

Capital Market

Unified Private Fund Regulation Released for Public Comments

Following the release of the *Consultation Draft of the Interim Measures for the Administration of Private Securities Investment Fund Business* (the “Old Draft”) on February 20, 2013 for public comments and the open for registration of private fund manager with the Asset Management Association of China (the “AMAC”) since February 7, 2014, the China Securities Regulatory Commission (the “CSRC”) issued on July 11, 2014 the *Consultation Draft of Interim Measures for the Supervision and Administration of Private Investment Fund* (the “New Draft”) for public comments. The New Draft contains 41 articles and 10 chapters, which, among others, sets forth the regulatory framework of private funds and addresses major issues in relation to fundraising and fund operation for private funds. Below is a summary of the main provisions of the New Draft.

1. Private Fund and Investment Scope

The definition of the private funds under the New Draft is in line with the definition made by the

Measures on the Private Investment Fund Manager Registration and Fund Filing (Pilot) promulgated by the AMAC on January 17, 2014. According to the New Draft, private funds mean those funds which are raised through non-publicly offering from accredited investors. The investment activities of the companies and partnerships, which are established by non-publicly offering for investment purposes, and whose assets are managed by a fund manager or a general partner, shall also be governed by the New Draft.

2. Fund Servicing Institutions

The New Draft generally divides the private fund market institutions into (i) the private fund management institutions, (ii) the institutions offering fund custodian services, (iii) the institutions offering fund distribution services, and (iv) other private fund servicing institutions, all of which are subject to the CSRC’s supervision. However, certain issues related to the qualification and internal control requirements for

the fund servicing institutions, such as the fund distributor or the fund advisor, remain to be further clarified by the CSRC.

3. Regulatory Framework

The New Draft restates that neither the incorporation of private fund management institution nor private fund offering is subject to any administrative approval, instead, fund managers are subject to the registration with the AMAC, which registration must be processed within 20 working days after all required materials are provided. Upon fund raising, the fund manager shall also complete the fund filing formalities according to AMAC rules, which filing is also required to be processed within 20 working days after all required materials are provided.

The New Draft requires AMAC to maintain an information system regarding the private fund manager registration and private fund filing and build up an information sharing mechanism with CSRC and its agencies. Besides, the New Draft also authorizes the AMAC to accept the investors' complaints and conduct the mediation of the relevant disputes.

4. Accredited Investors

According to the New Draft, no private fund product can be offered to non-accredited investors and the number of investors of a single fund must comply with the relevant regulations. In case of a transfer of fund unit, the transferee

should be an accredited investor and the number of investors after the transfer shall also comply with the relevant regulations.

As one of the most notable changes from the Old Draft, the New Draft provides for new criteria of accredited investor. An accredited investor should simultaneously meet the following: (1) its investment in a single fund is no less than RMB 1 million, and (2) for an institutional investor, its net assets should be no less than RMB 10 million, while for an individual investor, his/her personal financial assets should be no less than RMB 3 million or his/her annual average income of the latest three years is no less than RMB 500,000. Exemptions are made for the following investors which are deemed as accredited investors: (1) social security funds, company pension, charitable funds; (2) investment plans supervised by the financial supervision and administration agencies of the State Council; (3) private fund managers and their staff investing in the fund under their management; (4) other investors as stipulated by the CSRC.

5. Fundraising

The New Draft further prohibits fund manager and fund distributor from disseminating information to unspecified objects via public media, lectures, seminars, analysis meetings, bulletins, leaflets, messages, Wechat, Blogs or other means. Fund manager or fund distributor shall not offer any principal-guaranteed or return-guaranteed products.

In addition, fund manager or fund distributor should use questionnaires to evaluate the risk-perceiving and risk-taking capabilities of the investors, require the investors to make written commitment on their eligibility, and present risk disclosure statement to the investors for signing.

6. Fund Operation

The New Draft prescribes a series of behaviors that the fund managers, fund custodians, fund distributors and other fund servicing institutions as well as their staff are prohibited from conducting. Moreover, fund managers and fund custodians are required to accurately disclose information related to the fund to the investors, subject to disclosure rules to be promulgated by the CSRC separately. Other than the information that a private fund manager shall report to or update with the AMAC, private fund managers, fund custodians or fund distributors shall keep all records and other materials related to the investment decision, trading or administration of investor suitability for at least 10 years after the relevant fund is liquidated.

