asifma
Growing Asia's Markets

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中国证券监督管理委员会
西城区金融大街19号富凯大厦A座
北京，中国
邮编：100033

China Securities Regulatory Commission
Focus Plaza, 19 Jin Rong Street
Xi Cheng District
Beijing, P.R. China 100033

关于 2020 年 3 月 1 日施行的新《证券法》
RE: *Securities Law of the People's Republic of China* Implemented on March 1, 2020

尊敬的申兵主任：
Dear Director General Shen,

见信好！本信函概述了亚洲证券业与金融市场协会(ASIFMA[1])会员机构就新《中华人民共和国证券法》(以下简称"新法"或"新《证券法》")的修订和实施所提出的意见与建议。我们感谢您于百忙之中阅读本信函，并期待与您和中国证券监督管理委员会(以下简称"证监会")相关部门就相关问题进行进一步探讨。

[1]亚洲证券业与金融市场协会(ASIFMA)是一个独立的区域性行业协会，会员基础广泛，由银行、资产管理公司、专业咨询机构及市场基础设施服务供应商等超过135家来自买卖双方的领先金融机构组成。协会的使命是发掘金融行业的共同利益来推动亚洲资本市场的深度和广度发展。ASIFMA 提倡稳定、创新、竞争和高效的亚洲资本市场，从而为区内的经济发展及增长提供基本条件。ASIFMA 致力于通过清晰而有力的行业共同声音来推动业界就关键议题达成共识、提出解决方案和促进变革。我们所牵头的众多举措包括回应监管机构和交易所的咨询、树立统一的行业标准、通过政策论文倡导更优质的市场，以及为降低亚太区内的业务成本探索可行方案。通过全球金融市场协会(GFMA)，ASIFMA 与位于美国的证券业与金融市场协会(SIFMA)以及欧洲的金融市场协会(AFME)形成联盟，共同提供全球最佳行业实践及标准，为区域发展作贡献。

ASIFMA is an independent, regional trade association with over 135 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, professional and consulting firms, and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

ASIA SECURITIES INDUSTRY & FINANCIAL MARKETS ASSOCIATION | Unit 3603, Tower 2 Lippo Centre | 89 Queensway Admiralty, Hong Kong | Tel: +852 2531 6500 www.asifma.org

Hope this letter finds you well. The letter is intended to present the recommendations and suggestions proposed by the member institutions of Asia Securities Industry and Financial Markets Association (ASIFMA) with respect to the amendments and implementation of the new *Securities Law of the People's Republic of China* (hereinafter referred to as the "New Law" or "New Securities Law"). We really appreciate your time for reading this letter, and we are most honoured to be given the opportunity to consult with you and the relevant departments of the China Securities Regulatory Commission (CSRC) on the issues discussed herein.

新《证券法》已于 2019 年 12 月 28 日生效并于 2020 年 3 月 1 日施行。根据国务院办公厅 2020 年 2 月 29 日发布的《关于贯彻实施修订后的证券法有关工作的通知》(国办发[2020]5 号)，证监会、司法部等部门要对与证券法有关的行政法规进行专项清理，及时提出修改建议。ASIFMA 的会员机构十分关注新《证券法》的实施以及相关部门根据新《证券法》拟进行的对相关法规、规章和规范性文件的清理和修改。我们就新《证券法》做出的一些修订表示欢迎与支持，例如推行注册制。ASIFMA 热切期望密切配合和积极协助相关部门的修法和释法工作，提出相关的建议和意见。
The New Securities Law came into force on December 28, 2019 and has been officially implemented since March 1, 2020. Pursuant to the *Circular on Relevant Work Concerning Implementing the New Securities Law* issued by the General Office of the State Council on February 29, 2020 (Guobanfa [2020] No. 5), the CSRC, the Ministry of Justice and other regulatory authorities will need to initiate a special review of and propose amendments in a timely manner to the relevant administrative regulations so as to align with the provisions of the New Securities Law. The member institutions of ASIFMA are very focused on the implementation of the New Securities Law as well as the revision and amendment of relevant laws, regulations and normative documents proposed by the relevant regulators in accordance with the New Law. We welcome and are supportive of certain revisions in the New Law, for example, the implementation of registration based offering regime. ASIFMA is very keen to work closely and provide assistance to the relevant authorities throughout the process of law-making and interpretation of rules and regulations, while sharing suggestions and comments from subject matter experts in the industry.

我们恳请证监会也如同其他地区如香港、新加坡、日本和澳大利亚一样能够在出台各项最终细则前与 ASIFMA 等行业协会开展充分的讨论和沟通，这样做符合外资机构熟悉的国际惯行做法。
To make the rule-making process more functional to the foreign institutions, ASIFMA would request the CSRC to conduct thorough consultations with industry associations such as ASIFMA, before the rule-making process is finalized. Similar practices for industry engagement are prevalent in other jurisdictions such as Hong Kong, Singapore, Japan and Australia.

由于新《证券法》涵盖的领域非常之广，我们在此无法穷尽所有方面的问题和细节，并且我们亦在努力跟进相关问题的最新进展。由于篇幅所限，以下我们主要围绕适用范围、程序化交易、短线交易、5%持股变动、减持规定、先行赔付、市场操纵等方面提出我们的意见并期待与相关部门进一步讨论以提供更多的细节并回答任何相关问题。
Given the wide range of issues addressed in the New Securities Law, it is not possible to discuss all the issues in sufficient detail herein and we do attempt to keep ourselves apprised of all the updates and developments regarding such issues from time to time. To avoid redundancy, we mainly elaborate below on our suggestions and comments in the following aspects, namely, (i) scope of securities subject to the New Law, (ii) program trading, (iii) short swing profit rule, (iv) changes in regard to 5% shareholding, (v) restrictions on holding reductions,

(vi) responsibility of sponsors and underwriters and advance compensation mechanism, (vii) market manipulation, (viii) market making business, and (ix) providing documents or materials relating to overseas regulatory authorities, and look forward to future consultations with relevant authorities to provide additional details and answer any questions that might arise from the responses provided below.

1. 适用范围
Scope of Securities Subject to the New Securities Law

1.1 关于资产支持证券和资管产品
Asset-backed securities (ABS) and asset management products (AMP)

新法第二条规定：(i)在中华人民共和国境内发行和交易的股票、公司债券、存托凭证和国务院依法认定的其他证券；和(ii)上市交易的政府债券、证券投资基金份额，适用本法；国务院将按照新法的原则分别制定有关资产支持证券和资产管理产品发行交易的管理办法。
Article 2 of the New Law provides that the New Law applies to (i) shares, corporate bonds, depositary receipts and other securities recognized by the State Council that are issued and traded within the territory of the PRC[2]; and (ii) listed and traded treasury bonds and fund units of securities investment funds. Besides, the State Council will formulate administrative measures respectively on the issuance and trading of ABS and AMP in accordance with the principles of the New Law.

我们理解，新法的这一变化意味着，尽管分业监管现状不变，但各金融监管部门在监管规则的制订标准上应有所统一，即将资产支持证券、资产管理产品视作"准证券"，其相关规范的制定应当遵守证券法的原则，以强制信息披露和反欺诈作为保护投资者的主要手段。我们注意到，2018 年颁布并实施的《关于规范金融机构资产管理业务的指导意见》(以下简称"资管新规")已经形成了一套相对完善的规则体系，在一定程度上统一了各金融监管部门监管规则的制订标准，但具体规则仍由各金融监管部门分别在资管新规的原则下制定。我们希望了解国务院及下属各金融监管部门按照新法原则制定有关资产支持证券和资产管理产品发行交易的统一管理办法的计划，以及是否会参照证监会对银行间债券市场、交易所债券市场违法行为享有统一执法权的做法，对涉及资产支持证券和资产管理产品的违法行为在统一监管执法方面有所安排。
We understand this change implies that, although the current industry-oriented regulatory regime remains unchanged, financial regulators shall adopt unified standards in formulating relevant regulatory rules, that is, to treat ABS and AMP as "quasi-securities" and formulate relevant rules in accordance with the principles of the New Securities Law, while adopting mandatory information disclosure and anti-fraud measures as the main protective mechanisms available for investors. We note that the *Guiding Opinions on Regulating Asset Management Business of Financial Institutions* (hereinafter referred to as the "Guiding Opinions"), promulgated and implemented in 2018, have established a relatively comprehensive regulatory system and have (to some extent) unified the standards adopted by financial regulatory authorities in formulating

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[2]为本信函之目的，中国指中华人民共和国，不包括澳门特别行政区、香港特别行政区和台湾地区。For the purpose of this Letter, PRC means the People's Republic of China, excluding Macau, Hong Kong and Taiwan.

regulatory rules, though the detailed rules are still made by each financial regulator in accordance with the principles under the Guiding Opinions. We would like to know whether the State Council and its subordinate financial regulatory authorities have relevant proposals for promulgating unified administrative measures for the issuance and trading of ABS and AMP in accordance with the principles under the New Law, and whether they will make unified regulation and enforcement arrangements against violations involving ABS and AMP by reference to the CSRC's unified enforcement power over violations in both the interbank bond market and exchange bond market.

