

## 金融法律热点问题

### 简评《基金经理兼任私募资产管理计划投资经理工作指引(试行)》

2020年4月3日,中国证券投资基金业协会(以下简称“基金业协会”)发布了《基金经理兼任私募资产管理计划投资经理工作指引(试行)》(以下简称“《指引》”),并将于2020年5月1日起实施。

《指引》的总体思路是在公募基金管理人对相关风险“管得住”的前提下,对公募基金经理兼任私募资产管理计划投资经理的限制予以适度放开。我们认为,推出该项制度性安排有助于提升公募基金管理人对各类产品的整体投资管理能力和管理效率,解决部分中小型基金公司尤其是新成立基金公司投资管理人员相对紧缺的现实问题,并与成熟市场的做法趋同。

以下是我们对《指引》的简要解读:

#### 一、基金管理人及其基金经理应符合的必要条件

《指引》对于基金经理兼任投资经理的安排并非全面放开,而是对相关基金管理人和基金经理均规定了必要的条件:

对于拟推行此安排的基金管理人,《指引》强调需具有良好的持续合规风控能力,并以“负面清单”的方式列举了合规性条件,即最近1年未受到刑事处罚或行政处罚,未因内控缺失、投资管理违规、不公平对待投资者等相关事项被采取暂停产品注册或备案的行政监管措施。

对于拟兼任投资经理的基金经理,《指引》从

职业操守、专业能力等方面提出了要求:一方面,基金经理需最近3年未受过刑事处罚、行政处罚、行政监管措施和自律处分;另一方面,基金经理应具备良好的投资管理能力,且具有5年以上权益类公募基金、权益类私募资产管理计划或年金社保组合的投资管理经验。

《指引》对基金管理人和基金经理持续满足前述必要条件提出了要求,如基金管理人不再符合《指引》条件的,其兼任基金经理不得再新增管理私募资产管理计划;而基金经理本人不再符合要求的,该基金经理不得新增管理私募资产管理计划。

#### 二、持续审慎经营和合规风控的要求

过往监管部门限制公募基金经理兼任投资经理的出发点在于通过人员的任职隔离,防范公募基金与私募资产管理计划之间的利益输送和信息泄露等问题。因此,本次出台《指引》适度放开公募基金经理兼任投资经理限制,其前提仍是相关基金管理人必须本着审慎经营的原则,健全完善相关内控制度、决策流程和管控机制,避免因放开兼任而发生利益冲突、利益输送、利用未公开信息交易等违规行为。具体要求包括以下方面:

首先,基金管理人在推行此项安排前,应审慎评估可能发生的利益冲突,健全相关内部管理制度、工作流程和系统设置,明确相关部门和人员职责。同时,还应审慎评估投资者需求、产品投资策

略、合规风控能力及基金经理管理能力等因素，经过必要的内部决策程序后方可决定是否推行此项安排。也即基金管理人是否允许基金经理兼任投资经理以及多大范围内允许兼任，需与本公司的实际业务需求、基金经理的管理能力及精力保障、合规风控能力等相适应。

其次，基金管理人在推行此项安排的过程中需从严格落实内控管理、公平交易、信息披露等有关规定，完善同一基金经理管理的多个投资组合间的公平交易分析和异常交易监控机制，并完善信息披露和异常情况报告制度。同时，基金管理人拟任命基金经理兼任投资经理的，还应履行向基金业协会进行基金经理变更备案的程序。

最后，基金管理人还需要强化激励约束机制和责任追究，对兼任基金经理进行 5 年以上的长周期考核，考核激励指标除了包括所有兼任组合的长期业绩外，还应涵盖遵规守信、公平交易执行等合规情况。

### 三、相关问题及建议

我们建议各基金管理人应根据自身实际业务开展和投资管理人员的配置现状，在满足《指引》前述要求的情况下，慎重评估是否推行以及在多大范围内推行此项安排，并结合《指引》的相关规定，关注实践中是否可能存在相关问题或障碍：例如，为确保基金经理的履职能力，《指引》要求一名基金经理管理的公募基金和私募资产管理计划数量原则上不超过 10 只(完全按照有关指数的构成比例进行投资的产品除外)，那么这种情况下可能会限制公募基金管理公募基金的数量。又如，《指引》要求对兼任基金经理实施收入递延支付机制(原则上不少于 3 年、递延支付的收入金额不少于 40%)，在此情况下，如何调动基金经理兼任投资经理的积极性、在激励与约束之间取得平衡是另一个需要考虑的问题。

我们注意到，《指引》目前暂未放开固定收益类产品基金经理兼任投资经理，我们理解原因可能是债券场外交易产生利益输送的风险较高，合规风控难度较大，故监管部门对此采取了较为审慎的态度。