7. Special Provision on Venture Capital Funds

To emphasize facilitating the development of venture capital fund industry, the New Draft reserves a whole chapter for the venture capital funds. The New Draft defines the venture capital funds as the funds invested in ordinary shares, convertible preferred shares, or convertible bonds to unlisted startup companies.

It is stipulated that CSRC will provide facilitation for the venture capital funds in terms of the account opening, fund issuance and trade, as well as the investment exit, and will adopt differential administration treatment relating to the fund manager registration, fund filing, investment reporting, member administration and investment scrutiny compared with other types of fund.

8. Prominent Changes Compared with Old Draft

Other than the above, here below sets forth other major differences between the New Draft and the Old Draft or the AMAC's current practice.

(i) Private Fund Scope Expanded

As opposed to the Old Draft which only covers private securities investment funds (excluding private equity funds and venture capital funds), the New Draft regulates the activities of all types of private fund. Moreover, the New Draft further clarifies that the activities of securities companies, (mutual) fund management companies, futures companies and their subsidiaries shall be subject to the New Draft when those entities carrying out the private fund business.

(ii) Underlying Financial Products Clarified

Under the Securities Investment Fund Law, the assets of a private fund may be used for the investments on the financial products including stocks, bonds, and fund units publicly issued as well as other securities and their derivatives as

prescribed by the CSRC. The New Draft further clarifies the underlying financial products to cover stocks, equities, bonds, futures, options, fund units and other investment objects that may be agreed otherwise in the investment agreement. Our interpretation of the above underlying products is that, the futures referred hereto should include both financial futures and commodity futures and the options should also include both financial options and commodity options.

(iii) Timeline for AMAC to Process Private Fund Manager Registration

By stipulating that the AMAC shall process

private fund manager registration and private fund filing within 20 working days after all information required are submitted, the New Draft creates both the authority and obligation on AMAC under the administrative rules, to timely process the registration and filing.

(iv) Individual Private Fund Manager Permitted

Under the AMAC's current practice, individuals are not permitted to register as private fund managers. As the New Draft explicitly permits individuals to make the private fund manager registration, such restriction would probably be lifted by the AMAC.

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资本市场法律热点问题

证监会就统一的私募基金管理办法公开征求意见

继中国证券监督管理委员会（以下简称“证监会”）于 2013 年 2 月 20 日就《私募证券投资基金业务管理暂行办法（征求意见稿）》（以下简称“**原征求意见稿**”）公开征求意见，以及中国证券投资基金业协会（以下简称“**基金业协会**”）自 2014 年 2 月 7 日起开始接受私募基金管理人登记，证监会于 2014 年 7 月 11 日就《私募投资基金监督管理暂行办法（征求意见稿）》（以下简称“**新稿**”）再次向社会公开征求意见。新稿分为十章，共四十一条，其对私募基金监管体系以及私募基金募集和运作的主要问题作出了规定。

1. 私募基金及投资范围

新稿沿用了基金业协会于 2014 年 1 月 17 日发布的《私募投资基金管理人登记和基金备案办法(试行)》中对于“私募基金”的定义，即私募投资基金是指以非公开方式向合格投资者募集资金设立的基金。新稿同时指出，非公开募集资金，以投资活动为目的设立的公司或合伙企业，资产由基金管理人或普通合伙人管理的，其投资活动也应适用其规定。

2. 基金服务机构

新稿将私募基金市场机构大致分为四类，即私募基金管理机构、私募基金托管机构、私募基金销售机构以及其他私募基金服务机构，以上四类机构均由证监会监管。有关私募基金服务机构的资质以及内控等具体要求仍有待证监会出台进一步规定。

3. 监管框架

新稿重申对私募基金管理机构的设立和私募基金的发行不设行政审批，但要求各类私募基金管理人在基金业协会完成登记，且基金业协会应在要求材料齐备后 20 个工作日内办结登记。在基金募集完毕后，私募基金管理人还应当向基金业协会办理基金备案手续，同样的，基金业协会亦应在要求材料齐备后 20 个工作日内办结备案。