1.2 关于期货法
Futures Law

我们注意到，新法删除了《三审稿》中关于国务院按照《证券法》的原则规定制定证券衍生品种发行交易的管理办法的条款。起草者认为，证券衍生品种可分为证券型(如权证)和契约型(如股指期货)，其中证券型衍生品种可作为新法第二条所指国务院依法认定的其他证券，适用《证券法》，而契约性衍生品种可适用《期货交易管理条例》或者正在起草中的《期货法》。我们希望了解《期货法》的立法进程，并非常期待《期货法》草稿尽快公开征求意见。
We note that the New Law does not incorporate the provision proposed in the Third Consultation Draft which provides that the State Council shall formulate administrative measures on the issuance and trading of derivative securities in accordance with the principles of the Securities Law. The drafters classify derivative securities into securities-type (e.g. warrants) and contractual-type (e.g. stock index futures). Between the two, securities-type derivatives can be regarded as other securities recognized by the State Council and thus subject to the Securities Law, while the contractual-type derivatives may be subject to the *Administrative Regulations on Futures Trading* or the *Futures Law* that is currently being formulated. We hope to learn more about the legislative process of the Futures Law and would very much look forward to the release of the consultation paper of Futures Law.

1.3 域外管辖
Extraterritorial Jurisdiction

新法第二条新增一款：“在中华人民共和国境外的证券发行和交易活动，扰乱中华人民共和国境内市场秩序，损害境内投资者合法权益的，依照本法有关规定处理并追究法律责任”。这意味着《证券法》具有了一定的域外管辖效力，即在中国境外的场内或场外市场发生的证券发行或交易行为，如扰乱境内市场秩序或损害境内投资者合法权益的，可根据《证券法》追究其责任。为便于理解本条适用的范围，我们希望结合(i)目前内地与香港股票市场互联互通；(ii)沪伦通；(iii)中国合格境内投资者投资于海外一级或者二级市场等举例说明可能具体适用的情形。我们也希望了解证监会是否有意就有关域外管辖出台任何正式的实施细则，以及除既有对中资机构境外投资的监管和合规要求外，证监会是否有计划对海外的证券公司或者发行人规定额外的监管及合规责任。
Notably, a new paragraph has been added to Article 2 of the New Law, which provides that "issuance and trading activities of securities outside the territory of PRC which disrupt the domestic market order of the PRC or damage the legitimate rights and interests of domestic investors shall be regulated and relevant legal liabilities shall be pursued in accordance with this Law." This indicates that the Securities Law has certain

extraterritorial jurisdiction, meaning that the issuance or trading activities that occurred in an exchange or over the counter outside of the territory of PRC may attract relevant liabilities under the Securities Law, to the extent that they disrupt the market order of the PRC or damage the legitimate rights and interests of onshore investors. To better understand how this provision would apply in practice, we hope the CSRC could give some examples to illustrate the circumstances where this provision may apply, taking into account (i) the current interconnection between Hong Kong and Mainland securities markets via Stock Connect, (ii) the Shanghai-London Stock Connect and (iii) PRC eligible investors investing in overseas primary and secondary securities markets. In particular, we would like to know whether the CSRC has the intention to publish official implementation guidelines on the extraterritorial jurisdiction and whether it is CSRC's intention to impose additional liabilities and obligations on overseas securities companies or issuers on top of existing regulatory and compliance requirements imposed by regulators in relevant overseas securities markets.

2. 程序化交易
Program Trading

新法第四十五条规定，通过计算机程序自动生成或者下达交易指令进行程序化交易的，应当符合国务院证券监督管理机构的规定，并向证券交易所报告，不得影响证券交易所系统安全或者正常交易秩序。本条意味着证监会被授权对程序化交易制定关键性的和必备的具体规定，各证券交易所亦需要对程序化交易报告要求制定相应细则。我们希望了解证监会制定程序化交易相关规定的进展(特别是证监会在 2015 年出台征求意见稿之后是否打算根据市场发展状况发布新的细节化的征求意见稿)，并期待明确证券交易所层面何时及如何执行该报告制度。我们注意到上述条款的表述相当地原则性，例如，就向证券交易所提交关于程序化交易的报告而言，目前尚不清楚报告具体应涵盖的内容范围，而对于何种情形将会对交易系统安全或正常交易秩序构成影响也没有清晰的界定。总体而言，由于该四十五条过于原则性和概括性，缺乏可操作性。在目前中国证券市场上，特别是对专业投资者和机构投资者来说， 程序化交易是一种主要并被普遍应用的交易形式。而这些有经验的投资者的交易行为对市场流动性和价值发现起着关键性作用。因此，为避免因实施新规则而对流动性、市场秩序和稳定性造成任何潜在的干扰或意外后果，事先向各类市场参与者进行广泛的意见征询是至关重要的。

Article 45 of the New Law provides that program trading conducted through automatic generation and delivery of trading orders by the computer program shall comply with the rules prescribed by the securities regulatory authority of the State Council, and shall be reported to the stock exchanges and shall not impact the security of the trading systems or the normal trading order of the stock exchanges, which implies that the CSRC is given the authority to formulate the critical and necessary detailed rules on program trading, and that each stock exchange will need to put forward its own detailed rules in connection with the filing of reports on program trading. We would like to learn more about the latest developments regarding the promulgation of program trading rules by the CSRC, in particular, whether the CSRC intends to release a new and detailed proposal for public consultation in light of market development since the last consultation in 2015, and look forward to further clarification by the CSRC on when and how the reporting system will be implemented at the stock exchange level. We note that the above-mentioned clauses are quite vague. For example, in terms of the reporting requirement, the scope of the information to be reported remains unclear. Moreover, it is unclear what constitutes

"impact the security of the trading systems or the normal trading order of the stock exchanges". Generally speaking, Article 45 is hard to be applied in practice due to its vagueness and abstractness. It should also be noted that program trading represents a major and common form of trading especially among professional and institutional investors in the Chinese markets, and more importantly these experienced investors perform a critical liquidity provision and price discovery function in the market. Therefore, consultation from a wide variety of market participants will be essential to avoid any potential disruption or unintended consequences to liquidity, market order and stability from the implementation of the new rules.

3. 短线交易
Short Swing Profit Rule

新法第四十四条规定了持有百分之五以上股份的股东将其持有的该公司的股票或者其他具有股权性质的证券在买入后六个月内卖出，或者在卖出后六个月内又买入，由此所得收益归该公司所有，但是，证券公司因购入包销售后剩余股票而持有百分之五以上股份，以及有国务院证券监督管理机构规定的其他情形的除外。我们理解，根据此条规定证监会有权规定短线交易限制的豁免情形，因此我们期待证监会就此出台前述第四十四条(以下简称"短线交易规则")的豁免情形，以指导和保障市场主体，以使其确信投资活动不违反短线交易方面的法律或监管规定。
Article 44 of the New Law stipulates that where a shareholder holding 5% or more of the shares of a company sells either its shares of the company or other securities in the spirit of equity within six months after purchasing such shares or securities, or repurchases such shares or securities within six months after selling such shares or securities, the gains therefrom, if any, shall belong to the company. However, this requirement shall not apply to a securities company which comes to hold 5% or more of the shares as a result of absorbing the unsold shares under the terms of an underwriting agreement on a principal basis or other circumstances as prescribed by the securities regulatory authority of the State Council. We understand that according to this Article, the CSRC would have the authority to grant exemptions and therefore we would be grateful if the CSRC could also grant such exemptions which would apply in relation to this Article 44 (hereinafter referred to as the "short swing profit rules") in order to give a clear guidance and assurance to market participants so that they can invest with confidence that they will not be breaching any legal or regulatory provisions in this regard.

鉴于短线交易限制的立法本意在于建立内幕交易的事先防范和阻吓机制，建议证监会在下一步出台短线交易相关细则时，参照 2007 年制定的《证券市场内幕交易行为认定指引(试行)》中对不构成内幕交易的情形进行明确认定的做法，并按照"目的合理"和"实际持有"的原则，考虑对以下几种普遍存在的不具有违规交易或规避监管目的的市场实践豁免短线交易限制或豁免合并计算：
Given that imposition of restriction on short swing profit is intended to establish a precautionary and deterrent mechanism against insider trading, we recommend the CSRC, in the course of formulating the short swing profit rules, to refer to the approach adopted under the *Guidelines for Identification of Insider Trading in Securities Market (for Trial Implementation)* released in 2007, namely, to expressly provide for conduct that does not constitute insider trading, and exempt the following common market practices that have no intent to conduct trading activities in violation of laws or regulations or

circumvent regulation from the short swing profit restriction or aggregation of positions, in accordance with the principles of “reasonable purpose” and “actual holding”.

