment by a single investor shall not be lower than the minimum investment amount of a single AMP invested by a qualified investor and the total amount of initial payments by all investors shall not be less than RMB10 million. In order to ensure the full performance of payment installations by investors, the Consultation Paper for Administrative Provisions requires that the relevant asset management contracts shall expressly provide for the principles and methods for dealing with investors' failure to make relevant payments

as agreed, as well as strict liabilities for breach of contract thereof.

### **4.2 Allowing for Private AMPs to Increase the Scale of Their Fund-Raising**

Article 6 of the Consultation Paper for Administrative Provisions clarifies the pre-conditions that a private AMP shall satisfy for increasing the scale of its fund-raising, namely: (i) the AMP has been set up for more than one year and operated pursuant to law, and neither the securities and futures operating institution nor the custodian has violated any laws, administrative regulations or provisions issued by the CSRC and the asset management contract; (ii) the investment of the AMP shall adopt a portfolio investment approach; (iii) securities and futures operating institutions shall obtain prior consent of all investors and custodians in the manner agreed upon in the asset management contract; (iv) there is no circumstance of failing to conduct reasonable valuation as required or transferring risks, losses or benefits to new investors by increasing the scale of fund-raising; (v) it has been more than one year since the last increase in the scale of its fund-raising; (vi) other conditions stipulated by the CSRC.

The Consultation Paper for Administrative Measures further provided that where the scale of fund-raising of a closed-end collective AMP is expanded, the securities and futures operating institutions shall fully disclose to investors the source, scale, use and other information of the funds pursuant to the law.

### **4.3 Exemption of the 25% Limitation**

The Consultation Paper for Administrative

Provisions exempts private equity investment funds from the restriction that “all investments by all collective AMPs managed by the same securities and futures operating in the same asset shall not exceed 25% of the net value of such assets”. Specifically, AMPs set up for the purpose of acquiring other companies and AMPs specifically investing in equities of unlisted companies may not be subject to the aforementioned 25% restriction. According to the Consultation Paper for Administrative Provisions, an “AMP specifically investing in the equities of unlisted companies” refers to an AMP which uses no less than 80% of its total assets to invest in the equities of unlisted companies.

Furthermore, Article 21 of the Consultation Paper for Administrative Provisions provides that where a collective AMP established specifically for the purpose of investing in the equities of unlisted companies adopts a portfolio investment approach to investing, such collective AMP can invest in the equities of unlisted companies indirectly via special purpose vehicles (**SPVs**), provided that each of such SPVs shall be a company or a partnership that directly invests in the equities of unlisted companies and shall not undertake the fund-raising function or charge management fees or performance fees.

According to the Drafting Statement, the foregoing amendments intend to keep the Consultation Papers in line with existing regulatory provisions on venture capital funds and government industrial investment funds, while leaving open the possibility for indirect investments in the equities of unlisted enterprises through SPVs.

## **V. Lifting Restrictions on the Proportion of Investments by AMPs with Self-Owned**

## **Funds**

Article 11 of the Consultation Paper for Administrative Provisions lifts the limitation that the proportion of investment in a single collective AMP invested by securities and futures operating institutions with their self-owned funds shall not exceed 20% of the total assets of such AMP, so as to facilitate managers to make follow-up investments with their own funds.

## **VI. Moderately Easing Relevant Investment Restrictions on Futures Operating Institutions**

Article 18 of the Consultation Paper for Administrative Provisions allows futures companies rated as A Class AA Grade in the latest two periods and their subsidiaries to issue AMP products that invest in standard warehouse receipts, over-the-counter derivatives or other non-standard assets. The CSRC specifies in the Consultation Papers that it will carry out a pilot trial in this regard among leading futures companies.

## **VII. Others**

### **7.1 Refining Duties of Managers and Custodians.**

For example, there is a new obligation for managers to ensure that the entrusted funds and investment income thereof paid to an investor would be transferred to the initial settlement account used by such investor when investing in the AMP.

### **7.2 Exceptions to Multi-level Nesting.**

There is a notable qualification added to two articles of the Consultation Paper for Administrative Measures – Article 44, which provides that “where an AMP accepts entrustment by other asset management products, the securities and futures operating institution shall still perform its discretionary management duties

earnestly and shall not sub-entrust its duties or invest in asset management products other than public funds” and Article 45, which provides that “if an AMP invests in other asset management products, it shall be expressly agreed that the invested asset management products shall no longer invest in other asset management products other than public funds.” Appended to both of these statements is “unless otherwise provided by the CSRC.” For now, it is unknown when and how the CSRC will stipulate exceptions to the regulatory requirements regarding multi-level nesting.

7.3 Simplifying Matters Related to Filing and Reporting. The CSRC has simplified the filing procedures in order to implement the policy of streamlining the administration and delegation of powers.

7.4 Extending Grace Period. In line with the *Guiding Opinions on Regulating Asset Management Business of Financial Institutions*, the Consultation Papers extend the grace period to the end of the year 2021.

We will continue to monitor the situation and keep our clients apprised of any important developments.

Natasha XIE	Partner	Tel: 86 21 2208 6238	Email: xieq@junhe.com
Tianyu Qin	Associate	Tel: 86 21 2208 6140	Email: qinty@junhe.com

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