24 May 2019
2019 年 5 月 24 日

National People's Congress of the People's Republic of China Legislative Affairs Commission
中华人民共和国全国人民代表大会法制工作委员会
No.1 Qianmen West Street, Xicheng District
西城区前门西大街 1 号
Beijing, China
中国北京
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Dear Sir/Madam，尊敬的先生 / 女士：

RE: 2019 Third Consultation Draft of the Securities Law 关于证券法 2019 年修订草案三次审议稿

On behalf of its members, Asia Securities Industry & Financial Markets Association ("**ASIFMA**")[1]is submitting hereby our comments and suggestions on the Third Consultation Draft of the *Securities Law of the People's Republic of China (《中华人民共和国证券法》)* (the "**Securities Law**") issued by the National People's Congress (the "**NPC**") .

亚洲证券业与金融市场协会（ "**ASIFMA**"）谨代表其会员，在此向贵会提交我们对全国人民代表大会（"**全国人大**"） 发布的《中华人民共和国证券法（修订草案三次审议稿）》（"《**证券法》**"或"**三次审议稿**"）的意见与建议。

ASIFMA members welcome and appreciate the efforts made by the NPC and other government agencies of the PRC[2] to, amongst others, include registration system on the Science-Technology Innovation Board, provide exemptions to public offer of securities, and introduce new measures to protect the interests of investors in the securities market. We believe that the Securities Law will provide more guidance for the healthy development of the securities market of the PRC.

[1] ASIFMA is an independent, regional trade association with over 100 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law 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.

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、律师事务所及市场基础设施服务供应商等 100 多家领先机构组成。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，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。

[2] For the purpose of this Letter, PRC means the People's Republic of China, excluding Macau, Hong Kong and Taiwan. 为本函之目的，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。

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ASIFMA 的会员对全国人大与中国政府机构在本次修订中增加了科创板注册制度，公开发行证券的豁免情形，和证券投资者利益保护措施等多项努力表示欢迎与赞赏。我们坚信，新《证券法》将更好得为中国的证券市场的健康发展提供指引。

In this letter, we seek clarifications on the application of, and suggest amendments to, certain provisions of the Securities Law with the aim to strike a better balance between the regulation and promotion of the securities related activities and investment, taking into account the status and feature of the PRC's securities market as well as the international practice that would facilitate foreign investment in the PRC securities market. We set out our comments and suggestions in the order of the numbering of the provisions in the Third Consultation Draft. Unless otherwise provided, chapters, sections and articles mentioned in this letter refer to chapters, sections and articles in the Third Consultation Draft.
在本函中，我们基于使《证券法》在完善监管和促进证券相关活动/投资之间取得更好的平衡的出发点，考虑到中国证券市场的发展阶段和特点，以及可促进中国证券市场的外商投资的国际惯例，恳请明确《证券法》中一些条款的适用情况，并对一些条款提出我们的修订建议。我们按照三次审议稿的编号顺序提出我们的意见和建议。除非另有说明，本函中提及的章、节和条款是指三次审议稿中的章、节和条款。

1. Scope of securities subject to regulation of the Securities Law 受《证券法》规制的证券范围

Article 2 specifically extends the application of the Securities Law to depository receipts issued in the PRC (i.e. CDRs). In the meantime, we note that CDRs have been and will be further covered by specific regulations, e.g. the London Shanghai Stock Connect.
第 2 条将《证券法》的适用范围明确扩大到了在中国发行的存托凭证（即中国存托凭证）。同时，我们注意到，中国存托凭证已经并将进一步被纳入具体法规中（如沪伦通）。

From conversation with several potential issuers (western companies), we believe that a key success factor for CDRs will be to have relaxed requirements for listing – specifically around the language, frequency, depth, timeliness, and director responsibility etc. relating to disclosure. The CDR rules are still being drafted, but we reckon that CDRs should have lighter requirements than those applying to other domestic securities so as to attract more issuers that have been listed in mature offshore exchanges that, on the one hand, may have provided for lighter listing requirements, and on the other hand, have also imposed very strict requirements on on-going compliance by the issuers, and the Securities Law should allow for specific regulations to provide for them (as it's currently envisaged). We would assume this should also be the regulators' perspective, but think worth highlighting, and would appreciate the Securities Law specifically provide that trading and disclosure of CDRs shall be subject to a separate set of rules to be issued by the China Securities Regulatory Commission (the "**CSRC**") or the State Council to the extent applicable.
基于我们与几家潜在发行人（西方国家公司）的沟通，我们相信，中国存托凭证的一个关键成功因素将会是放宽上市要求——特别是放宽与信息披露相关的语言、频率、深度、及时性和董事责任等要求。中国存托凭证的规则仍在起草中，但我们认为，为了吸引更多已在成熟的境外交易所（一方面，上市要求较为宽松；另一方面，对发行人的持续合规要求更为严格）上市的发行人，对于中国存托凭证的要求应该宽于对申请其他国内证券发行的要求。并且正如目前的设想，《证券法》应允许其他法规和规范性文件对其作出具体规定。我们理解这也是监管机构的观点，同时也希望在此强调，并建议《证券法》明确规定中国存托凭证的交易和披露事宜将由中国证券监督管理委员会（"**证监会**"）或国务院另行颁布相关规定。

Apart from CDRs, as the highest level of law regarding securities activities in the PRC, we recommend that generic reference to issuance of securities (either stocks or bonds) by international issuers in the PRC or on a cross-border basis to be included in the Securities Law with further details to be formulated by the NPC or the State Council. The PRC currently has international banks issuing panda bonds in the PRC. It may also allow for stocks being issued in the future, and cross-border issuance of securities by international issuers to qualified PRC investors is not uncommon either. By including reference to these scenarios, the Securities Law

will provide a fuller framework for securities activities relating to or in the PRC and provide room for specific governing rules to be formulated.
除中国存托凭证之外，作为调整中国境内证券活动的最高层级法律，我们建议将国际发行人在中国境内或跨境发行证券（股票或债券）一般性地纳入《证券法》，并由全国人大或国务院进一步制定细则。目前，中国已经允许国际银行在中国发行熊猫债券，中国未来也可能放开国际机构在境内发行股票，并且国际机构向合格中国投资者跨境发行证券的情况也并不少见。通过在条文中提及这些交易情形，《证券法》将能够为中国境内或与中国相关的证券活动提供更全面的框架，并为未来制定具体适用规则提供空间。