3.1 对被动型指数基金的买卖交易豁免短线交易限制。
Exemption for trading by index-tracking passive funds

被动型指数基金存在因跟踪标的指数的成分股发生调整、投资者申赎等原因而频繁买卖标的指数成分股的客观需要，对于此种因基金产品自身特性而发生的正常交易行为不应受6个月持有期的限制。同时，监管实践中，被动型指数基金往往可以豁免主动型基金的相关投资限制，如其投资运作无需遵守“双十”比例限制。基于上述原因，建议对被动型指数基金豁免短线交易限制。
Index-tracking passive funds may have to frequently buy and sell the underlying index constituents due to changes in the weightings of constituents of the relevant index, investors' subscription/redemption applications or other reasons. Accordingly, such normal trading conduct required by the inherent characteristics of such fund type should not be subject to the six-month holding period restriction. Meanwhile, in regulatory practice, index-tracking passive funds, unlike discretionary funds, would often be exempt from the relevant investment restrictions imposed on discretionary funds, such as the Double 10% Ratio Limit. In light of the above, it is recommended to exempt index-tracking passive funds from the application of short swing profit restriction.

3.2 对因证券市场波动、上市公司合并、资管产品规模变动等资产管理人之外的因素引发资管产品被动超标后，其为满足法规要求及合同约定而减持相关证券的情形豁免短线交易限制。
There are cases where factors beyond an asset manager’s control, such as volatility in the securities market, merger of listed companies and change in the size of the AMP, force an AMP to exceed its relevant trading limits, and in order to re-comply with such regulatory requirements or contractual obligations, the relevant asset manager has to reduce its shareholding of certain securities, which shall also be exempt from the application of short swing profit restriction.

在被动超标的情况下，资产管理人为了符合监管要求或合同约定而减持相关证券是实践中较为常见的做法，其目的具有合理、合规性。在这种情况下，建议对其豁免短线交易限制。
In such cases, it is a common practice for an asset manager to reduce its shareholding of relevant securities to meet regulatory requirements or contractual obligations, the purpose of which is reasonable and compliant. Thus, we recommend to add this as another exemption for short swing profit restriction.

3.3 对同一资产管理人管理的多个资管产品，如管理人就各资管产品组合所涉证券，独立地且为该资管产品自身利益，行使投资决策权和表决权，则在计算该资管产品的持股比例时，管理人无需将该资管产品的持股比例与其管理的其他资管产品的持股比例合并计算。
For multiple AMPs managed by the same asset manager, if the asset manager exercises its investment decision-making power and voting rights in relation to the securities in each AMP’s portfolio independently and in the separate interest of each of those AMPs, respectively, it should not be necessary for the asset manager to

aggregate the holdings of all the AMPs under its management when calculating its own holding.

首先，建议短线交易规则中明确对 5%以上股东的认定采用"实际持有"的原则，即不仅包括登记在投资者名下的账户，也包括虽未登记在该投资者名下、但可以为该投资者所实际控制和支配表决权的账户。在这一原则下，一方面需要将投资者实际控制的账户纳入持股合并计算范围[3]，但另一方面也需要将投资决策权和表决权不归同一主体/投资团队所实际享有的账户从合并计算持股的范围中予以剔除。
First of all, it is recommended to expressly stipulate in the short swing profit rules that the principle of "actual holding" shall apply for the identification of shareholders holding more than 5% of shares, namely, to take into account both accounts under the name of the investor and accounts not under the name of the investor but actually controlled by the investor with the voting rights thereto also vesting with such investor. Under such principle, on the one hand, shares held in accounts actually controlled by an investor shall be aggregated for the purpose of shareholding calculation, on the other, accounts with investment decision-making power and voting rights vesting respectively with different entities/investment teams shall be excluded from such calculation.

过往监管实践中，证监会对社保基金是否可以豁免短线交易限制的认定也遵循了"实际持有"的原则。根据中国证监会 2002 年给全国社保基金理事会发送的《关于全国社会保障基金委托投资若干问题的复函》(证监函[2002]201 号)相关意见，全国社保基金合并持有上市公司 5%股份后，若社保基金理事会与各投资管理人以及各投资管理人之间的投资决策是相互独立的，则对该公司股票的买卖可以不受六个月持有期的限制(即原《证券法》第四十七条的规定).
In past regulatory practice, the CSRC applied the principle of "actual control" in determining whether the National Social Security Fund can be exempt from short swing profit restriction. Pursuant to the *Reply to Several Issues Concerning the Entrusted Investment of the National Social Security Fund* (Zheng Jian Han [2002] No. 201) issued by the CSRC to the National Council for Social Security Fund (NCSSF) in 2002, in the event that the National Social Security Fund holds 5% of the shares in a listed company, if the investment decisions made by the NCSSF and each investment manager are independent of each other, then the purchase and sale of the stocks in such listed company are not subject to the six-month holding period restriction (as stipulated under Article 47 of the original Securities Law).

我们建议证监会将对社保基金豁免短线交易限制的认定思路推广至所有类型的资管产品，包括但不限于基金专户、券商资管、期货资管、银行理财、保险资管、信托以及私募基金，即如同一资产管理人管理的多个资管产品的投资决策权和相关股票的表决权是彼此独立的，则无需合并计算持股。

[3] 新《证券法》第四十四条第二款已将上市公司董监高的配偶、父母、子女持有的及利用他人账户持有的股票或者其他具有股权性质的证券纳入持股合并计算范围，体现了"实际持有"和从严监管的原则。

Article 44, Paragraph 2 of the New Securities Law has incorporated the shares held by the spouse, parents, and children of a listed company's directors, supervisors and senior managers as well as securities or other securities in the spirit of equity held via others' accounts into the scope of shares that shall be aggregated for the purpose of shareholding calculation, which reflects the principle of "actual holding" and strict regulation.

We suggest the CSRC to adopt the same approach as determining the short swing profit exemption for the National Social Security Fund to all types of AMP, including but not limited to AMPs offered by fund management companies, securities companies and futures companies, banks, insurance companies and trusts and private funds offered by private fund managers, namely, holdings of stocks in a listed company by multiple AMPs managed by the same asset manager do not need to be aggregated, provided that both the investment decision-making powers and the voting rights related to relevant stocks are exercised independently in relation to each AMP.

3.4 对同一投资者通过不同管理人管理的多个资管产品，如就相关股份而言，各产品的投资决策权和表决权彼此独立行使，则在计算该投资者通过各资管产品的持股比例时，无需合并计算各资管产品的持股比例。
For multiple AMPs invested by the same investor that are managed by different asset managers, if the investment decision-making powers with respect to such AMP accounts and voting rights related to relevant stocks are exercised independently in relation to each AMP, then the holdings of all the AMPs need not be aggregated when calculating the holding of the relevant investor through all of those AMPs.

与上述第 3.3 点的认定思路类似，参考证监会对社保基金豁免短线交易限制的认定思路，对其他类型的机构投资者通过不同管理人管理的资管产品账户，如各投资管理人之间的投资决策权和表决权相互独立地且为各资管产品自身利益而行使，则无需合并计算持股比例。
Similar to the discussion under point 3.3 above, we recommend the CSRC to refer to its approach adopted for determining the short swing profit exemption for the National Social Security Fund when determining the aggregation of holdings for other types of institutional investors who invest in multiple AMPs managed by different managers, namely, holdings of all such AMPs invested by such institutional investors do not need to be aggregated, provided that the investment decision-making powers and the voting rights related to relevant stocks are exercised independently by each investment manager in the interests of each separate AMP.

3.5 对同一投资者拥有的自营账户及其管理的资管产品账户，如该等账户的投资决策权和表决权代表各资管产品彼此独立行使，无需合并计算持股比例。
For an investor’s proprietary account and AMP accounts under its management in the capacity of investment manager, the holdings of shares by such accounts need not be aggregated, provided that the investment decision-making powers over such accounts and the voting rights related to relevant stocks are exercised independently on behalf of each AMP.

