JUNHE BULLETIN

September 15, 2020

Financial

CSRC Reiterates the Regulatory Requirements for Private Investment Funds

On September 11, 2020, the China Securities Regulatory Commission (CSRC) issued the *Several Provisions on Strengthening the Regulation of Private Investment Funds (Consultation Paper)* ("Consultation Paper") and the corresponding drafting notes ("Drafting Notes"). In consideration of law enforcement practices, as well as the kinds of violations emerging in the past couple of years, the CSRC, by issuing the Consultation Paper, intends to reiterate and clarify the "bottom line" regulatory requirements, as well as strengthen regulation of private fund industry.

We have briefly summarized below the key points of the Consultation Paper.

I. Requirements for Corporate Name, Business Scope and Business Activities

1 In terms of the corporate name and business scope, the Consultation Paper requires a private fund manager (PFM) to adopt a standard naming format – specifically, the words "private fund" and "private fund management" must appear in its name and business scope. Furthermore, it provides that if the name and business scope of a PFM do not meet the foregoing requirements, it shall make rectifications. The *Q&As on Registration and Filing of Private Investment Funds No. 7* and the *Instructions on Registration of Private Fund Managers (December 2018)* ("Registration Instructions") issued by the Asset Management Association of China (AMAC) stipulate that the corporate name and business scope of a PFM shall include words such as "fund management", "investment management", "asset management", "equity investment", "venture capital" or other similar words. The requirements under the Consultation Paper differ from the above existing AMAC rules as the Consultation Paper explicitly requires to have the word "private" in the corporate name and business scope.

We understand the requirement that a PFM shall have the word "private" in its corporate name and business scope intends to draw a clear distinction between public fund management companies (FMC) and PFMs, and require PFMs to engage exclusively in private fund management businesses, based on the dedicated business operation principle. It is, however, noteworthy that once the Consultation Paper is officially implemented, more than 20,000 existing PFMs will need to change their names and business scopes to

comply with the new requirements under the Consultation Paper, which may increase their operating costs. We would recommend the CSRC to give existing PFMs a stated grace period and sufficient time for rectification on a "new-old-cut" basis. Meanwhile, for a QDLP fund manager, its name and business scope are currently required to include the words "overseas investment fund management" due to the particularity of its business. As a QDLP fund manager is also a PFM, it remains to be clarified by the CSRC how the name and business scope of a QDLP fund manager should conform to the requirements under the Consultation Paper.

2 In terms of business activities, the Consultation Paper requires a PFM to focus on investment management business, and carry out fund raising, investment management, and advisory services solely for the purpose of private fund management. It further reiterates that a PFM shall not manage private funds that are not duly filed according to law, nor shall it engage in any business in conflict with or unrelated to private fund management.

II. Review of Prohibited Activities of Private Fund Raising

The Consultation Paper reorganizes and integrates the provisions of the *Interim Measures on the Supervision and Administration of Private Investment Funds* ("Interim Measures"), the *Administrative Measures on the Fundraising by Private Investment Funds* and the *Interim Provisions on the Administration of Securities and Futures Operating Institutions Regarding the Operation of Private Asset Management Business* ("Interim Provisions on Business Operation") with respect to the prohibited activities for private fund raising. Moreover, the Consultation Paper adds the following two prohibitions: (1) a PFM shall not disseminate misleading marketing or promotional materials which mention completion of registration and filing with the AMAC, custody by financial institution, funding sourced from government, etc. as a means of credit enhancement; (2) a PFM shall not, directly or in any disguised form, establish a branch for the purpose of engaging in fundraising activities.

At the same time, the Consultation Paper emphasizes that the investors, de facto controllers, and affiliates of a PFM shall not engage in the marketing and promotion of private funds. In practice, the shareholders and affiliates of some PFMs may have been assisting the PFMs in raising funds. Since such entities are not qualified to distribute private funds, by doing so they may potentially violate relevant regulations. We recommend the shareholders and affiliates of PFMs strictly avoid all activities that may be considered to be fund marketing and promotion.