2. Responsibility of sponsors 保荐人责任

Article 27 specifically provides that sponsors will not be jointly and severally liable together with the issuer of securities provided that the sponsor can demonstrate that it is not at fault. However, we notice that the current administrative rules impose greater liability on sponsors. For example, in the case of alleged false statement by the issuer, the sponsor is liable and has to compensate investors before the CSRC or the court has a final decision/judgment on the responsibilities involved in the matter. We want to emphasize that, whilst we appreciate the intention behind the pre-judgment compensation requirement under the existing rules, no administrative rules may supersede the provisions in the Securities Law on sponsors or impose greater liability on sponsors. We look forward to the current rule and practice being changed so that sponsors will not be exposed to the risk of liability before being judged. The pre-judgment compensation requirement may prejudice the long-term development of sponsoring and hinder the business development of small-size sponsors.
第 27 条特别规定，保荐人能够证明自己没有过错的，不与发行人承担连带责任。但我们注意到，现行的行政法规对保荐人规定了更高的责任。例如，在发行人涉嫌虚假陈述时，保荐人有义务在证监会或法院作出最终赔偿决定 / 判决之前对投资者先行赔付。我们希望强调的是，虽然我们理解现行制度下判决前先行赔付要求的初衷，但任何行政规章都不应取代《证券法》中关于保荐人的规定，或对保荐人规定更高的责任。我们期待改变目前的规定和做法，保荐人不会面临在裁决前承担责任的风险。先行赔付要求可能会损害保荐业务的长期发展，阻碍小型保荐人的发展。

Related to the above, Article 103 provides for a pre-compensation regime although it uses the term “may” which means that securities companies can opt to pre-compensate the investors suffering losses. In the first instance, we would suggest removal of Article 103. Whilst it uses the term “may”, in practice, the regulator would most likely to put it as “have to”. In addition, this Article goes far beyond the current regulations and practice, and seems to impose liabilities on a securities company of an issuer, irrespective of its capacity being an underwriter, advisor or sponsor. However, in current practice, pre-compensation undertaking is only required for IPO sponsors.
与上述情况相关的是，第 103 条也规定了先行赔付，尽管使用了“可以”一词，以表示证券公司可以选择是否向遭受损失的投资人先行赔付。首先，我们建议删除第 103 条。虽然使用了“可以”，但在实践中，政府机关更有可能将其视为义务。并且，该条超出了现有的法规和实践，并要求无论发行人的证券公司是承销商、顾问或是保荐人，都要承担更多的责任。但是，在实践操作中，先行赔付仅针对首次公开发行的保荐人。

From a philosophy of law perspective, under Article 27, a sponsor are presumed to have fault on an issue of securities that does not comply with statutory conditions or procedures, unless it can demonstrate that it is not at fault. Article 103 stipulates, amongst others, the pre-compensation rule for intermediaries such as sponsors for faults of issuers. This liability attribution deviates from the principle of attribution in the General Rules of the Civil Law and above-mentioned Article 27, and breaches the three basic principles of liability under torts law.
从法理上看，第 27 条规定了保荐人的过错推定责任，即证券发行不符合法定条件或法定程序的，保荐人应当与发行人承担连带责任，但是能够证明自己没有过错的除外。第 103 条对保荐人等中介机构规定了先行赔付的制度。此种归责方式偏离了《民法总则》及上述第 27 条的归责原则，突破了侵权责任的三大基本原则。

In practice, this attribution rule inappropriately increases the liabilities of intermediaries, especially sponsors. The responsibilities of issuers are improperly transferred to and imposed on the intermediaries, which have to bear liabilities without being properly judged and the compensation amounts are usually unlikely to be able to be recovered in practice. This is completely different from international practice and will not be beneficial to the rule of law and internationalization of China's securities market. We appreciate the regulators intend to protect interests of public investors, and in the meantime, regulators also have the responsibility of promoting fairness and justice of the market. Excessive protection of interests of public investors may harm the legitimate rights and interests of intermediaries, and not benefit the long-term development of internationally competitive intermediaries and the securities market.
实践中，此一归责方式不恰当地增加了中介机构特别是保荐人的责任，发行人的责任不恰当地转由中介机构承担，并且令中介机构在未经审判的情况下即承担责任，而中介机构的损失基本无法通过事后向发行人索赔的方式获得补偿，这与国际惯例截然不同，也不利于证券市场的法治化、国际化发展。我们理解监管机构保护中小投资者的初衷，但同时监管机构也应承担维护市场公平公正的职责。过度保护中小投资者而损害中介机构的合法权益，不利于培育具有国际竞争力的中介机构，长久来看不利于市场的健康发展。

As China further opens up its financial market, the Securities Law, being the most important law in the space of securities market, will be a window to the world as to how the Chinese government enacts and supervises the market via every single provision. We believe that the pre-compensation system is extremely controversial in both theory and practice, which needs further debating, and is not appropriate to be included in the Securities Law at this stage. Accordingly, Article 18 of the Notice of China Securities Regulatory Commission (2015) No. 32——Content and Format Guidelines of Information Disclosure No. 1 for Publicly Issuing Securities Companies——the Prospectus (2015 revision), which providing that sponsors undertake to compensate for the loss of investors in advance where the documents produced or issued for the issuer's initial public offering of stocks contain false records, misleading statements or major omissions, and thereby causing losses to investors, should be amended to comply with Article 27 of the Securities Law.
中国市场的开放程度越来越高，《证券法》作为规范证券市场最重要的法律规范，每一个制度设计都向世界展示着立法水平、监管水平。我们认为先行赔付制度无论在法理上还是实践中都极具争议性，需要进一步论证，不适宜在现在阶段写进证券法。相应地，《中国证券监督管理委员会公告(2015)32 号－－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(2015 年修订)》第十八条规定“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”，应作出修改以符合上位法《证券法》第 27 条的规定。

We believe the newly added Chapter Six of the Securities Law would greatly enhance the protection of investors' rights, and investors' rights should ultimately depend on a sound system which, amongst others, supports investors to raise lawsuits for compensation.
我们相信，《证券法》新增的第六章将进一步完善投资者利益的保护。投资者利益的保护最终还应依赖于完善的诉讼赔偿等机制。

3. Shareholding reduction restriction 减持限制

3.1 Article 44 imposes more restrictions on disposal of securities by persons such as substantial shareholders and shareholders holding shares issued prior to IPO or via private placement of a listed company. These provisions are intended to incorporate existing restrictions under the relevant CSRC rules on shareholding reduction by shareholders and directors and others of a listed company. Looking at the level of details of such provisions (e.g. time to notify the issuer and restriction on transfer amount and time period) and the possibility of future policy change, we strongly believe it would be more appropriate to keep these provisions in the CSRC rules with only the general principles to be set out in the Securities Law. Such principles may be included in the first paragraph of Article 44.