与上述第 3.3 点的认定思路类似，我们期待证监会采取对社保基金豁免短线交易限制的认定思路，对于 QFII、全牌照证券公司等机构投资者的自营账户及其管理的资管产品账户，如其自营账户与资管账户之间能做到有效的业务隔离，就各自产品账户的投资决策权和表决权彼此独立行使，则无需合并计算持股比例。
Likewise, we would be grateful if the CSRC could adopt the same approach as it did when granting the exemption to the National Social Security Fund in relation to the calculation of its holdings for the purpose of the short swing profit rule. In particular,

the aggregation of holdings of the proprietary accounts and AMP accounts managed by the same institutional investors (e.g. QFIIs, fully-licensed securities companies) should not be required for the purpose of the short swing profit rule shareholding calculation, provided that (i) the businesses of the proprietary accounts and AMP accounts can be effectively isolated from each other, and (ii) the decision-making powers and voting rights are exercised independently on behalf of each account.

3.6 对于 H 股买卖原则上豁免短线交易的限制。
Exemption for trading of H-shares in principle

目前，新《证券法》第四十四条关于短线交易的规定并未区分股票的种类，即未明确是否适用于 H 股的交易。鉴于《证券法》第二条第一款规定的本法适用范围包括中华人民共和国境内的证券发行和交易，以及实践中对发生于香港市场的内幕交易行为应由香港证监会负责监管执法，建议证监会明确在 A 股市场为防范内幕交易而制定的短线交易规则原则上并不适用于 H 股。同时，对于投资者就其持有的同一家公司发行的 A 股和 H 股先后进行反向交易是否受短线交易限制也有待澄清。
At present, Article 44 of the New Securities Law does not distinguish between different types of securities in regard to short swing profit restriction, namely, it fails to address whether the short swing profit restriction applies to the trading of H-shares. Given that Article 2, Paragraph 1 of the New Securities Law stipulates that issuance and trading of securities within the territory of PRC are subject to the New Law and that in practice the insider trading activities that occurred in Hong Kong are regulated by the Hong Kong Securities and Futures Commission, we recommend the CSRC further specify that the short swing profit rule, which is intended to prevent insider trading in the A-share market, in principle does not apply to the H-shares. At the same time, it remains to be clarified whether investors trading A-shares and H-shares of the same listed company successively in the opposite direction are subject to the short swing profit restriction.

此外，我们也建议证监会对短线交易规则中“其他具有股权性质的证券”的具体范围进行释明。
Additionally, we also recommend the CSRC to clarify the scope of securities that constitute "other securities in the spirit of equity" for the purpose of short swing profit rule.

3.7 对于 ETF 换购业务中短线交易的适用规则
Application of short swing profit rule in regard to the purchase of ETFs with securities

目前，股票 ETF 可接受投资者用股票换购，投资者后续赎回 ETF 份额时取得股票。建议证监会对于上述换购及赎回行为是否视作卖出及买入股票以适用短线交易规则进行释明。如视作卖出及买入股票，则持有公司百分之五以上股份的股东、董事、监事及高级管理人员在换购 ETF 份额后六个月内予以赎回，或是赎回 ETF 份额取得股票后六个月内予以卖出的，都将适用该短线交易规则；另一种解读则是自投资者换购 ETF 份额后直接卖出基金份额，或是赎回 ETF 份额后卖出股票才视作真正的“卖出”行为，自此后六个月内再行买入的，才适用该短线交易规则。

At present, investors are allowed to purchase stock ETFs with securities. Under such arrangement, the investors will obtain securities when they subsequently redeem ETF units. We recommend the CSRC to clarify whether the aforesaid purchase and redemption are considered as selling and buying securities and thus are subject to the short swing profit rule. If so, shareholders, directors, supervisors and senior management personnel holding more than 5% of a listed company's shares are subject to the short swing profit rule when (i) they redeem ETF units within six months after purchasing ETF units with securities, or (ii) selling securities redeemed from ETF units within six months after the aforesaid redemption. An alternative interpretation is that only (i) selling ETF units right after purchasing ETF units with securities, and (ii) selling securities redeemed from ETF units are considered as selling for the purpose of short swing profit rule. Therefore, if an investor purchases securities after the occurrence of either of the foregoing two selling activities, then such investor will be subject to the short swing profit rule.

4. 5%持股变动
Changes in Regard to 5% Shareholding

与上述关于短线交易限制豁免情形的分析思路类似，我们建议证监会在制定投资者持股比例达 5%及之后持股变动达 5%的信息披露义务及交易限制期的豁免规则时，考虑对以下情形予以豁免：
Similar to the above discussion on the exemptions for short swing profit restriction, we suggest the CSRC consider allowing the following exemptions when applying the information disclosure obligations and the trading restriction period imposed on any investor holding 5% of shares in a listed company and with respect to every 5% increase or decrease in such shareholding thereafter:

4.1 对被动型指数基金的买卖交易豁免股票限制交易期规定。
Exempting the trading of index-tracking passive funds from the trading restriction period.

4.2 对因证券市场波动、上市公司合并、资管产品规模变动等资产管理人之外的因素引发资管产品被动超标后，其为满足法规要求及合同约定而减持相关证券的情形豁免股票限制交易期规定。
In the event that factors beyond an asset manager’s control, such as volatility in the securities market, merger of listed companies and change in the size of the AMP, force an AMP to exceed its relevant trading limits, the asset manager should be allowed to reduce its holding of relevant shares to re-comply with any available regulatory requirements or contractual obligations without breaching the trading restriction period.

4.3 在资管产品持股合并计算方面，目前的监管实践是因公募基金不具备要约收购的功能，故对于公募基金公司管理的多只公募基金累计持有某一上市公司的股份累计达到 5%的，基金公司可以选择不予信息披露(即豁免公募基金合并计算持股比例)。除此以外，对于社保基金及其他资管产品，并无明确的豁免合并计算的规定。而根据《上市公司收购管理办法》第八十三条规定，投资者如果要主张相互之间不构成“一致行动人”，需提供相反证据。

For aggregation of shareholdings by AMP, the current regulatory practice is that due to the fact that public funds are unable to initiate general tender offer, a securities fund management company may choose not to make disclosure with respect to the fact that holdings of shares in a listed company by multiple public funds under its management have reached 5%, i.e., exempt public funds from the aggregation of shareholdings. However, there is no such exemption for National Social Security Fund and AMP of other types. According to Article 83 of the *Administrative Measures on Acquisition of Listed Companies*, investors have to provide evidence denying the existence of persons acting in concert to demonstrate that they are not persons acting in concert.

因此，我们提出如下建议：
Accordingly, we have the following suggestions:

(1) 按照证监会目前对公募基金豁免合并计算持股的监管思路，建议对其他境内外资产管理人发行的不具备要约收购功能的公募基金或公募类资管产品也豁免合并计算持股比例。
By reference to the regulatory approach taken by the CSRC also exclude from the holdings calculation, the shares held by other public funds such as offshore domiciled public funds which are unable to initiate a general tender offer and public-fund-type asset management products offered by onshore and offshore asset managers.

(2) 对于社保基金、养老保险基金、企业年金等主要为资产保值增值目的而拥有上市公司股份，且不以收购上市公司为目的的境内外特殊机构投资者，建议豁免合并计算持股。我们注意到，在 2018 年 4 月上海、深圳交易所分别发布的《上市公司收购及股份权益变动信息披露业务指引(征求意见稿)》中已作出对这些特殊机构投资者豁免合并计算持股的规定。
For special institutional investors such as National Social Security Fund, pension funds and corporate annuities that hold shares in a listed company for the purpose of preserving or increasing asset value with no intent to acquire the listed company and no such actual effect, we recommend the CSRC exempt such special institutional investors, whether they be domestic or offshore, from the aggregated calculation of shareholdings. We note that in April 2018, the Shanghai Stock Exchange and the Shenzhen Stock Exchange respectively issued the *Guidelines on Information Disclosure Regarding Acquisition of Listed Companies and Change of Shares and Interests in Listed Companies (Consultation Paper)*, which have already exempted the aforesaid special institutional investors from the aggregation of shareholdings.

(3) 对其他类型的资管产品，以下情形可视为不构成"一致行动人"从而无需合并计算持股：
For other types of AMP, the following circumstances should not be deemed persons acting in concert and their shareholdings should therefore not have to be aggregated

a) 同一资产管理人管理的多个资管产品账户，但表决权彼此独立；
multiple AMP accounts managed by the same asset manager, with the voting rights related to relevant stocks exercised independently on behalf of each AMP account;

b) 同一投资者通过不同管理人管理的多个资管产品账户，但表决权彼此独立；

multiple AMP accounts managed by different asset managers for the same investor, with the voting rights related to relevant stocks exercised independently on behalf of each AMP account;

c) 同一投资者同时拥有自营账户及管理资管产品账户，但表决权彼此独立。
proprietary accounts and self-managed AMP accounts managed by the same investor, with the voting rights related to relevant stocks exercised independently on behalf of each AMP account.

