

## 金融法律热点问题

### 四部委联合发文规范金融营销

2019年12月20日，中国人民银行(以下简称“人行”)、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联合发布《关于进一步规范金融营销宣传行为的通知》(银发[2019]316号)(以下简称“《通知》”)。

在答记者问中，人行介绍了《通知》出台的背景和目的，即近些年来各类金融风险事件多体现出违法金融活动在前期通过大量违法金融营销宣传活动误导金融消费者的共同特征，金融消费者合法权益因此遭受严重侵害。制定《通知》的目的在于统一金融营销宣传行为监管尺度，督促市场经营主体严格依法合规开展金融营销宣传。以下简要介绍《通知》的要点。

#### 一、适用范围

《通知》规范所有依法从事金融业务的机构，包括银行业、证券业、保险业金融机构以及其他依法从事金融业务或与金融相关业务的机构(以下简称“**金融产品或金融服务经营者**”)。根据这一定义，私募基金管理人尽管不属于金融机构，也受本通知的规范。如任何外国基金管理人或其他金融机构获准在中国境内从事金融活动的，也应受本通知的规范。

根据《通知》的定义，金融营销宣传行为是指金融产品或金融服务经营者利用各种宣传工具或方式，就金融产品或金融服务进行宣传、推广的行为。尽管《通知》没有界定何为“宣传或推广行为”，

但我们理解《通知》界定的金融营销的核心在于“宣传和推广”，应通过行为的实质以判断是否属于金融营销。

#### 二、监管部门职责分工

《通知》要求国务院金融管理部门分支机构或派出机构应当以金融产品或金融服务经营者住所地为基础，以问题导向为原则，对违法违规金融营销宣传线索依法进行甄别处理，并应与地方政府有关部门加强合作，监管辖区内的金融营销宣传行为。如属于未取得相应金融业务资质以及未依法作为受托人的市场经营主体开展与金融业务相关的营销宣传活动的，根据其所涉及的金融业务，由相关国务院金融管理部门分支机构或派出机构与地方政府相关部门加强沟通配合，依法、依职责做好相关监测处置工作。

#### 三、金融营销宣传资质

《通知》明确，任何市场经营主体均应在取得相应金融业务经营资质的前提下方可自行开展或委托他人开展金融营销宣传，且金融营销宣传不得超出其业务许可的范围，但《通知》亦明确信息发布平台、传播媒介等依法接受金融产品或金融服务经营者的委托，为其开展金融营销宣传活动的除外。

#### 四、金融营销行为规范

《通知》列举了金融产品或金融服务经营者应

遵循的营销规范，包括建立健全金融营销宣传内控制度和管理机制、金融营销宣传行为监测工作机制，加强对业务合作方金融营销宣传行为的监督，还要求金融产品或金融服务经营者应当依法审慎确定与业务合作方的合作形式，明确约定本机构与业务合作方在金融营销宣传中的责任，共同确保相关金融营销宣传行为合法合规。金融产品或金融服务经营者应当监督业务合作方作出的与本机构相关的营销宣传活动。除法律、法规、规章另有规定外，金融产品或金融服务经营者不得以业务合作方金融营销宣传行为非本机构作出为由，转移、减免应承担的责任。

针对过去市场上普遍存在的明显违规并引起严重关切的违法违规行为，《通知》特别列举了如下行为规范要求：

- (1) 金融产品或金融服务经营者不得以欺诈或引人误解的方式或以损害公平竞争的方式或利用政府公信力对金融产品或金融服务进行营销宣传。
- (2) 金融产品或金融服务经营者应提供对该金融产品或金融服务相关信息的查询方式，并禁止金融产品或金融服务经营者对未经国务院金融管理部门或地方金融监

管部门审核或备案的金融产品或金融服务进行预先宣传或促销，除非相关法律、法规、规章另有规定。

- (3) 金融营销宣传应当通过足以引起金融消费者注意的文字、符号、字体、颜色等特别标识对限制金融消费者权利和加重金融消费者义务的事项进行说明。
- (4) 金融产品或金融服务经营者不得利用互联网进行不当金融营销宣传，不得允许从业人员自行编发或转载未经相关金融产品或金融服务经营者审核的金融营销宣传信息。
- (5) 金融产品或金融服务经营者不得违规向金融消费者发送金融营销宣传信息。未经金融消费者同意或请求，不得向其住宅、交通工具等发送金融营销信息，也不得以电子信息方式向其发送金融营销信息。以电子信息方式发送金融营销信息的，应当明确发送者的真实身份和联系方式，并向接收者提供拒绝继续接收的方式。

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：xieq@junhe.com  
房昊 律师 电话：86 21 2283 8357 邮箱地址：fangh@junhe.com

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## Financial

### Four Authorities Jointly Issue Circular to Regulate Financial Marketing Activities

On December 20, 2019, the People's Bank of China (PBOC), the China Banking and Insurance Regulatory Commission, the China Securities Regulatory Commission, and the State Administration of Foreign Exchange jointly issued the *Circular on Further Regulating Financial Advertising and Promotional Activities* (Yinfa [2019] No. 316) ("Circular").