第 44 条对大股东与持有首次公开发行前发行的股份或者非公开发行的股份的股东处置证券的行为规定了更多的限制。这些规定意在纳入证监会对上市公司股东和董事等人员减持的规定的现行限制。从这些条文的详细程度（比如通知发行人的时间要求，转让的金额和时间限制）和未来政策变化的可能性来看，我们坚信，将这些具体条文留在证监会规定中，而在《证券法》中只规定原则，更为合适。这些原则可列入第 44 条第 1 款。

Specifically, the 15-trading day requirement to notify the issuer and the restriction of transfer (amount and time period) would hinder relevant fund managers from continuing trading or tracking index once the 5% threshold is met. As such, we would suggest exemption for fund managers, for example, shares owned by index-tracking passive public funds not be included in the holding of such funds or their investment managers for the purpose of calculating the 5% holding referred to under Article 44. This is to avoid extra operational burden for fund managers to calculate the positions of 5% where such funds are authorized for retail distribution by a regulator in a recognized jurisdiction and their investment managers of these funds are regulated in a recognized jurisdiction. The CSRC can be authorized to establish a list of recognized jurisdictions in the Securities Law. In addition, we would suggest exemption for fund managers to announce their trading activities 15 trading days ahead.
具体而言，通知发行人的 15 个交易日的要求和（对金额和时间段的）转让限制将阻碍相关基金管理人在达到 5%的阈值后继续交易或追踪指数。因此，我们建议豁免基金管理人，例如，对于在受认可的法域内被许可零售分销，且投资经理受到受认可法域监管的被动式指数型公募基金持有的股份，在计算是否达到第 44 条下 5%阈值时，不计入相关基金或其投资经理持有的股份中，从而减轻基金管理人额外的运营负担。此后，可以授权中国证监会制定《证券法》中的受认可的法域名单。并且，我们建议同时豁免基金管理人在进行交易的提前 15 个交易日内通知发行人的要求。

Besides, we would appreciate if NPC could clarify whether the restrictions under Article 44 also apply to any persons or entities which actually own or control the voting rights attaching to 5% or more of the shares in a single PRC issuer, confirm that it is not necessary to include those shares within the scope of 5% threshold simply because an investment manager holds investment discretion relating to such shares, and confirm that it is not necessary to treat aggregate “holdings” of different persons or entities as under the scope of Article 44, unless the asset manager is a party to an agreement whose purpose is to increase control of the PRC issuer.
此外，我们恳请全国人大澄清第 44 条规定的限制是否也适用于任何实际拥有或控制中国单一发行人 5%或以上股份表决权的个人或实体，希望全国人大确认无需仅因为投资经理就其股份拥有投资裁量权就将其计入 5%的阈值中，并确认无需将不同个人或实体的总持股数量在第 44 条下合并计算，除非资产管理公司是旨在增加对中国发行人控制权的协议的当事方。

In addition, given that the Securities Law applies to trading activities within mainland China, we consider that the restrictions proposed under Article 44 (including newly added provisions) do not apply to transfer of H shares or shares listed in other offshore jurisdictions by a company incorporated in the PRC. We of course reckon that the aforementioned does not apply to one-year lock-up restriction for shares issued prior to an IPO as required under the Company Law, which applies to all companies incorporated in the PRC.
此外，鉴于《证券法》适用于中国内地的交易活动，我们认为第 44 条（包括新增条款）不适用于转让 H 股或在中国成立在其他境外上市的公司股权。当然，我们认为《公司法》下在首次公开发行前发行的股份的一年禁售期规定仍然适用于所有在中国注册的公司。

3.2 Article 83 has extended the lock-up period of shares acquired via public take-over from 12 months to 18 months, which when implemented together with the restrictions above, would be too onerous for an acquirer and this is also rarely seen in the international capital markets. From a practical perspective, the implementation of this reduction restriction has led to huge amount of share pledges which contributed to the bear market in 2018 and created significant pressure for the CSRC and local governments. Also with capital markets more open to the international investors, the imposed reduction restriction would make investing in the China market more difficult than HK and US markets, thus making the China market less attractive to many domestic unicorn or elephant companies. We understand regulators intend to curb speculative share disposals by adding such restriction. However, we believe this speculation was caused by inefficient pricing. Regulators should consider introducing more commercialized pricing scheme and fostering efficient market instead of reducing market liquidity. We believe the pilot registration in the Science-Technology Innovation board, which may extend to the whole market, pricing will be more reasonable. Law enactment should take into consideration the future trend of the market and encourage reasonable realization of investment by the shareholders rather than addressing short-term need. Therefore, we suggest that no amendment be made to this provision.

第 83 条将通过公开收购所取得股份的禁售期从 12 个月延长至 18 个月，如果该条限制与上述第 44 条的限制一起实施，对收购者来说将过于严苛，该等限制在国际资本市场中也很少见。从实践角度来看，之前这一减持限制的实施，导致了大量的股权质押，部分引发了 2018 年的熊市，也给中国证监会和地方政府带来了巨大压力。此外，由于资本市场对国际投资者更加开放，这一减持限制使投资中国市场与香港和美国相比显得更为困难，而降低了中国市场对许多国内“独角兽”或“大象”公司的吸引力。我们理解监管机构试图通过增加这种限制来遏制投机性股票交易，但我们认为这种投机行为是由定价效率低下造成的。监管机构应考虑采用更商业化的定价机制，加强市场有效性，而非减少市场流动性。我们相信，随着科创板注册制试点的开展和向整个市场的推广，市场定价将更加合理。法律的推行应考虑市场的未来趋势，鼓励股东合理实现投资收益，而不是满足短期需求。因此，我们建议不对该条进行修改。

3.3 Article 71 provides for the freeze on all purchases and sales of shares in the listed company by the investor after making an announcement of its 5% shareholding and any 5% change thereafter. This, again, would adversely affect the most passive fund managers from tracking an index during that period. For the reasons stated above, we would appreciate that the NPC consider adding exemptions of the holdings of index tracking funds from the 5% substantial shareholder calculation and/or treat the shareholdings managed by asset managers at a fund or client level instead of the asset manager level. In addition, from a practical perspective, it would be helpful to confirm if such holdings of shares are calculated on an end-of-day basis as it is not possible to ascertain holdings intra-day before settlement takes place. We also sincerely hope that the Securities Law could confirm that there is no freeze on trading after a change in holding of only 1% and that such 1% changes need only be notified to the listed company itself and not to the CSRC.