5. 减持规定
Restrictions on Holding Reductions

新法第三十六条新增规定，上市公司持有百分之五以上股份的股东转让其持有的该公司股份时，不得违反法律、行政法规和国务院证券监督管理机构关于持有期限、卖出时间、卖出数量、卖出方式、信息披露等规定，并应当遵守证券交易所的业务规则。
Article 36 of the New Law stipulates that if a shareholder holding more than 5% of shares in a listed company proposes to transfer the shares held, such transfer shall not violate relevant provisions regarding holding period, selling time, selling quantity, selling method, information disclosure, etc. as provided under laws, administrative regulations and rules formulated by the securities regulatory authority of the State Council, and shall comply with the business rules of the relevant stock exchange.

与短线交易限制、持股 5%规定面临的类似情形是，在考虑减持规定中所述的 5%以上股东时，对同一管理人管理的多个资管产品账户是否需要合并计算持股比例。我们建议，对于这种情况需要考察不同资管产品账户之间的投资决策权和表决权是否独立，而不是简单的进行合并计算，也希望监管部门对此问题进行明确。
As discussed above in relation to the short swing profit rule and changes in regard to 5% shareholding, it is unclear whether the shares held in the accounts of multiple AMPs managed by the same investment manager should be aggregated for the purpose of determining whether the restrictions on holding reductions apply, namely, whether or not there is a shareholder holding 5% of shares in a listed company. We believe that in making the aforesaid determination, it is necessary to consider whether the investment decision-making powers over different AMP accounts and the voting rights relating to the relevant shares are exercised independently on behalf of each AMP account, rather than simply adding up the shareholdings of the various AMP accounts. We also look forward to receiving further clarification on this point from the CSRC and other relevant regulatory authorities.

6. 保荐人、承销商责任与先行赔付制度
Responsibility of Sponsors and Underwriters; Advance Compensation Mechanism

6.1 关于对投资者适当性的审查责任
Responsibility for scrutiny of investor suitability

新法第八十八条规定，证券公司向投资者销售证券、提供服务时，应当按照规定充分了解投资者的基本情况、财产状况、金融资产状况、投资知识和经验、专业能力等相关信息；如实说明证券、服务的重要内容，充分揭示投资风险；

销售、提供与投资者上述情况相匹配的证券、服务。投资者在购买证券或者接受服务时，应当根据证券公司明示的要求提供前款所列真实信息。拒绝提供或者未按照要求提供信息的，证券公司应当告知其后果，并按照规定拒绝向其销售证券、提供服务。证券公司违反第一款规定导致投资者损失的，应当承担相应的赔偿责任。
Article 88 of the New Law stipulates that (i) when a securities company sells securities and provides services to an investor, it shall fully know the investor's basic information, property status, financial asset status, investment knowledge and experience, professional expertise and other relevant information in accordance with relevant provisions; it shall explain to the investor the important aspects of the securities and services offered and fully disclose associated investment risks; it shall only sell securities and provide services that match the investor's status; and (ii) when purchasing securities or receiving services, the investor shall provide the foregoing information truthfully according to the explicit requirements put forward by the securities company. If an investor refuses to provide relevant information or fails to provide relevant information as required, the securities company shall notify the investor about the corresponding consequences and refuse to sell securities or provide services to such investor in accordance with relevant provisions. If a securities company violates the aforesaid item (i) and incurs losses to the investor, it shall bear corresponding liabilities for compensation.

新法第八十九条规定，根据财产状况、金融资产状况、投资知识和经验、专业能力等因素，投资者可以分为普通投资者和专业投资者。专业投资者的标准由国务院证券监督管理机构规定。普通投资者与证券公司发生纠纷的，证券公司应当证明其行为符合法律、行政法规以及国务院证券监督管理机构的规定，不存在误导、欺诈等情形。证券公司不能证明的，应当承当相应的赔偿责任。
Pursuant to Article 89 of the New Law, investors can be classified as ordinary investors and professional investors according to their property status, financial asset status, investment knowledge and experience, professional expertise, etc. The criteria for identifying professional investors shall be stipulated by the securities regulatory authority of the State Council. Where there is a dispute between an ordinary investor and a securities company, the securities company shall prove that its relevant activities comply with laws, administrative regulations and requirements prescribed by the securities regulatory authority of the State Council, in absence of any misrepresentation or fraud; if the securities company fails to prove so, it shall bear the corresponding liabilities for compensation.

据本协会所知，要求证券公司对投资者进行资格适当性审查是国际主要资本市场监管机构的普遍性要求，但其他主要国家的该项要求侧重于反洗钱方面的调查与防范。由于证券投资本身就是一项高风险活动，投资者在开立证券账户并进行证券投资、交易活动时，应当知悉其可能因市场风险遭受损失，而证券公司在合理提示风险之后不应承担更多的责任。而目前证券法的第八十八条和八十九条的规定，实际上是把投资者特别是所谓的普通投资者视为一般产品和服务的消费者，按照《消费者权益保护法》中对消费者倾斜保护的原则进行保护，实际上助长了公众有关证券投资损失由证券公司兜底的不合理期待，不利于培育成熟的投资者和成熟的证券投资行为。
To our knowledge, requiring securities companies to conduct investor suitability scrutiny is a common practice among regulators of major international capital

markets, while implementing such requirement in other countries and regions mainly focus on anti-money laundering investigations and prevention. As securities investment is a high-risk activity, when investors open securities accounts, invest in securities and conduct trading activities, they shall have been made aware of the possibility of suffering losses due to market risks, and securities companies shall not bear additional liabilities after disclosing such risks to the investors in a reasonable manner. However, the current Articles 88 and 89 of the Securities Law in fact treat investors, especially so-called ordinary investors, as consumers of ordinary products and services and offer better protection for investors in accordance with the leaning protection principle under the *Consumer Protection Law*, which raises the unreasonable public expectation that losses incurred by securities investments will be borne by securities companies, thereby impeding the cultivation of mature investors and mature securities investment behaviors.

有鉴于此，我们建议中国证监会在制定相关配套规章时对此予以修正，明确以下几段，以避免不适当地扩大证券公司的审查义务或加重证券公司的赔偿责任以及不适当地影响投资者对证券投资风险与收益的预期：

(1) 因投资者向证券公司提供虚假信息或者以其他方式误导证券公司，导致证券公司在资格审查或者对投资者的分类(普通投资者 vs 专业投资者)发生错误判断的，证券公司对该等投资者的损失不承担责任；
(2) 投资者对证券账户开立后自行在证券账户中进行的证券交易行为的后果应自行承担责任，如因发行人欺诈上市、证券发行文件存在虚假记载等原因进行索赔的，应直接向负有赔偿义务的发行人或其他相关责任人索赔，而不能向提供证券账户开立和交易经纪服务的证券公司索赔；
(3) 在划分普通投资者及专业投资者时，应当严格限制可归入普通投资者类别的投资者范围。

In view of the above, we recommend the CSRC to rectify this problem when formulating relevant regulations and rules, and to clarify on the following aspects in order to avoid improperly expanding the scrutiny obligations of securities companies or increasing their compensation liabilities, thereby improperly guiding the investors' expectation on the risks and returns of securities investments, namely:

(1) in the event that a securities company made wrong judgment when conducting investor suitability scrutiny or classifying investors (ordinary investor vs professional investor) due to the false information provided by the investors or other misleading conduct on the part of the investors, the securities company shall not be liable for any loss incurred to such investors therefrom;
(2) investors shall be liable for the consequences arising from the securities trading conduct carried out by themselves under their own securities accounts after opening such accounts; for losses incurred by the issuer's fraudulent listing or false records in the issuance documents, investors shall directly claim compensation from the issuer or other relevant persons that are responsible for such losses, rather than against securities companies solely providing securities account opening and trading brokerage services; and
(3) when distinguishing between ordinary investors and professional investors, the scope of ordinary investors shall be strictly defined.

6.2 保荐人、承销商对于发行人信息披露的责任

Sponsor’s and underwriter’s liabilities for information disclosure made by the issuer

新法第十九条规定，发行人报送的证券发行申请文件，应当充分披露投资者作出价值判断和投资决策所必需的信息，内容应当真实、准确、完整。为证券发行出具有关文件的证券服务机构和人员，必须履行法定职责，保证所出具文件的真实性、准确性和完整性。
Article 19 of the New Law provides that application documents for securities offering submitted by an issuer shall fully disclose the information necessary for an investor's value judgment and investment decision-making, and the information disclosed shall be true, accurate and complete. Securities service institutions and personnel issuing the relevant documents for securities offering shall perform their statutory duties, and ensure that the documents issued are true, accurate and complete.