我们还注意到，《指引》暂未涉及基金经理是否可以参与投顾业务的问题，该问题有待监管部门进一步明确。2017 年出台的《中国人民银行、银监会、证监会、保监会关于规范债券市场参与者债券交易业务的通知》(银发【2017】302 号)就债券类产品规定参与者应将自营、资产管理、投资顾问等各类前台业务相互隔离，在资产、人员、系统、制度等方面建立有效防火墙。如下一步放开基金经理参与投顾业务，可考虑先放开权益类业务的兼任以避免与上述债券类产品的监管规定相冲突。同时，从实操的角度，由于基金管理人仅仅提供投资建议，投顾产品的交易执行并不通过基金管理人的投资交易系统，因此要将投顾产品一并纳入基金管理人的合规风险管理范畴将面临更大的难度，相应也对基金管理人的合规风控能力提出了更高的要求。

此外，《证券期货经营机构私募资产管理业务管理办法》(中国证券监督管理委员会令第 151 号)第五十九条要求“证券期货经营机构应当采取有效措施，确保私募资产管理业务与其他业务在场地、人员、账户、资金、信息等方面相分离”，那么在《指引》适度放开公募基金基金经理兼任投资经理的情况下，如何理解和执行前述第五十九条规定的业务隔离要求是另一个需要明确的问题。我们理解，目前监管部门对于公募基金管理人总体上是持审慎监管的态度，除监管规则明确放开的事项外，建议对相关法规的落实和执行从严把握。

我们将持续关注并及时与我们的客户分享最新的进展。

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## Financial

### Observations on ‘Guidelines for Public Fund Portfolio Managers to Concurrently Serve as Portfolio Managers for Private AMPs (for Trial Implementation)’

On April 3, 2020, the Asset Management Association of China (AMAC) issued the *Guidelines for Public Fund Portfolio Managers to Concurrently Serve as Portfolio Managers for Private Asset Management Plans (for Trial Implementation)* ("Guidelines"), which will be officially implemented on May 1, 2020.

The general approach taken under the Guidelines is to moderately relax the prohibition on public fund portfolio managers concurrently serving as portfolio managers for private asset management plans (AMPs), on condition that the securities investment fund management companies (FMCs) can duly control and manage the relevant risks arising therefrom. We believe this reform will help improve the overall investment management capabilities and efficiency of FMCs with respect to various products, especially for those small or medium-sized FMCs or newly established FMCs which usually encounter shortages of portfolio managers. Furthermore, such reform, in our belief, is also in line with the common practices in mature markets.

Below is our briefing of the key points of the Guidelines:

#### **I. Requisite Conditions for the FMC and their Portfolio Managers**

The Guidelines do not allow a full liberalization without condition, but rather stipulate specific conditions for both FMCs and portfolio managers:

The Guidelines underscore the importance of having good capabilities to ensure continuous risk control and compliance management for FMCs intending to implement such arrangement. The Guidelines also list out the compliance requirements by using a “negative list”, that is, the FMC has not been subject to (i) any criminal penalties or administrative penalties during the most recent year; or (ii) any administrative regulatory measures (i.e. suspension of product registration or suspension of filing) due to lack of internal control, violations related to investment management or unfair treatment of investors.

For a portfolio manager who intends to concurrently serve as an AMP portfolio manager, the Guidelines set forth requirements regarding his/her professional ethics and expertise, namely, (i) the portfolio manager has not been subject to any criminal penalties, administrative penalties, administrative regulatory measures or

self-disciplinary measures over the past three years; and (ii) the portfolio manager possesses good investment management capabilities, and has more than five years of investment management experience in equity-type public funds, equity-type private AMPs, annuity portfolios or social security portfolios.

The Guidelines require the FMCs and portfolio managers to stay in continuous compliance with the aforesaid requirements. If an FMC no longer meets the aforesaid requirements, the portfolio managers of such FMC shall be prohibited from managing new private AMPs concurrently. If a portfolio manager of an FMC no longer meets the aforesaid requirements, such portfolio manager shall be banned from managing new private AMPs.

## **II. Continuous Requirements of Prudent Operation and Compliance and Risk Control**

The rationale behind previous regulatory prohibition on public fund portfolio managers concurrently serving as portfolio managers for private AMPs was to prevent interest tunneling and information leakage between public funds and private AMPs by separation of relevant personnel. Therefore, the prerequisite for the moderate relaxation of the prohibition proposed by the Guidelines is still that relevant FMCs shall follow the principle of prudent operation and improve the relevant internal control systems, decision-making procedures and control mechanisms to avoid violations such as conflict of interests, interest tunneling and front running while allowing the portfolio managers to take concurrent positions. Specifically, the requirements include the following:

First, before implementation, the FMCs shall carefully assess all possible conflict of interests, improve relevant internal management systems,

work procedures and system settings, as well as specify the responsibilities of relevant departments and personnel. Meanwhile, it shall prudently assess several factors such as investor needs, product investment strategies, compliance and risk control capabilities, and portfolio manager's management capabilities, and decide whether to implement such arrangement only after all the necessary internal decision-making procedures have been taken. In other words, whether, and to what extent, the FMC allows a public fund portfolio manager to concurrently serve as the portfolio manager of private AMP shall reflect the actual business needs of the FMC, as well as the portfolio manager's management capabilities, time commitment, and compliance/risk-control capabilities.