第 71 条规定，投资者在公告其持有上市公司 5%的股份和之后每次 5%股份变更后，在一定期间内其将不能再买卖该上市公司的所有股票。这也将严重影响被动管理的基金经理在这一期间追踪指数。鉴于上述理由，我们恳请全国人大考虑在计算 5%的大股东时，对指数型基金予以豁免，和/或将基金管理人管理持有的股份计算在投资人或客户层级，而不计算在基金管理人层级。并且，从实践的角度来看，我们恳请确认该等股份的持有量是否按日终计算，因为无法在结算前的日中确定持仓量。我们也真诚希望《证券法》能够确认，仅为 1%的持仓变动不会导致该股票交易冻结，且相应变动只需通知上市公司本身，而不需要通知证监会。

4. Securities professionals' holding of stocks
证券从业人员持股

We fully appreciate that the PRC has a strict prohibition for securities business employees to hold and trade stocks or other equity type of securities and welcome the newly proposed exception under Article 48 for such holding/trading in the context of employee stock incentive schemes of securities companies. We would like to suggest further extending such exception to shares held due to such incentive programs of the parent or subsidiaries of the securities company to make such exception even more helpful in practice. Besides, it would be helpful for this exception to cover both existing employees, and ex-employees of securities companies etc. and allow ex-employees to continuously hold such stocks or other equity type of securities for a period of time.
我们充分理解中国严格禁止证券公司从业人员持有和买卖股票或其他具有股权性质的证券，并欢迎第 48 条项下拟定的对证券公司员工股权激励计划持有、买卖股票的例外规定。我们建议将这种例外规定进一步扩大到因证券公司母公司或子公司的此种激励计划而持有的股票，以使该例外规定在实践中更有裨益。此外，我们也真诚希望该等例外适用于证券公司的在职以及离职员工等，并允许离职员工在一定时间内继续持有股票或其他具有股权性质的证券。

In addition, we sincerely hope the NPC may clarify what is intended by "other equity type of securities", the lack of clarity on this term may bring uncertainty on permissible investment by securities companies' employees and may impact their existing investments (e.g. convertible bonds held prior to the issuance of the amended Securities Law).
并且，我们真诚希望全国人大可以澄清"其他具有股权性质的证券"的含义。该词语含义的不清晰可能会造成一定困扰，包括所允许证券公司员工持有的投资，以及是否会影响其现有的投资（比如，在修订后的《证券法》出台之前，员工所持有的可转让债券）。

5. Short swing profit rule
短线交易收益规则

According to the short swing profit rule set out under Article 52, a shareholder holding 5% or more of the shares (either alone or jointly with others via a contractual or other arrangement) of a listed company would generally be subject to such rule. We believe, however, that the interpretation concerning certain key aspects of this Article remains unclear and this is a cause for concern among market participants in respect of their trading activities. In particular, we would like to propose that, exemptions can be provided subject to meeting certain conditions:

- for asset managers, proprietary positions and client/fund positions do not need to be aggregated; different client/fund positions managed by the same asset managers do not need to be aggregated
- for mutual funds, pension funds and social security funds, investments made via different channels (or different asset managers) do not need to be aggregated
- index tracking funds should be exempted from the application of the short swing profit rule
- positions held by affiliates should not be aggregated by default, or at least the presumption of "acting in concert" or "commonly hold" by affiliates should be rebuttable

Without the above exemptions being provided for under the short swing profit rule, large asset managers (and the group they belong to) and large mutual/social funds will have to reduce their investments in China to ensure compliance with this rule, and capital inflow into China will be adversely impacted.

根据三次审议稿第 52 条规定的短线交易收益规则，持有或者通过协议、其他安排与他人共同持有上市公司 5%以上的股东均会受到该规则的约束。然而，我们认为，与该规定相关的部分关键问题的具体解释尚不明朗，又与交易活动密切相关，使得市场参与者十分关切。尤其是，除非满足其他条件，我们建议采取一定的豁免情形：

- 针对资产管理公司，自营仓位和客户/基金仓位不应合并计算；同一资产管理公司管理的不同的客户/基金仓位不应合并计算

- 针对公募基金、养老基金和社会保障基金，不同通道（或不同的资产管理公司）所做的投资不应合并计算
- 指数型基金应被短线交易收益规则豁免
- 关联方的持仓不被默认为需要合并计算，关联方不被默认为“一致行动人”或者“共同持有”。

如果没有上述短线交易收益规则的豁免情形，大型资产管理公司（以及他们所在的集团）以及大型公募/社会保障基金将为符合该条的规则，而减少他们在中国的投资活动，对中国的资本流入会受到较大影响。

We provide further elaboration on the aforementioned suggestions as following:
下面我们对上述建议逐条进行具体阐述。

a) for asset managers, proprietary positions and client/fund positions do not need to be aggregated; different client/fund positions managed by the same asset managers do not need to be aggregated
针对资产管理公司，自营仓位和客户/基金仓位不应合并计算 ，同一资产管理公司管理的不同的客户/基金仓位不应合并计算

It is unclear how holdings should be calculated for asset managers for the purpose of the 5% threshold under Article 52. Some consider that only direct shareholding should be considered (including holdings jointly held with others), while others believe that the same aggregation principle as applied in the Take-over code should be applied (i.e. aggregation of holdings of shares registered in the investor's name and also those over which the investor actually controls voting rights, and shares owned by persons acting in concert with the investor).
对于第 52 条规定的资产管理公司的 5%持股份额应如何计算，目前尚不明确。有观点认为，该等持股份额应只考虑直接持股（包括与他人共同持有的股份）；而也有观点认为，该等持股份额应适用上市公司收购管理办法中所适用的合并原则（即合并计算登记在投资者名下的股份，投资者实际控制投票权的股份，以及投资者的一致行动人持有的股份）。

We hope the Securities Law could clarify that the aggregation requirement under the Take-over code do not apply to the holdings of funds and client accounts managed by the same manager for purposes of the short swing profit rule. Otherwise, while individually each client or fund may not hold more than 5% of a listed company, the 5% ownership threshold may easily be reached if the shareholdings of all clients and funds managed by the same asset manager have to be aggregated and this would have a particularly adverse impact on large asset managers as they may be forced to limit the shareholding of all of their clients and/or funds so as not to trigger the short swing profit rule.
我们希望《证券法》能够澄清，在短线交易收益规则下，收购规则中的合并计算标准不适用于同一管理人管理的不同基金和客户账户。如果必须将同一资产管理人管理的所有客户和基金的持股合并计算，则很容易达到 5%的门槛，即使每个客户或基金各自持有的上市公司的持股比例均未超过 5%；这将对大型资产管理公司造成特别不利的影响，他们可能会因此而被迫限制所有客户和基金的持股，以免触发短线交易收益规则。

We appreciate that it is possible that shareholders holding 5% or more of the shares of a listed company is an insider. However, asset managers who manage assets for different clients or funds are usually not an insider privy to inside information even though their percentage of shareholding in a listed company, when aggregated across all clients and/or funds they manage, reaches or exceeds 5%. This is particularly true in the case of large global asset managers which have many clients and funds. We believe it is persuasive to note that the short swing profit rule in offshore jurisdiction such as the United States would not treat investment managers as being within scope simply because they hold the investment discretion and/or control the voting rights attaching to shares held by their clients. In the United States, an investment manager/adviser must include in its holding for the purpose of short swing profit rule any securities in relation to which it controls the voting

rights or investment power unless an exemption applies, and actually they are among the 10 categories of persons (including but not limited to banks, investment advisers) who may exclude from their holding any securities held in customer or fiduciary accounts in the ordinary course of business provided that they do not have the purpose or effect of changing or influencing control of the listed company.
我们理解，持有上市公司 5%或以上股份的股东有可能是内幕信息知情者。然而，为不同客户或基金管理资产的资产管理公司通常无法接触到内幕信息，即使他们的客户和管理的基金合并持有的股份达到或超过 5%。对于拥有众多客户和基金的大型全球资产管理公司来说尤其如此。我们注意到一个可供参考的事实：美国等境外法域的短线交易收益规则，不会仅仅因为投资管理人拥有投资决策权和/或对客户持有股份的投票权有控制权，就对其适用短线交易的相关规定。在美国，根据短线交易收益规则，投资经理/顾问的持股情况应当包含由其控制投票权或投资权的证券，除非有豁免规定；而事实上，投资管理人正属于十类被豁免人士（包括但不限于银行、投资顾问）之一，只要投票管理人没有更改或影响上市公司控制的效果或目的，就可以免于将其日常经营中客户或受托账户所持股份纳入其持股情况。