新法第二十九条第 1 款规定，证券公司承销证券，应当对公开发行募集文件的真实性、准确性、完整性进行核查，发现有虚假记载、误导性陈述或者重大遗漏的，不得进行销售活动；已经销售的，必须立即停止销售活动，并采取纠正措施。
Article 29, Paragraph 1 states that a securities company underwriting a security shall verify the authenticity, accuracy and completeness of the documents for public issuance and offering. Upon discovering any false records, misrepresentation or major omission in such documents, the securities company shall not carry out selling activities; where the selling activities have already commenced, the securities company shall immediately suspend such selling activities and take corrective measures.

新法第八十五条规定，信息披露义务人为按照规定披露信息，或者公告的证券发行文件、定期报告、临时报告及其他信息披露资料存在虚假记载、误导性陈述或者重大遗漏，致使投资者在证券交易中遭受损失的，信息披露义务人应当承担赔偿责任；发行人的控股股东、实际控制人、董事、监事、高级管理人员和其他直接责任人员以及保荐人、承销的证券公司及其直接责任人员，应当与发行人承担连带赔偿责任，但是能够证明自己没有过错的除外。
Article 85 of the New Law further provides that where a person with disclosure obligation fails to disclose information pursuant to relevant provisions, or the disclosed securities offering documents, regular reports, interim reports and other materials contain false records, misrepresentation or major omission, causing investors to suffer losses in the course of trading securities, the obligor shall bear relevant compensation liabilities; the controlling shareholder(s), de facto controller, directors, supervisors, senior management personnel and other personnel directly accountable of the issuer, as well as the sponsor, the underwriter and their respective personnel directly accountable shall bear compensation liabilities jointly and severally with the issuer, unless they can prove that they are not at fault.

本协会充分理解新《证券法》对于证券公司在扮演保荐人及承销商角色时应当勤勉尽责的期待。但中国证券市场中一直存在的如下问题期待中国证监会能够在新《证券法》的相关实施规章中厘清：
We fully understand that the New Securities Law expects securities companies to be diligent and responsible in their capacity of sponsors and underwriters. However, we hope that the CSRC could clarify with respect to the following longstanding problems

in China's securities market when making the relevant implementation regulations of the New Securities Law:

(1) 保荐人如何证明"自己没有过错"？从国内已经披露的欺诈上市案例看，欺诈行为都是由发行人的实际控制人或者发行人高管主动实施，而保荐人及其他证券服务机构因为未能勤勉尽职等原因未能发现发行人的造假行为。本协会认为，如果保荐人主动教唆、授意甚至知道发行人进行造假，保荐人与发行人承担连带责任甚至承担更重的责任无可厚非；但如果发行人造假、保荐人未勤勉尽责导致发生欺诈上市，由于二者主观恶意不同，让保荐人与发行人承担连带责任并未体现"罚当其罪"的法治精神(并且，由于在此种情况下欺诈上市的实施人可能已丧失偿付能力，实际上是由存在疏忽行为的保荐人承担了欺诈上市实施人的全部经济后果)。另外，由于缺乏勤勉尽责的合理标准，以及一旦出现发行人信息披露违规证券监管机构都一概以"未勤勉尽责"为由追究保荐人的责任，中国的保荐业务一直未能发展出行业公认的标准和惯例，无法形成"良币驱逐劣币"的良性市场格局，也无法真正形成保荐机构之间的行业自律。有鉴于此，我们建议中国证监会在实施新《证券法》的相关规章中借鉴成熟资本市场中保荐人如能证明其已经达到了合理的勤勉尽责标准即应认定为没有过错的做法，使证券发行上市的各方参与主体真正实现归位尽责。
How could the sponsor prove that it was not at fault? Judging from the cases of fraudulent listings that have been disclosed in China, fraudulent conduct was all initiated by the issuer's de facto controller or senior management personnel, while sponsors and other securities service providers failed to discover the issuer's fraud due to reasons such as lack of due diligence. We believe if the sponsor actively directed or instigated the issuer to commit fraud or had knowledge of the issuer's fraudulent conduct, the sponsor shall bear joint liabilities with the issuer or even assume greater liabilities. However, in the event that the issuer's fraudulent conduct and the sponsor's failure to perform due diligence led to fraudulent listing, as the respective subjective culpability of the issuer and the sponsor are different, holding the sponsor and the issuer jointly liable goes against the legal principle of "proportionality" (and, in such case, the wrongdoer of fraudulent listing may have already become insolvent, thereby in fact rendering the negligent sponsor liable for all the economic losses caused by the wrongdoer of fraudulent listing). In addition, due to the lack of reasonable standards for due diligence, and the fact that securities regulatory authorities always pursue the sponsor's liabilities on the ground of lack of due diligence with respect to information disclosure violations committed by the issuer, China's securities sponsoring business has not yet established any industry-recognized standards and practices, which lowers the market competitiveness and impedes the formation of self-regulation among sponsors. In light of the foregoing, we recommend that the CSRC, in the course of implementing the New Securities Law, adopt the approach taken by mature markets, namely, if the sponsor has conducted a reasonable standard of due diligence, it shall not be deemed at fault, so that all participants in securities issuance and listing can assume appropriate responsibilities and duly perform their relevant duties.

(2) 非保荐人的承销商勤勉尽责标准是否与保荐人等同？新法第二十九条第 1

款要求该等承销商也要对公开发行募集文件的真实性、准确性和完整性进行核查并对其承担责任。但在成熟资本市场中，监管法规及实践对于保荐人的勤勉尽责标准与非保荐人的承销商并不是等同的。希望中国证监会在新证券的实施过程中也能够明确采纳此种成熟经验，以利于更多的证券公司积极参与上市承销工作。

Are the standards for non-sponsor underwriters' due diligence identical with those for sponsors? Article 29, Paragraph 1 of the New Law requires the underwriters to verify the authenticity, accuracy and completeness of the documents for public issuance and offering and take corresponding responsibilities. In mature capital markets, however, the due diligence criteria imposed by applicable regulations and market practice on sponsors are not identical to non-sponsor underwriters. We hope that the CSRC would adopt the same approach in implementing the New Securities Law, so as to incentivize more securities companies to participate in the business of securities listing and underwriting.

6.3 先行赔付制度

Advance compensation mechanism

新法第九十三条规定，发行人因欺诈发行、虚假陈述或者其他重大违法行为给投资者造成损失的，发行人的控股股东、实际控制人、相关的证券公司可以委托投资者保护机构，就赔偿事宜与受到损失的投资者达成协议，予以先行赔付。先行赔付后，可以依法向发行人或者其他连带责任人追偿。

Article 93 of the New Law stipulates that if an issuer causes losses to the investors due to fraudulent issuance, misrepresentations or other major illegal acts, the issuer's controlling shareholder, de facto controller, or related securities company may entrust an investor protection institution to reach an agreement with the investors suffering losses with respect to the compensation liabilities and advance the compensations stipulated under the agreement to the investors. After the advance payments are made, the entities making the payments may recover such compensations from the issuer or other persons jointly-liable in accordance with law.

新法第一百七十一条第 1 款规定，国务院证券监督管理机构对涉嫌证券违法的单位或者个人调查期间，被调查的当事人书面申请，承诺在国务院证券监督管理机构认可的期限内纠正涉嫌违法行为，赔偿有关投资者损失，消除损害或者不良影响的，国务院证券监督管理机构可以决定中止调查，被调查的当事人履行承诺的，国务院证券监督管理机构可以决定终止调查；被调查的当事人未履行承诺或者有国务院规定的其他情形的，应当恢复调查。具体办法由国务院规定。

Pursuant to Article 171, Paragraph 1 of the New Law, when the securities regulatory authority of the State Council investigates into an institution or individual suspected of committing a securities related violation, if the party under investigation applies in writing and undertakes to rectify the alleged violation within a period agreed by the securities regulatory authority of the State Council, to compensate the losses incurred to the relevant investors, and to recover the damages or eliminate adverse consequences therefrom, the securities regulatory authority of the State Council may decide to suspend the investigation. If the party under investigation complies with the aforesaid undertakings, the securities regulatory authority of the State Council

may decide to terminate the investigation; if the party under investigation fails to comply with the aforesaid undertakings or other circumstances stipulated by the State Council occur, the investigation shall be resumed. The relevant detailed rules shall be stipulated by the State Council.