新稿要求基金业协会建立私募基金管理人登记和私募基金备案管理信息系统，并建立与证监会及其派出机构的信息共享机制。此外，新稿还授权基金业协会受理投资者投诉，对纠纷进行调解。

4. 合格投资者

根据新稿，私募基金只能向合格投资者募集，单只私募基金的投资者人数累计不得超过法律规定的特定数量。在基金份额转让的情况下，受让人同样必须满足合格投资者要求，且受让后投资者的人数也应当符合相关法律规定。

相比原征求意见稿而言，新稿的重要变化之一是提出了新的合格投资者标准。根据新稿，合格投资者需要同时满足以下条件：（1）投资于单只私募基金的金额不低于 100 万元，且（2）单位投资者的净资产不低于 1000 万元，个人投资者的金融资产不低于 300 万元或者最近三年个人年均收入不低于 50 万元，但下列投资者应被直接认定为合格投资者，不受上述条件限制：（1）社会保障基金、企业年金、慈善基金；（2）依法设立并受国务院金融监督管理机构监管的投资计划；（3）投资于所管理私募基金的私募基金管理人及其从业人员；（4）证监会规定的其他投资者。

5. 资金募集

新稿进一步规定私募基金管理人和私募基金销售机构不得通过公众传播媒体或讲座、报告、分析会和张贴广告、散发传单、发送手机短信、微信、博客和电子邮件等方式，向不特定对象宣传推介，且不得向投资者承诺投资本金不受损失或者承诺最低收益。

此外，私募基金管理人或私募基金销售机构应当采取调查问卷方式来评估投资者的风险识别能力和风险承担能力，要求投资者书面承诺符合合格投资者标准，并应当制作风险揭示书，由投资者签字确认。

6. 基金运作

新稿列举了一系列私募基金管理人、私募基金托管机构、私募基金销售机构以及其他私募服务机构及其从业人员不得从事的行为。此外，新稿还要求私募基金管理人和私募基金托管机构向投资者如实披露基金有关信息，信息披露规则由基金业协会另行制定。除了私募基金管理人应当向基金业协会报告和更新的信息外，私募基金管理人、私募基金托管机构和私募基金销售机构应当妥善保存私募基金投资决策、交易和投资者适当性管理等方面的记录，保存期限自基金清算之日起不少于 10 年。

7. 关于创业投资基金的特别规定

为了支持创业投资基金行业的发展，新稿对创业投资基金专设一章以作特别规定。新稿将创业投资基金定义为投资于未上市创业企业普通股、依法可转换为普通股的优先股、可转换债券等权益的股权投资基金。新稿同时规定，证监会将在账户开立、发行交易和投资退出等方面为创业投资基金提供便利服务，并在基金管理人登记、基金备案、投资情况报告要求和会员管理等环节为创业投资基金采取差异化的监督管理措施。

8. 相比原征求意见稿的主要变化

与原征求意见稿以及基金业协会目前操作实践相比，新稿的主要变化还包括：

（1） 扩大适用范围

与原征求意见稿仅适用私募证券投资基金不同，新稿涵盖了所有类型的私募基金（包括私募股权投资基金和风险投资基金）。此外，新稿还进一

步明确，证券公司、基金管理公司、期货公司及其子公司从事私募基金业务也同样适用其规定。

（2） 明确投资标的

在《证券投资基金法》下，私募基金可以投资于公开发行的股票、债券、基金份额，以及证监会规定的其他证券及其衍生品种。新稿进一步明确，私募基金可以投资股票、股权、债券、期货、期权、基金份额及投资合同约定的其他投资标的。我们理解，此处的期货应包括金融期货和商品期货，而期权则应包括金融期权和商品期权。

（3） 增加办结登记备案的时限要求

新稿要求基金业协会在所需材料齐备后的 20 个工作日内处理完毕私募基金管理人的登记申请和私募基金备案，对基金业协会办结登记和备案的时限提出了要求。

（4） 自然人可以担任私募基金管理人

在基金业协会目前的操作实践中，自然人尚不可以登记为私募基金管理人。鉴于新稿明确规定自然人可以登记为私募基金管理人，基金业协会将来有可能会取消该限制。

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