If asset managers cannot benefit from the exceptions suggested above entirely, we request that the Securities Law that proprietary positions of the asset manager and its affiliates do not need to be aggregated with the positions of funds and clients managed by them so long as an effective Chinese wall is established between the two lines of business, and further that aggregation across different fund and client positions is not needed so long as decisions are made independently. This is supported by the CSRC decisions in a number of cases such as with respect to investments in Shenzhen Everwin Precision Technology Co., Ltd. (listing series number 300115) by various investment schemes managed by the same trust company, it was held that, since such investment schemes were managed by different investment managers which were not associated with one another and there was no overlap between any investment management staff or research teams, shareholdings of those investment schemes should not be aggregated for the purpose of the short swing profit rule, despite the fact that the relevant investment schemes were all managed by the same trust company. Also, if a complete exemption is not possible, at least funds offered to the public, whether within or outside China, should be excluded from the calculation of the holdings of the asset/fund manager for purpose of the short swing profit rule.
如果资产管理公司不能按照上述建议得到完全的豁免，我们希望证券法可以明确：只要自营和资产管理两个业务间建立了有效的隔离墙，资产管理公司及其关联方的自持仓位不需要和其管理的客户和基金仓位合并计算；只要不同客户的投资决策相互独立，其各自仓位和基金就不需要合并计算。这一观点其实已经在证监会作出决定的一些案例中得到了支持：例如，在证监会关于同一信托公司在多个投资计划下对深圳市长盈精密技术股份有限公司（上市公司代码 300115）的投资的决定中，证监会认为，虽然该等投资计划由同一公司管理，但由于这些投资计划分别由不同的投资经理管理，且这些经理之间没有联系，投资管理人员或研究团队之间也没有人员重叠，因此，该等投资计划的持股在短线交易收益规则下不应合并计算。并且，如果《证券法》无法按照上述建议进行完整的豁免规定，我们希望在短线交易收益规则下计算资产/基金管理人的持股量时，至少应该排除在中国境内或境外公开募集的基金。

The availability of argument to be made by asset managers so that they do not have to aggregate group proprietary positions and client positions, or across different client positions, would significantly benefit foreign investment in the PRC securities market, particularly by the large global asset managers who manage hundreds of funds and client mandates. Otherwise, the larger asset managers may be forced to take a cautious approach and limit the individual holdings of each of the funds and/or clients that they manage so that the aggregate shareholdings in a listed company that they manage is lower than 5%. This is more important now than ever given the expected large inflow of funds with MSCI A-share inclusion.
如果资产管理公司不必将自持仓位和客户仓位，或将不同客户仓位的持股合并计算，这将大大有利于在中国证券市场中的外商投资活动，尤其是大型全球资产管理公司所管理的大量基金和客户投资委托。否则，较大规模的资产管理公司只能被迫采取谨慎的态度，限制其管理的

每个基金和/或客户的持股规模，使其合计管理的上市公司股份比例低于 5%。鉴于近期 MSCI 宣布了 A 股扩容安排，我们可以预见大量资金的流入，让这一问题显得尤为重要。

b) for mutual funds, pension funds and social security funds, investments made via different channels (or different asset managers) do not need to be aggregated
针对公募基金、养老基金和社会保障基金，不同通道（或不同的资产管理公司）所做的投资不应合并计算

We recommend mutual funds, pension funds and social security funds, both onshore and offshore to be listed as exception to short swing profit rule, to align such rule with the law in other jurisdictions. These funds usually have large asset scale and may invest via different asset managers to make investments, each of which make investment decisions independently. Further, these funds usually do not seek to control a listed company. Hence, it is reasonable not to aggregate the investments made by these funds via different asset managers; otherwise, the restriction would prohibit these funds from holding a relatively high stake in listed companies (e.g. above 5%), which is usually the case for large funds in international market (and increasingly in domestic market).
我们诚挚建议在短线交易收益规则中豁免境内和境外的公募基金、养老基金和社会保障基金，使该规则与其他法域的法律一致。这些基金通常有大型的资产规模，并会通过不同的资产管理公司进行投资，每个资产管理公司都单独作出投资决定。并且，这些基金往往不会试图控制一个上市公司。因此，我们建议不要将不同的资产管理公司运用其基金所做的投资合并计算。否则，该限制将导致这些基金无法持有相对较高的上市公司权益（比如高于 5%），而这往往在全球市场上较为常见（并逐渐在国内市场上变得常见）。

We note that a CSRC circular issued to the National Council for Social Security Fund (the "**NCSSF**") in 2002 provided that if the NCSSF directly and indirectly through its investment managers holds shares exceeding 5% in aggregate, the shares so held by the NCSSF may be exempted from the short swing profit rule under the Securities Laws if the NCSSF and the investment managers make investment decisions independently from one another. Again, in the context of international investors, given each portfolio manager makes investment decisions independently, we believe it is appropriate that holdings of a mutual fund (or pension fund, or social security fund, as appropriate) via different fund managers not to be aggregated, and this should apply to both domestic and offshore funds. The fact that the Shanghai and Shenzhen stock exchanges have recently proposed in the draft Guidelines for Information Disclosure for Takeover and Change of Shareholder of Listed Companies that, for the purpose of information disclosure by substantial shareholders, positions held by the NCSSF, pension funds, annuities and mutual funds via different managers or channels do not need to be aggregated also supports our suggestion in relation to aggregation principle for the short swing profit rule.
我们注意到，证监会 2002 年向全国社会保障基金理事会（"社保基金"）发出的《关于全国社会保障基金委托投资若干问题的复函》指出，如果社保基金直接持有和通过其投资管理人间接持有的股份总计超过 5%，而社保基金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，则社保基金持有的这些股份不受《证券法》短线交易收益规则限制。同样，对于国际投资者而言，鉴于每个投资经理均独立做出投资决策，我们认为公募基金（或养老基金和社会保障基金）中通过不同投资经理持有的份额不应合并计算，且这一点应同等适用于国内基金和境外基金。上海和深圳证券交易所最近在《上市公司收购及股份权益变动信息披露业务指引》草案中提出，对于大股东信息披露的规定，社保基金、养老保险基金、企业年金和公募基金通过不同经理或渠道的持仓不需要合并计算，该草案也支持了我们关于短线交易收益规则下合并计算原则豁免的建议。

c) index tracking funds should be exempted from the application of the short swing profit rule
指数型基金应被短线交易收益规则豁免