本协会很遗憾地看到，尽管本协会在日期为 2019 年 5 月 24 日就证券法 2019 修订草案第三稿致全国人民代表大会法制工作委员会的意见和建议中提出了明确的反对意见，先行赔付制度仍被写进了新《证券法》。对此，本协会有如下意见恳请中国证监会考虑：
It is regretful for us to see that despite our objections in the comments and suggestions dated May 24, 2019 to the Constitution and Law Committee of the National People's Congress regarding the Third Consultation Draft of the Securities Law in 2019, the advance compensation mechanism has still been written into the New Securities Law. Accordingly, we hope the CSRC could consider the following opinions:

(1) 如前文第 6.2(1)项所述，在已公开披露的欺诈上市案例(以及其他绝大多数发行上市申请文件信息披露违规案例)中，发行人及其实际控制人的相关行为实施人主观恶性最大，因此也应当受到最严厉的处罚及承担首要的赔偿责任。保荐人应承担与其未勤勉尽责有因果关系的赔偿责任。而先行赔付制度实际上使应当承担次要责任的保荐人承担了第一顺位的赔偿责任(并且，由于彼时欺诈上市行为的实施人已经被判刑或者丧失清偿能力等原因，保荐人赔偿后无法向其他责任人追偿)。这违反了“罚当其罪”这一法治基本原则，客观上助长了投资者出了问题就找保荐机构索赔这一类似“刚性兑付”的心态，不利于培育成熟的投资者和成熟的证券市场；
As discussed in point 6.2(1) above, in the cases of fraudulent listings (and most cases of information disclosure violations related to application documents for securities issuance and listing) that have been disclosed so far, the issuer and its de facto controller are the most culpable for the relevant violations and therefore shall be subject to the most severe penalties and bear the primary liabilities for compensation. The sponsor shall only be liable for losses incurred by its failure to perform due diligence. The advance compensation mechanism in fact puts the sponsor, who should have born the secondary liabilities, in a position to assume primary liabilities for compensation (and since the wrongdoer of fraudulent listing may have already been sentenced or become insolvent, the sponsor making the relevant compensations is unable to get reimbursed from other responsible persons). Such arrangement violates the basic principle of "proportionality” and in effect induces investors to expect a “rigid payment” from sponsors, that is, to seek compensation from sponsors whenever they get into trouble, thereby impeding the cultivation of mature investors and mature securities market;

(2) 根据新法第一百七十一条，赔偿投资者的损失是有关单位或个人与中国证监会达成行政和解的先决条件。由于实践中保荐人对于尽快终结证监会的调查及降低处罚有更高的迫切性，对于主要责任在行为实施人的欺诈上市行为多数情况下都是由保荐人买单。此种操作实际上剥夺了保荐人在民事诉讼程序中的抗辩权，对保荐人极不公平，也与成熟资本市场上保荐人的责任承担方式存在重大差异，不利于中国资本市场的对外开

放与国际资本市场的接轨；
According to Article 171 of the New Law, compensating investors' losses is a prerequisite for the relevant institution/individual to reach an administrative settlement with the CSRC. In practice, sponsors are more eager to promptly end the investigation by the CSRC and mitigate the relevant penalties imposed, which causes sponsors to be accountable for most cases of fraudulent listings rather than the perpetrators who should have assumed most of the liabilities. Such arrangement in fact deprives sponsors of their rights of defense in civil proceedings, and is extremely unfair to sponsors. It is also a significant deviation from the practice in mature markets and potentially impedes the opening up of the Chinese capital market and its integration into international capital markets;

(3) 如前文第 6.2(2)项所述，非保荐人的其他承销商的勤勉尽责标准不同于保荐人。如果令其承担与保荐人相同的责任(包括先行赔付责任)，将大大增加该等承销商对尽职调查工作的标准(即导致其需要全面重复保荐人已完成的工作)，最终增加发行人的上市时间和费用成本；
As discussed in point 6.2(2) above, the criteria of due diligence on sponsors are different with those on non-sponsor underwriters. If non-sponsor underwriters are made to assume the same liabilities (including the liability for advance compensation) as the sponsors, the due diligence standards for non-sponsor underwriters will be significantly raised (i.e. the non-sponsor underwriters have to duplicate all due diligence investigation that have been done by sponsors), and eventually the time and costs of listing will be significantly increased for the issuers;

(4) 上海证券交易所 2019 年设立的科创板已实行了保荐机构子公司强制跟投制度。从本协会的角度看，强制跟投制度实际上要求保荐机构通过以自有资金认购股票这一方式对其所保荐的上市公司质量提供更强的担保。在此情况下，如果还一概而论地对科创板企业推行先行赔付制度，将大幅增加保荐人的负担(从而也最终增加发行人的上市成本)。由于中国证监会已经明确了企业发行上市以注册制为改革方向，如果其他板块在改为注册制后也采用类似科创板的强制跟投制度，再推行先行赔付制度就有画蛇添足之嫌；
The Shanghai Stock Exchange has introduced a mandatory co-investment system for the sponsors (via their subsidiaries) in the Science and Technology Innovation Board set up in 2019 (hereinafter referred to as the “STAR Market”). We understand that under the mandatory co-investment system sponsors are required to make mandatory co-investment by using their own capitals to better guarantee the listed companies sponsored. Accordingly, imposing advance compensation with regard to companies listed on the STAR Market will impose more burden on sponsors and ultimately increase the listing costs incurred to the issuers. As the CSRC has made clear that the registration based offering regime will gradually be implemented for corporate issuance and listing, if other sectors of the securities market also adopt the mandatory co-investment system similar to that in the STAR Market after the implementation of the registration based offering regime, then the advance compensation mechanism would be excessive.

(5) 值得注意的是，在新《证券法》颁布之前，仅有 2015 年中国证监会 2015 年修订的《公开发行证券的公司信息披露内容与格式准则第 1 号——招股说明书》要求第十八条招股说明书扉页应载有如下声明及承诺：...... “保荐人承诺因其为发行人首次公开发行股票制作、出具的文件有虚假记载、误导性陈述或者重大遗漏，给投资者造成损失的，将先行赔偿投资者损失。”，同期公布的创业板招股说明书以及有关上市公司再融资、重大资产重组及上市公司股权变动相关信息披露的内容与格式准则均未包括保荐人的先行赔付承诺。

Notably, prior to the release of the New Securities Law, Article 18 of the *Standards No. 1 for the Content and Format of Information Disclosure by Companies Offering Securities to the Public – Prospectus*, as amended by the CSRC in 2015, provides that a prospectus shall contain the following representation and warranty: ..."the sponsor undertakes to make advance compensation to the investors for any losses incurred by the false representation, misleading statements, or major omission contained in the documents prepared and issued by the sponsor for the issuer's initial public offering". However, the content and format requirements for the prospectus of a company listed on the ChiNext and for the information disclosure related to refinancing, major asset restructuring and shareholding changes of a listed company, which were released at the same time, do not provide for any representation regarding advance compensation.

基于以上各点，本协会强烈建议中国证监会通过行政规章对严格限定先行赔付的适用范围，尽量避免该制度可能产生的不利影响。具体而言：

In light of the above, we strongly recommend that the CSRC should strictly define its scope of application for advance compensation in the relevant administrative regulations, thereby minimizing any adverse impact arising from the implementation of advance compensation:

(1) 我们建议中国证监会按照新《证券法》的规定修改其相关信息披露准则，明确是否进行先行赔付是相关当事人可以自主选择的行为，而不能在招股书中要求保荐机构对此做出有法律约束力的承诺；

Revise relevant information disclosure rules in accordance with the provisions of the New Securities Law, and specify that whether to make advance compensation shall be optional, and the relevant party shall not be required to make a legally binding undertaking regarding advance compensation in the prospectus;

(2) 我们建议中国证监会明确先行赔付仅适用于欺诈上市且保荐人未能勤勉尽责的情况，而不能适用于其他情形(例如上市公司发行新股、要约收购、重大资产重组、债券及其他债务融资工具发行等)，以避免无限扩大保荐人的责任；

Specify that advance compensation shall apply only to the case of fraudulent listing where the sponsor fails to perform due diligence but shall not apply to other circumstances (such as follow-on offering, general tender offer, material

acquisition or disposal, offering of bonds or other debt-financing products, etc.) to avoid improperly expanding the sponsor's liabilities;

(3) 我们建议中国证监会明确承担先行赔付义务的"相关证券公司"只限于保荐人，不包括非保荐人的证券承销商；
Specify that "relevant securities companies" liable for advance compensation shall be limited to sponsors, excluding non-sponsor underwriters;

(4) 我们建议中国证监会明确，在科创板已经引入了保荐机构子公司强制跟投制度的情况下，先行赔付制度不适用于科创板以及未来采用类似跟投制度的其他板块(比如未来的新创业板)；
Clarify that since the STAR Market has introduced the mandatory co-investment system for sponsors (via their subsidiaries), advance compensation mechanism is not applicable to the STAR Market and any other sector of the securities market that adopts similar co-investment system in the future (such as the proposed new ChiNext);

(5) 我们建议中国证监会明确保荐人对于投资人提出的索赔请求有权在法院或仲裁机构抗辩。合法行使抗辩权利不应被视为消极对待投资者的赔偿请求，不应因此增加保荐人与证监会达成行政和解的难度及行政和解金的金额；
Stipulate that a sponsor has the right to defend any claim made by the investor either in a court or arbitral tribunal, and that the sponsor's exercise of the right of defense in a lawful manner shall not be deemed as taking a negative attitude towards the investor's claim for compensation, and thus shall not increase the difficulty for the sponsor to reach an administrative settlement with the CSRC or the amount of administrative settlement;

(6) 我们建议中国证监会借鉴已有案例的成功经验，明确接受保荐人先行赔付的投资者视为放弃对保荐人的索赔权，并将其对保荐人之外的其他违法行为责任人的索赔权转让给保荐人行使；
Explicitly stipulate that an investor's acceptance of the sponsor's advance compensation shall be deemed as a waiver of its right to claim compensation against the sponsor, and consequently the investor's right to claim compensation from relevant responsible persons shall be transferred to the sponsor to exercise, which practice was also confirmed in some previous cases successfully closed, and

(7) 我们建议中国证监会在严格限定先行赔付适用范围的同时，积极考虑借鉴成熟资本市场中已经反复证明行之有效的相关当事方投保责任保险、以投资者保护基金进行赔付的做法。
In addition to a strictly limited scope of application for advance compensation, consider adopting the practices proven effective in mature markets, such as requiring relevant parties to buy insurance or using investor protection funds to compensate investors.