In the Q&A session accompanying the release of the Circular, the PBOC provided an introduction including an explanation of the background and purpose of the Circular. According to the PBOC, they have observed a recent trend in extensive illegal marketing to mislead financial consumers early on, which later contributes to various levels of systemic financial risks and severely degrades the legitimate rights and interests of financial consumers. Accordingly, the purpose of the Circular is to unify the regulatory standards for financial marketing activities and urge market operators to comply with laws and regulations governing financial marketing activities. We have summarized below the key points of the Circular.

#### **I. Scope of Application**

The Circular covers all institutions that engage in financial businesses in accordance with laws,

including financial institutions in banking, securities and insurance sectors, as well as other institutions that engage in financial or related businesses in accordance with laws ("financial product or service providers"). Given this definition, even though private fund managers are not financial institutions, they shall be covered by the regulations set out in the Circular. If any foreign fund manager or other financial institution is approved to engage in financial activities in China, it shall also be governed by the Circular. Pursuant to the Circular, financial advertising and promotional activities ("financial marketing activities") refers to activities in which financial product or service providers use various tools or methods to advertise and promote financial products or services. Although the Circular does not specify what constitutes advertising or promotional activities, we understand that the core of financial marketing as defined under the Circular is to "advertise and promote", and whether a given activity constitutes financial marketing will be determined on a case by case basis, according to the details of the activity.

#### **II. Division of Duties Among Regulators**

The Circular requires that the local branches or agencies of the financial regulators, accounting

for the locality of the financial product or service providers and based on the problem-oriented principle, shall identify and address indications of illegal and non-compliant financial marketing activities in accordance with relevant laws, and strengthen the cooperation with relevant local governmental authorities to supervise financial marketing within their respective jurisdictions.

For market operators engaging in financial related marketing activities without having obtained the relevant financial business licenses nor being entrusted in accordance with relevant laws, the relevant local branches or agencies of the governing financial regulators shall take supervisory and enforcement actions over such market operators, in accordance with laws and their respective duties after seeking cooperation and conducting communication with various agencies of the local government involved.

### **III. Qualifications for Financial Marketing**

The Circular provides that a market operator may conduct or entrust others to conduct financial marketing activities, provided that it has obtained the required financial business license, and the financial marketing shall not exceed the scope of the business license. However, the Circular also specifies that information platforms or media utilized by financial product or service providers to conduct financial marketing in accordance with laws, shall be exempted from the foregoing provision.

### **IV. Guidance for Financial Marketing**

The Circular enumerates the marketing rules imposed on a financial product or service provider, including the establishment of a sound internal control and management mechanism, as well as a monitoring system for financial marketing and a strengthened supervision of the financial marketing activities carried out by its business

partners. The Circular also requires a financial product or service provider to carefully determine the form of cooperation with its business partners in accordance with laws, and clearly stipulate the respective responsibilities assumed by it and the business partners in financial marketing. The financial product or service provider and its business partners shall jointly ensure that relevant financial marketing activities are legal and compliant. A financial product or service provider shall supervise the financial marketing activities conducted by its business partners on their behalf. Unless otherwise provided by laws, regulations or rules, a financial product or service provider shall not transfer, reduce or exempt its liabilities on the ground that the financial marketing activities are conducted by its business partners rather than itself.

In regard to the illegal or non-compliant activities that have prevailed in the market in the past and caused serious concerns, the Circular specifically proposes the following guidance on such activities:

- (1) Financial product or service providers shall not advertise or promote financial products or services in a fraudulent or misleading manner or in a manner that undermines fair competition, or use government credibility to advertise or promote financial products or services.
- (2) Financial product or service providers shall provide financial consumers with methods to inquire about the relevant information of financial products or services, and are prohibited from conducting advance advertisement or promotion for financial products or services that have not been reviewed by or filed with the financial regulatory departments of the State Council or local financial regulatory authorities, unless otherwise stipulated by relevant laws,

regulations or rules.

- (3) Financial product or service providers shall not use the Internet for improper financial marketing, or permit their practitioners to edit and post or re-post financial marketing information that has not been reviewed by them.
- (4) Financial marketing shall use special indicators, such as words, symbols, fonts or colors that are capable of drawing the attention of financial consumers, to explain matters that restrict the rights of financial consumers or increase their obligations.

Financial product or service providers shall not distribute financial marketing information to financial consumers in violation of relevant laws or regulations. Without the financial consumer's consent or request, financial product or service providers shall not post financial marketing information to the financial consumer's home or vehicle or send such information in an electronic form. When sending financial marketing information in an electronic form, the true identity and contact information of the sender shall be specified, and the receiver shall be provided with a right to refuse to continue receiving such information.

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

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