To the extent Article 52 is concerned, index-tracking passive investment funds may face difficulties when conducting their business, as such funds must purchase and sell A-shares continuously in order to track the relevant index (e.g. MSCI Emerging Markets). We would

therefore propose that index-tracking passive investment funds which are managed by fund managers or any investment managers of these funds regulated in any other recognised jurisdiction (to include Hong Kong, US, UK, Ireland, Luxembourg, Australia, Singapore, etc.) be excluded from the calculation of shareholdings for the purpose of the short swing profits rule under Article 52.
在第 52 条的规定下，被动式指数型基金在开展业务时可能面临困难，因为这些基金必须不断买卖 A 股股票，以跟踪相关指数（如 MSCI 新兴市场指数）。因此，我们建议：在任何其他受认可的法域（包括香港、美国、英国、爱尔兰、卢森堡、澳大利亚、新加坡等）受监管的这些基金的基金管理人或投资管理人所管理的被动式指数型基金，均可豁免于第 52 条短线交易收益规则下的持股计算。

d) positions held by affiliates should not be aggregated by default, or at least the presumption of "acting in concert" or "commonly hold" by affiliates should be rebuttable
关联方的持仓不被默认为需要合并计算，关联方不被默认为"一致行动人"或者"共同持有"

In addition, we also hope the Securities Law could confirm that persons/entities will not be treated as holding shares jointly simply because they are under common control (i.e. affiliates) unless they have entered into an agreement specifically to increase their control of the PRC companies. Therefore, to better reflect this clarification, we would suggest revising as "holds or jointly holds with others under agreements or other arrangements… for the purpose of which is to increase control over that company" into both Article 52 and Article 201 for breach of Article 52.
此外，我们也恳切希望《证券法》能够明确：个人或实体不会仅仅因为其存在共同的控制人（即属于关联方）而被视为共同持有股份，除非他们签订了专门为增加其对该等中国上市公司控制权的行动协议。因此，为了更好地明确这一问题，我们诚挚地建议在第 52 条和第 201 条（违反 52 条的后果的规定）中修改为"通过协议、其持有或者通过协议、其他安排与他人共同……为增加对该公司的控制权"等类似表述。

Lastly, we sincerely hope the Securities Law can clarify whether the short swing profit rule only applies to trading that takes place in the PRC, and clarify if the short swing profit rule only applies to the securities of PRC companies listed in the PRC or it also apply to the securities of PRC companies listed in any other jurisdictions. We believe that it intends to regulate the trading taking place in the PRC and the PRC companies listed in the PRC only, as Chapter one of the Securities Law suggests that the law governs securities issuance and trading within the PRC.
最后，我们再次恳切希望《证券法》能够阐明：短线交易收益规则是否只适用于在中国发生的交易，并明确该规则是只适用于在中国上市的中国公司的证券，还是也适用于在其他法域上市的中国公司的证券。我们理解，鉴于《证券法》第一章表示本法适用于在中国境内的证券发行和交易，因此这一规定只会适用于在中国境内发生的交易，及在中国上市的中国公司。

We would also like to note that, for the triggering point of short swing profit rule, the usual international practice is 5% or 10%, and by applying 5% as the triggering point without further providing reasonable carve-out, the PRC may be forcing down the investment scale from institutional investors both domestically and internationally.
我们同时注意到，对于短线交易收益规则的门槛值，国际惯例一般是 5%或 10%。因此，如果将门槛定在较低的 5%且没有合理的例外规定，可能会影响国内外机构投资者的投资规模。

6. Insider dealing
内幕交易

According to Articles 59, any person is prohibited from making use of insider information to trade securities in the PRC. It has however been unclear whether one business department of a securities company (e.g. asset management) may trade securities if another business department (e.g. underwriting or M&A) is in possession of insider information. In light of international practice, we sincerely hope that the NPC may include appropriate exceptions in insider trading section such that an investor's trading activities should not be impacted so long as it can demonstrate that a robust Chinese wall is established between different business units and the actual trading does not involve using insider information. We also suggest the NPC considering adding other

widely accepted safe harbors in the application of insider dealing rule, including, for example, the person in possession of insider information is dealing for the sole purpose of acquiring shares required for a person being qualified as a director or intending director of a corporation, it is in the performance in good faith of an underwriting agreement for the listed securities in question, or it is in the performance in good faith of acting as a liquidator, receiver or trustee in bankruptcy. As the PRC further opens up its financial sector, and international banks are more deeply involved in various aspects of the securities business in the PRC, this issue will be increasingly relevant to their PRC related activities. By setting out the clear criteria for benefiting from the exception will also help develop healthy securities institutions that operate comprehensive securities businesses (including both domestic and foreign-invested securities companies).

根据第 59 条，任何人不得利用内幕信息在中国进行证券交易。但尚不明确的是，如果证券公司的一个业务部门（如承销或并购部门）掌握了内幕信息，另一个业务部门（如资产管理部门）是否还可以交易证券。根据国际惯例，我们恳切希望全国人大在内幕交易一节加入适当的例外规定：如果投资方能够证明在不同业务单元之间建立了有效信息隔离机制，且实际交易并不涉及使用内幕信息，其交易活动就不会受到影响。随着中国金融领域的进一步开放，国际银行更加深入地参与到中国证券业务的各个方面，这一问题与它们的中国业务愈发相关。通过制定明确的豁免标准，也有助于综合性证券机构（包括本土和外商投资证券公司）健康发展。我们同时建议，全国人大考虑其他广为接受的内幕交易的豁免情形，包括为了担任一家公司的董事或成为董事，由掌握内幕信息的人士进行证券交易、为了诚信履行上市公司的证券承销活动、或为了在破产情况下，诚信履行其作为清算人、接收人或信托人职责等。

7. Market manipulation
证券市场操纵

We welcome that Article 63 emphasizes market manipulation must have an intention to affect the securities trading volume or price. We also understand that the PRC exchanges have formally or shared with domestic brokers a set of abnormal trading rules, which clarity in detail what the CSRC and exchanges will consider as market manipulation and abnormal trading behavior. To help the international securities industry comply with Article 63 and to identify and prevent market manipulation and abnormal trading, we respectfully request the CSRC and exchanges to also publish and share with international participants a copy of such abnormal trading rules.