Second, in the process of implementation, an FMC shall strictly adhere to the relevant rules on internal control management, fair trading, and information disclosure, improve the fair trading analysis and abnormal trading monitoring mechanism with respect to multiple investment portfolios managed by the same portfolio manager, and enhance the information disclosure and abnormality reporting systems. Moreover, if the FMC proposes to appoint a public fund portfolio manager to concurrently serve as portfolio manager for a private AMP, it shall also perform the formalities for change of filing of portfolio manager with the AMAC.

Third, the FMC is also required to strengthen the incentive-deterrence and accountability mechanisms, and conduct long-term assessments on portfolio managers who take concurrent positions for more than five years. In addition to the long-term performance of all portfolios that a portfolio manager manages concurrently, the key performance indicators shall also include other compliance related matters, such as regulatory compliance, good faith and fair execution of trades.

### III. Relevant Issues and Our Observations

We recommend each FMC, in compliance with the relevant requirements stipulated under the Guidelines, to prudently evaluate whether, and to what extent, to implement such an arrangement according to its actual business development and status of investment management personnel. It shall also consider whether there may be related problems or obstacles in practice by referring to the Guidelines. For example, to ensure the performance of a portfolio manager, the Guidelines require that the number of public funds and private AMPs managed by a single portfolio manager shall not exceed 10 in total in principle (products completely index-tracked will not be considered in this count). In this case, there may be a limit on the number of public funds managed by a portfolio manager. Moreover, the Guidelines require the deployment of a deferred income payment mechanism (in principle, in no less than three years, and the amount of deferred income payment is not less than 40%) for the portfolio managers who take portfolio manager positions concurrently. In this case, how to incentivize the portfolio managers while striking a balance between incentives and restraints is another problem worth considering.

Notably, the Guidelines have not yet allowed the portfolio managers of fixed-income products to concurrently serve as portfolio managers for private AMPs. We understand the reason may be that concern over the risk of interest tunneling in OTC bond transactions is relatively high, and correspondingly it is more difficult to ensure full compliance and achieve risk control and therefore, the regulatory authorities incline to take a more cautious approach in this regard.

We also note that the Guidelines are silent on the issue of whether a public fund portfolio manager may participate in investment advisory business concurrently, which remains to be further clarified

by the competent regulatory authorities.

According to the *Circular on Regulating the Bond Trading Business of Bond Market Participants (Yinfa [2017] No.302)* jointly issued by the People's Bank of China, the China Securities Regulatory Commission, the China Banking Regulatory Commission and the China Insurance Regulatory Commission (now the China Banking and Insurance Regulatory Commission) in 2017, participants in the bond market shall separate the front end businesses of proprietary trading, asset management, and investment advisory business from each other and establish effective firewalls with respect to relevant assets, personnel, IT systems, and internal policies. In light of the above regulatory restriction related to bond products, we would recommend the regulators to start with the equity-type products first if allowing portfolio managers to concurrently participate in investment advisory businesses in the future.

Moreover, from a practical perspective, since an FMC only provides investment recommendations to the products that it advises, and trades of such products will not be executed via the investment management system of the FMC, the relevant FMC may face greater difficulty in incorporating the investment advisory products within the scope of its compliance and risk management, which may therefore raise higher standards for the FMC's compliance and risk control capabilities correspondingly.

In addition, Article 59 of the *Administrative Measures on Private Asset Management Business of Securities and Futures Business Institutions* (China Securities Regulatory Commission Order No. 151) provides that securities and futures business institutions shall take effective measures to ensure that private asset management businesses and other businesses are firewalled from each other with respect to work space, personnel, accounts,

funds, information, etc. Given the moderate relaxation of the prohibition on public fund portfolio managers concurrently serving as portfolio managers for private AMPs under the Guidelines, another issue that needs to be clarified is how to interpret and implement the aforesaid business segregation requirement stipulated in Article 59. Currently regulatory authorities are generally taking a cautious

approach for the supervision of FMCs, and in our view, unless it is explicitly allowed by the regulatory authorities, FMCs are recommended to take a more conservative approach when interpreting and enforcing the relevant regulatory requirements.

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

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