III. Clarification on the Negative List of Investments by Private Fund

On the basis of the *Instructions on the Filing of Private Funds* issued in December 2019, the Consultation Paper further reorganizes the negative list of investments by private funds. The Consultation Paper strictly prohibits a PFM from using fund assets to engage in the following activities, namely, (i) non-private fund investment activities such as borrowing (depositing) loans, guarantees, and debts in the name of shares; (ii) investment in credit assets or their beneficial rights, and (iii) investment with unlimited liabilities, or investment in projects prohibited or restricted by the state. The Consultation Paper allows a private fund set up for the purpose of investing in equities to provide loans or guarantees for portfolio companies for less than one year, but further stipulates that the due date of such loan or guarantee shall not be later than the date of withdrawal of the equity investment, and the total amount of the loan or guarantee provided shall not exceed 20% of the total assets of the private fund, with the amount of multiple loans and guarantees being calculated in aggregate.

Pursuant to the Drafting Notes, the purpose of clarifying the negative list is to guide private funds in focusing on investment business, while simultaneously reiterating the nature of "profit sharing and risk sharing" in investment activities.

IV. Strengthened Regulatory Requirements for PFMs and Their Personnel

On the basis of the Interim Measures and the Interim Provisions on Business Operation as well as the cases of punishment by the CSRC, the Consultation Paper summarizes the "ten don'ts" (i.e. ten prohibited activities) for PFMs and their relevant personnel: compliance of related party transactions; prohibition on the mixing of fund assets, pooling businesses, embezzlement or misappropriation of fund assets and interest tunneling; prohibition of the use of private fund assets to directly or indirectly invest in PFMs, their controlling shareholders, de facto controllers or the enterprises or projects de facto controlled by the foregoing entities; and other self-financing activities, insider trading, market manipulation, unfair treatment of fund assets and investors, and other activities in violation of laws and regulations.

Notably, the Consultation Paper also provides that private fund custodians, fund distribution agencies and other service providers and their personnel shall neither engage in the aforementioned prohibited activities nor provide convenience for such activities.

V. Other

In addition to the four points above, the Consultation Paper also reiterates the "bottom line" requirements for private funds, such as non-public fund raising from qualified investors, information disclosure and reporting obligations of PFMs, custodians, fund distribution agencies, and other service providers. It also emphasizes the tightened regulation of "corporate group-type" PFMs as stipulated in the Registration Instructions.

We believe that the release of the Consultation Paper signals the regulators' determination for strictly regulating the private fund industry and cracking down on violations of laws and regulations. After the Consultation Paper is officially implemented, PFMs that do not meet the relevant requirements shall make rectifications in accordance with the Consultation Paper. We will continue monitoring the official implementation of the Consultation Paper and issue alerts to clients on those compliance issues.

Natasha XIE	Partner	Tel：86 21 2208 6238	Email：xieq@junhe.com
Tianyu Qin	Associate	Tel：86 21 2208 6140	Email：qinty@junhe.com
Hao Fang	Associate	Tel：86 21 2283 8357	Email：fangh@junhe.com

君合研究简讯

JUNHE

2020 年 9 月 15 日

金融法律热点问题

证监会重申私募基金监管底线

2020 年 9 月 11 日，中国证券监督管理委员会（以下简称“**证监会**”）发布《关于加强私募投资基金监管的若干规定（征求意见稿）》（以下简称“**《征求意见稿》**”）及其起草说明（以下简称“**《起草说明》**”）。结合近年来的监管实践和查处的违法违规案例，证监会藉《征求意见稿》重申和明确监管底线要求，加强对私募基金的监管。

以下我们简要梳理了《征求意见稿》的重点内容。

一、规范名称、经营范围和业务活动

1、 就名称和经营范围而言，《征求意见稿》要求私募基金管理人统一名称规范，即必须在名称和经营范围中表明“私募基金”、“私募基金管理”等字样，并规定如私募基金管理人名称和经营范围不符合前述要求的，应当进行整改。而中国证券投资基金业协会（以下简称“**基金业协会**”）发布的《私募基金登记备案相关问题解答（七）》以及《私募基金管理人登记须知（2018 年 12 月）》（以下简称“**《登记须知》**”）规定，私募基金管理人的名称和经营范围中应当包含“基金管理”、“投资管理”、“资产管理”、“股权投资”、“创业投资”等相关字样。《征求意见稿》的要求与基金业协会的现行要求略有不同，即要求必须包含私募的字样。