第 63 条强调必须有影响证券交易量或价格的意图才能构成证券市场操纵，对此我们表示强烈赞同。同时我们了解到，中国证券交易所曾向国内券商发放了一套异常交易规则，详细说明了证监会和交易所将何种行为视为证券市场操纵行为和异常交易行为。为帮助国际证券业更好地遵守第 63 条，识别和防范证券市场操纵行为和异常交易，我们谨恳请证监会和各证券交易所公布或向国际市场参与者发放该等异常交易规则。

8. Information disclosure
信息披露

a) The third paragraph of Article 87 provides that where a company is listed both in and outside the PRC, information disclosure obligator shall disclose the information in the PRC “at the same time” where disclosure is made offshore. We understand the intention of this provision is to ensure that equal information rights can be enjoyed by domestic investors as well as international investors. We would suggest the law clarifying that the concurrent information disclosure requirements apply to issuers and not apply to substantial shareholders which are also information disclosure obligors unless otherwise exempted for this purpose. We understand this is the intention of this Article 87, as evidenced by the current practice of disclosure by shareholders relating to their H-share trading of A- and H- share dual listed companies, and the CDR rules.

   第 87 条第 3 款规定，对于同时在中国境内和境外上市的公司，信息披露义务人应当在境外披露信息时，“同时”在中国披露信息。我们理解这一规定的目的是确保国内投资者与国际投资者能够享有同等信息权利。我们建议《证券法》澄清，该同时披露要求适用于发行人，而不适用于大股东（如无豁免规定，大股东也是信息披露义务人）。我们理解，上述内容即为第 87 条的立法意图，同时在 A 股和 H 股市场上市的公司所作出的股东披露的实践中也印证了这一点。

b) Further, even if the above requirement is restricted to issuers only, the strict requirement would be practically difficult to implement in practice due to different time zones, formats, language, etc. across the world. We welcome further clarification on how "at the same time" should be interpreted or if certain relaxation would be made (e.g. at least a few more business days to make such disclosures in the PRC).
此外，即使上述要求仅适用于发行人，由于时差和全球市场对信息披露的格式、语言等要求不同，这一严格要求实际上难以实施。我们欢迎《证券法》进一步澄清如何解释"同时"一词，或适当放宽这一要求（例如要求在几个工作日内，在境内作出披露）。

9. Cross-border transmission of securities business related documents/materials 证券业务相关文件、资料的跨境传输

Article189 requires that any entity or individual shall not provide documents or materials relating to securities business overseas without the consent of the securities regulatory authority and relevant competent authorities under the State Council. Article 189 generally deals with cooperation between the CSRC and securities regulators in offshore jurisdictions, and whether or not foreign securities regulator may conduct enforcement activity in the PRC. It is however unclear whether the intention of the aforementioned restriction on cross-border information transmission is limited to provision of such information to offshore securities regulators, or to any offshore person. Literal reading of such provision suggests an absolute prohibition of provision of the information to anyone in an offshore jurisdiction for any purpose.
第 189 条规定，未经证券监督管理机构和国务院有关主管部门同意，任何单位或者个人不得向境外提供与证券业务活动有关的文件和资料。第 189 条主要涉及证监会与境外证券监管机构之间的合作，以及境外证券监管机构是否可以在中国境内进行执法活动的问题。但是，该条款未明确，上述跨境信息传输限制的意图是仅限于限制向境外证券监管机构提供信息，还是限制向任何境外人士提供信息。基于该规定的文义理解，是绝对禁止出于任何目的向境外的任何人提供信息。

We strongly recommend the NPC clarify the scope of restricted recipients for the information/materials above, and the scope of information/materials to be covered, e.g. only most critical information should be included. We believe cross-border information transfer should be permitted as a principle, provided that the proprietary right, trade secret, data privacy and state secret is not compromised, and it is only in exceptional or limited circumstances that regulatory consent should be sought for such transfer. The law should also specify such circumstance demanding consent, and how the consent will be provided (e.g. criteria, procedure, and timetable). This issue is of concern to the onshore presences of international financial group whose home regulator might request information for integrated risk control purposes or conduct onsite inspection. Global financial institutions do not want to be put at risk of not complying with their home regulators' demand for information or request for onsite inspection which do take place in other jurisdictions.
我们强烈建议全国人大明确上述信息 / 资料的限制接收主体范围，并明确信息 / 资料的涵盖范围，例如只包括最关键的信息。我们认为，跨境信息传输原则上应被允许，只要不侵犯专有权利、商业秘密、数据隐私和国家秘密。仅在特殊或有限的情况下，才应当需要取得监管机构的同意。《证券法》还应细化需要获得同意才能传输的情况，以及该同意的方式（例如标准、程序和时间表）。跨境信息传输问题关系到国际金融集团的境内实体，因为其母公司的母国监管机构可能出于综合风险控制的目的，要求获得信息或进行现场检查。国际金融机构不希望因此而导致不能遵守其母国监管机构获得信息或现场检查的要求（其他法域的确有这种要求）的风险。

We also note that the PRC Cybersecurity Law and related implementation rules (some are to be formulated or in draft form) have requested critical information infrastructure operators ("CIIO", potentially to be expanded to all network operators in China) to go through specific assessment process (including assessment by regulators) for cross-border sharing of important data and personal information. This has significant implication on business of international groups in China. We sincerely hope the NPC may clarify the relationship between the restriction under Article 189 and the restriction under the Cybersecurity Law, and issue the relevant rules to clarify the scope of CIIOs and other issues relating to cross-border data sharing as soon as possible. Specially, for the members of ASIFMA, it would be critical for them to understand that the kind of data is

allowed to be shared and the purposes of cross-border sharing, such as risk management, management reporting or even for trade surveillance purposes, as some global banks may centralize this function outside the PRC. Therefore, we welcome further clarification on the scope of documents, materials or data to be transferred on a cross-border basis in the Securities Law.
我们还注意到《网络安全法》和相关实施细则（有些尚未制定或仍是草案的形式）规定，关键信息基础设施运营商（“CIIO”,可能扩大到所有的中国网络运营商）跨境共享重要数据和个人信息，须通过特定的评估过程（包括监管机构评估）。这对国际集团的在华业务具有重要影响。我们衷心希望全国人大尽快厘清第 189 条规定的限制与《网络安全法》规定的限制之间的关系，出台相关规则明确 CIIO 的范围及其他有关跨境数据共享的问题。特别是，对 ASIFMA 的成员来说，了解哪些数据是否被允许共享，以及哪些跨境共享的目的是被允许的（例如风险管理目的、管理报告目的甚至交易监测目的），是非常重要的。一些全球性银行可能将这一功能集中在中国以外的地区。因此，我们期望《证券法》对跨境转移的文件、材料或数据的范围作出进一步澄清。

10. Securities business
证券业务

Art 129 includes margin finance and securities lending, and market making as two new base securities businesses rather than add on licenses. The rationale for such new insertion is unclear to us. Does this imply that licenses for these two lines of businesses may be applied for at the time of the new establishment of a securities company without having to be conditional upon other licenses and at least one year of business operation? If so, we definitely welcome such amendment and believe that more international players may be attracted to offer such securities services leveraging its expertise.
第 129 条将证券融资融券和证券做市交易作为证券公司两个新的基础证券业务种类，而不是作为新的许可。我们想了解三次审议稿中增加这两项证券公司业务种类的原因。这是否意味着，新设证券公司如需从事这两项业务无需额外的执照，或无需满足持续经营至少一年的前提条件。如果确实如此，我们十分欢迎该等修订，并相信该修订将可能吸引更多的国际市场参与者利用其专业程度提供该等证券服务。