7. 操纵市场
Market Manipulation

新法第五十五条对禁止的操纵行为类型进行了扩展，新增虚假申报、抢帽子交易、跨市场操纵三种禁止的操纵行为。其中对于虚假申报行为，新法第五十五条第4项规定较为原则，对于报撤单量是否需要达到某一指标才可能引发行政处罚责任没有作出明确规定。我们建议证券交易所在制定对市场发布的异常交易规则时，明确界定报撤单量的上限指标。
Article 55 of the New Law expands the scope of prohibited market manipulations by adding three new types of manipulations, namely, spoofing, scalping, and cross-market manipulation. For spoofing, item 4 of Article 55 of the New Law only provides for a general definition of spoofing without elaborating on whether the amount of orders placed and cancelled has to reach a certain threshold to trigger an administrative penalty. We recommend that at the exchange level, a certain and well defined threshold shall be set on the maximum amount of orders placed and cancelled in the abnormal trading rules publicized to the market.

最高院、最高检在《关于办理操纵证券、期货市场刑事案件适用法律若干问题的解释》中，对于虚假申报行为刑事起诉的标准规定了明确指标，证监会在《关于<期货交易管理条例>第七十条第5项"其他操纵期货交易价行为"的规定》及起草说明中，对于期货市场操纵中虚假申报的构成要件和认定参考要素作出了详细说明。证券交易所在异常交易行为相关规则中，也对交易所关注的虚假申报异常交易行为作出了详细规定。
In the *Interpretations on Several Issues Concerning the Application of Laws in the Handling of Criminal Cases of Manipulation of the Securities or Futures Market*, the Supreme People's Court and the Supreme People's Procuratorate have proposed a specific standard for criminal prosecution of spoofing. In the *Rules concerning the Application of Item 5 of Article 70 of the Administrative Regulations on Futures Trading – Other Conduct Manipulating Futures Trading Price* and its explanatory notes, the CSRC has made detailed explanation on the constituent elements of spoofing and the reference factors for identifying spoofing in the cases involving manipulation of futures market. Stock exchanges have also formulated detailed rules on spoofing in the relevant abnormal trading rules.

证监会曾在2007年发布了《证券市场操纵行为认定指引(试行)》，其中将频繁报撤单行为定义为"在同一交易日内、在同一证券的有效竞价范围内，按照同一买卖方向、连续、交替进行3次以上的申报和撤销申报"，对于虚假申报行政责任认定参考因素也规定的较为原则。相比刑法司法解释和证券交易所异常交易规则关于虚假申报的规定，《证券市场操纵行为认定指引(试行)》已经显得较为滞后。建议证监会对于《证券市场操纵行为认定指引(试行)》进行修改与更新，特别是关于虚假申报操纵行为的认定进行进一步完善，以明确新法下虚假申报操纵市场行政责任的认定。明确界定的法律法规和各项条款将会促使市场参与者更好地避免不当行为，并更加有效的进行内部监控以达到并严格遵守市场监管者的期许和要求。
In the *Guidelines for Identification of Securities Market Manipulation (for Trial Implementation)* (hereinafter referred to as the "Guidelines") issued by the CSRC in 2007, frequent order placement and cancellation is defined as consecutively or alternately placing or cancelling orders for more than 3 times in the same direction of buying or selling, on the same trading day, within the effective range of the reference price of the

same security, and the standards for determining administrative liabilities incurred by spoofing thereto are lack of particulars. Compared with the judicial interpretations of the *Criminal Law* and the abnormal trading rules issued by the stock exchanges with respect to spoofing, the Guidelines appear to be out of date. We therefore recommend the CSRC to amend and update the Guidelines and in particular further improve the standards for identifying spoofing so as to clarify how administrative liabilities are triggered by market manipulative conduct of spoofing under the New Law. By having clarity and certainty of the definitions and rules, participants will be able to better avoid misconduct and monitor, control and comply with regulatory expectations.

8. 做市业务
Market Making Business

新法第一百二十条增加了证券做市交易作为证券公司可经营的一项业务，独立于自营、经纪、投资咨询等其他业务。新法第一百二十八条在业务隔离方面也增加了做市业务，要求证券公司必须将其证券做市业务与其他业务分开办理，不得混合操作。
Article 120 prescribes that securities market making business is considered as one type of business which securities companies can conduct, separate from securities proprietary trading business, securities brokerage business, securities investment advisory business, etc. With respect to business segregation, Article 128 requires a securities company to effectively segregate its securities brokerage business, securities underwriting business, securities proprietary trading business, securities market making business, and securities asset management business from each other and not to co-mingle such businesses.

目前证券市场的做市有多种种类，例如银行间债券市场的做市更加类似于自营业务。我们建议证监会明确哪些种类的做市属于自营业务，哪些种类的做市属于新《证券法》所述的做市业务需要获发做市业务牌照。
Currently, there are various types of market making businesses in relation to the securities market, for example, the market making business in the interbank bond market seems equivalent to proprietary trading business. We suggest the CSRC to clarify the specific types of market making businesses that shall be classified as proprietary trading business, and the specific types of market making businesses that are deemed as a market making business stipulated under the New Securities and thus shall be licensed separately.

9. 向境外提供与证券业务活动有关的文件和资料
Providing Documents or Materials Relating to Securities Business Activities to Overseas Regulatory Authorities

新法第一百七十七条规定国务院证券监督管理机构可以和其他国家或者地区的证券监督管理机构建立监督管理合作机制，实施跨境监督管理。境外证券监督管理机构不得在中华人民共和国境内直接进行调查取证等活动。未经国务院证券监督管理机构和国务院有关主管部门同意，任何单位和个人不得擅自向境外提供与证券业务活动有关的文件和资料。
Article 177 of the New Law prescribes that the securities regulatory authority of the State Council may, in conjunction with the securities regulatory authorities of other countries or regions, establish a supervision and administration cooperation mechanism to conduct cross-border supervision and administration. Overseas securities regulatory authorities shall not conduct investigation, evidence collection and other activities directly within the territory of the PRC. Without the consent of the securities regulatory authority of the

State Council and the competent departments of the State Council, no entity or individual may provide documents or materials relating to securities business activities to overseas regulatory authorities without approval.

我们理解，本条主要内容是国际监管合作机制以及限制境外证券监管机构在中国境内的调查取证；因此，建议明确限制向境外提供证券业务活动有关的文件和资料的对象是否仅限于“境外证券监督管理机构”。
We understand this Article is mainly to govern the cross-border regulatory cooperation mechanism and restrict an overseas securities regulatory authority from conducting investigation and evidence collection in China. Therefore, we recommend to clarify whether the restriction to provide documents or materials relating to securities business activities to overseas is only applicable to the circumstances where such documents and materials are provided to securities regulatory authorities of other countries or regions.

我们期待随时与相关部门分享我们对上述问题的意见和建议，积极配合相关部门修改和清理相关法规、规章和规范性文件。
It would be most appreciated if the regulators could consider the suggestions and concerns mentioned above and we are most honoured to be given the opportunity to contribute throughout the process of amending relevant regulations and rules.

本协会非常乐意适时更详细地讨论这些问题。如果您有任何疑问，请随时联系我 （电邮：lchao@asifma.org 或电话+852 2531 6550）。

We look forward to future engagement on these important issues in greater detail. Should you have any questions, please do not hesitate to contact me via email (lchao@asifma.org) or via telephone (+852 2531 6550).

Sincerely,

Lyndon Chao
Managing Director, Head of Equities, Post Trade and China Capital Markets Committee
Asia Securities Industry and Financial Markets Association