我们理解，《征求意见稿》要求私募基金管理人在其名称和经营范围中加注“私募”字样旨在明示区分公募基金管理人和私募基金管理人，并体现私募基金管理人的专业化经营要求。然而，这意味着一旦《征求意见稿》正式实施，现存超两万家私募基金管理人均需按照《征求意见稿》的要求变更名称和经营范围，这将增加一定的运营成本。我们建议证监会采取新老划断的原则给予现存私募基金管理人充分的整改时间。

同时，就 QDLP 基金管理人而言，其名称和经营范围由于其业务特殊性目前均要求包含“海外投资基金管理”，但 QDLP 基金管理人仍属于私募基金管理人，其名称和经营范围是否需要按照《征求意见稿》更新仍有待证监会进一步澄清。

2、 在业务活动上，《征求意见稿》要求私募基金管理人聚焦投资管理主业，围绕私募基金管理开展资金募集、投资管理、顾问服务等业务，进一步强调私募基金管理人不得管理未依法备案的私募基金，不得从事与私募基金管理存在冲突或无关的业务。

二、重新梳理私募基金募集的禁止行为

《征求意见稿》梳理并整合了《私募投资基金监督管理暂行办法》（以下简称“**《暂行办法》**”）、《私募投资基金募集行为管理办法》以及《证券期货经营机构私募资产管理业务运作管理暂行规定》（以下简称“**《运作管理暂行规定》**”）中对私募基金

募集过程中禁止行为的规定，在此基础上，《征求意见稿》新增以下两项禁止性规定：(1)不得以已完成协会登记备案、金融机构托管、政府出资等名义为增信手段进行误导性宣传推介；(2)不得以从事资金募集活动为目的设立或者变相设立分支机构。

同时，《征求意见稿》强调私募基金管理人的出资人、实际控制人、关联方不得从事私募基金宣传推介。实践中，部分私募基金管理人的股东、关联方可能会协助私募基金管理人募集资金，由于该等实体并不具备销售私募基金的资质，由此可能涉嫌违规。我们建议相关私募基金管理人的股东、关联方应避免从事任何可能被认为是基金宣传推介的行为。

三、明确私募基金财产投资的负面清单

《征求意见稿》在 2019 年 12 月发布的《私募基金备案须知》的基础上进一步梳理了私募基金财产投资的负面清单。《征求意见稿》严禁私募基金管理人使用基金财产从事借(存)贷、担保、明股实债等非私募基金投资活动，严禁投向类信贷资产或其收(受)益权，不得从事承担无限责任的投资以及国家禁止或限制投资的项目等。《征求意见稿》规定，私募基金以股权投资为目的，按照合同约定为被投企业提供一年以下借款、担保的不在前述禁止范围之列。但是，借款或者担保到期日不得晚于股权投资退出日，且借款或者担保总额不得超过该私募基金财产总额的 20%，多次借款、担保的金额应当合并计算。

根据《起草说明》，明确负面清单是为了引导私募基金回归投资本质，同时重申投资活动“利益共享、风险共担”的本质。

四、强化私募基金管理人及其从业人员等主体规范要求

《征求意见稿》在《暂行办法》和《运作管理暂行规定》的基础上，并结合实践中的处罚案例总结了私募基金管理人及从业人员等主体的“十不得”禁止性要求，包括规范开展关联交易，严禁基金财产混同、资金池运作、侵占或挪用基金财产、利益输送；禁止使用私募基金财产直接或者间接投资于私募基金管理人、控股股东、实际控制人及其实际控制的企业或项目等套取私募基金财产的自融行为；禁止内幕交易、操纵市场、不公平对待基金财产和投资者等情形。

值得注意的是，《征求意见稿》还规定私募基金托管人、销售机构、其他服务机构及从业人员也不得从事前述禁止行为或为该等行为提供便利。

五、其他

除前述四点外，《征求意见稿》亦重申了向合格投资者非公开募集，私募基金管理人、托管人、销售机构及其他服务机构履行信息披露和报送义务等底线要求，同时强调了《登记须知》中规定的从严监管集团化私募基金管理人的要求。

我们认为，《征求意见稿》的发布释放了监管机构从严监管私募基金行业并严厉打击违法违规行为的信号。《征求意见稿》正式出台后，不符合相关要求的私募基金管理人应按《征求意见稿》的规定进行整改。

我们将继续密切关注正式规则的出台并提示客户注意相关合规事宜。

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