Another drafting point relating to Article 129 is that we believe the current practice allows that, apart from securities companies, institutions such as trust companies and commercial banks may also conduct underwriting business. This suggestion needs to be addressed in Article 129; otherwise only securities companies are allowed to underwrite securities.
与第 129 条相关的另一个措辞方面的问题是，我们理解，目前的市场实践允许证券公司之外的信托公司、商业银行等机构从事证券承销业务。这一点需要在第 129 条中说明，否则，按照此条表述，只有证券公司可以承销证券。

11. Program trading
程序化交易

Article 53 requires program trading to be reported to the stock exchanges. We respectfully submit that given no detailed rules have been enacted for the reporting at current stage, it is impossible for market participants to comply with Article 53 and Article 202. We therefore suggest amending the draft to “such trading shall comply with the rules prescribed by the securities regulatory authority under the State Council and the stock exchanges” and remove “shall be reported to the stock exchanges”. By then, the Securities law can be more generic and flexible to cover any future stock exchange rules on program trading.
第 53 条规定程序化交易需要报告给证券交易所。我们诚挚地提出，由于目前还未有相应的法规出台来规范向证券交易所的报告，对于市场参与者来说，比较难符合第 53 条和第 202 条的要求。我们因此建议将本条修改为“应当符合国务院证券监督管理机构和证券交易所的规定”，并删去“并向证券交易所报告”。由此，《证券法》可以更概括和灵活的涵盖未来所制定的有关于程序化交易的证券交易所规定。

12. Others
其他

a) Clarification on permitted information disclosure
允许信息披露的说明

Article 49 provides that institutions such as securities companies shall keep investors' information confidential in accordance with laws, and shall not unlawfully purchase or sell, provide or make public investors' information. We would like to seek clarification that this provision allows disclosure of investors' information to the extent permitted under laws which are applicable to securities companies in all relevant jurisdictions, and also that other usual permitted disclosure is allowed under this provision. As such, we propose to amend the language as follows:
第 49 规定，证券公司等机构应当依法为投资者信息保密，不得非法买卖、提供或者公开投资者信息。我们恳请《证券法》进一步明确，该条款允许证券公司在相关法域的法律允许范围内，披露投资者的信息以及其他通常披露在一定条件下可以得到允许。我们建议将该条修订如下：

"Stock exchanges, securities companies, securities registration and settlement institutions and securities service institutions shall keep investors' information confidential in accordance with laws, and shall not purchase or sell, provide or make public the investors' information unless required by law or by any securities exchange, regulatory or governmental body or judicial authority having jurisdiction over such persons, or with investors' prior consent. Stock exchanges, securities companies, securities registration and settlement institutions and securities service institutions shall not disclose the known business secrets unless required by law or by any securities exchange, regulatory or governmental body or judicial authority having jurisdiction over such persons."
"证券交易所、证券公司、证券登记结算机构、证券服务机构应当依法为投资者保密，除具有管辖权的法律、证券交易所、监管机构、政府机构或者司法机关要求或者有投资者的事前同意外，不得买卖、提供或者公开投资者信息。证券交易所、证券公司、证券登记结算机构、证券服务机构不得泄露所知悉的商业秘密。但是，具有管辖权的法律或者证券交易所、监管机构、政府有关部门、司法机关另有规定的除外。"

b) Use of others' accounts/accounts lending
利用他人账户／出借账户

The current Securities Law prohibits "illegal use of others' account" or "borrowing/lending of securities accounts", while we note that Article 66 has removed the word "illegal". ASIFMA fully understands the intention of such prohibition on use of others' account to trade. However, from drafting perspective, it would be advisable to add a qualifier of "unless provided under other laws and regulations" since certain legitimate trading arrangement involves use of accounts of others, e.g. trading of stock connect shares by international investors via a nominee account.
现行《证券法》禁止"非法利用他人账户"或"出借证券账户"，我们注意到，第 66 条已经删除了"非法"一词。我们完全理解禁止使用他人账户进行交易的立法意图。但从措辞角度来看，考虑到一些合法的交易安排可能涉及使用他人账户，如国际投资者通过名义持有人账户进行沪股通股票买卖等，建议在条款中增加"除非另有法律法规另有规定"的限定语。

c) Definition of major shareholder
主要股东的定义

The term "major shareholder" is mentioned in a few provisions in the Third Consultation Draft, e.g. Article 128 which requires that a major shareholder of a securities company to be set up not to be in material breach of laws in past three years, and Article 148 requires major shareholders of a securities company to submit information/materials to the securities regulator within prescribed time and to ensure the information/materials to be true, accurate and complete. We suggest the meaning of "major shareholder" being clarified in the Securities Law. We note that "Administrative Provisions on Equity in Securities Companies

(Draft for comments)" defines a major shareholder of a securities company to be a shareholder holding 25% or more of the equity of a securities company or the largest shareholder holding 5% or more of the equity of a securities company, while it appears to us that the Securities Law uses this term for a slightly different group of shareholders and this point is worth clarification.
"主要股东"这一词出现在三次审议稿的一些条文中。例如，第 128 条要求设立证券公司的主要股东在最近三年内无重大违法行为；第 148 条要求证券公司的主要股东向国务院证券监督管理机构在规定的时间内报送或者提供的信息、资料，且必须真实、准确、完整。我们建议在证券法中明确"主要股东"的含义。我们注意到《证券公司股权管理规定（征求意见稿）》将证券公司主要股东定义为持有证券公司 25%以上股权的股东或者持有 5%以上股权的第一大股东。但是《证券法》在适用这一概念时似乎针对的是不同的股东群体，这一点需要进一步说明。

ASIFMA greatly appreciates the NPC's consideration of the points and questions raised in this letter and would be pleased to discuss them in greater detail as appropriate. If you have any questions, please contact Eugenie Shen at eshen@asifma.org or Tel: +852 2531 6570. This submission was prepared by PRC law firm Fangda Partners, ASIFMA member, based on feedback from the wider ASIFMA membership.

本协会非常感谢全国人大考虑本函提出的观点和问题，并很乐意适时更详细地讨论这些问题。如果您有任何疑问，请联系沈玉琪（电邮 eshen@asifma.org 电话 +852 2531 6570）。本函由本协会会员上海市方达律师事务所在广泛征求本协会会员意见后撰写。

Yours sincerely,
顺颂商祺，

Mark Austen
Chief Executive Officer 首席执行官
Asia Securities Industry & Financial Markets Association 亚洲证券业与金融市场协会