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Financial

The Regulation of Overseas Derivatives Transactions – The First Step in the Exercising of Extraterritorial Jurisdictions?

To implement the *Futures and Derivatives Law* which took effect on August 1, 2022, the China Securities Regulatory Commission (CSRC) issued the *Measures for the Supervision and Administration of Derivatives Trading (Consultation Paper)* on March 17, 2023 (the "Consultation Paper" or the "Measures"). The intention is to unify the regulation of the derivatives market within the jurisdiction of the CSRC at a departmental regulation level. We note that Article 50, Paragraph 2 of the Measures stipulates that, "Where an overseas operation institution and an overseas trading institution conduct a derivatives transaction outside China while the relevant hedging transactions take place within China, they shall comply with the relevant provisions of Article 12, and Articles 14 to 22 of these Measures." This is the first time that the CSRC has proposed to regulate derivative transactions wherein both parties are foreign institutions. Our introduction and analysis below focuses on this provision.

I. Higher-Level Legal Basis for Extraterritorial Jurisdictions

Article 2 of the *Futures and Derivatives Law* provides for extraterritorial applications and stipulates that, "Futures trading, derivatives trading and related activities taking place outside the territory of the People's Republic of China that disrupt domestic market order and impair the legitimate rights and interests of domestic traders, shall be handled and investigated for legal liability in accordance with this *Futures and Derivatives Law*." This article provides a higher-level legal basis for Article 50, Paragraph 2 of the Measures. As mentioned in the previous JunHe Client Briefing "'*Constant Efforts Ensure Success' — Marking the Formal Promulgation of the Futures and Derivatives Law*", paralleling other cross-boundary investment schemes such as QFI, Stock Connect, and internationalized commodities futures products, foreign institutional investors indirectly trade domestic assets through trading overseas OTC derivatives products that link to domestic underlying assets such as stocks, bonds and their derivatives, as well as commodity derivatives. Such overseas OTC derivatives products (for example, Total Return Swap (TRS)) are usually tailor-made by foreign investment banks or foreign brokers for their institutional clients and could enable foreign investors to gain economic exposure to domestic underlying assets indirectly. Although the

Futures and Derivatives Law does not explicitly prohibit or restrict such OTC derivatives trading, the legality and compliance of such overseas OTC derivatives trading may need to be further reviewed depending on how PRC regulators exercise the extraterritorial jurisdiction with the authorization of Article 2 of the *Futures and Derivatives Law*.

II. The Meaning of "Hedging Transactions Taking Place within China"

Article 50, Paragraph 2 of the Consultation Paper would apply only to derivatives transactions taking place outside China while the relevant hedging transactions take place within China, but it is unclear how to define "relevant hedging transactions taking place within China". On a related note, Article 10 of the *Provisions on Issues Concerning the Implementation of the Measures for the Administration of Domestic Securities and Futures Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* provides that, "The CSRC, based on its regulatory needs, may require QFIs to report their overseas hedging positions related to domestic securities and futures investments." However, it is unclear how the "overseas hedging positions" would be defined either. If "hedging transactions taking place within China" referred to in Article 50, Paragraph 2 will cover any and all relevant transactions taking place within China, Article 50, Paragraph 2 would apply if an overseas TRS transaction links to any underlying assets listed and traded in a market regulated by the CSRC and the overseas operation institution acquires, holds or sells any positions of such underlying assets. This means that the way the PRC regulator interprets "hedging transactions taking place within China" would directly define the application of such a provision, i.e., whether a derivatives transaction concluded between an overseas operation institution and an overseas trading institution should be subject to Article 12, and Articles 14 to 22 of the Measures.

III. Compliance Requirements for Overseas Derivatives Transactions

Should Article 50, Paragraph 2 of the Measures applies to overseas derivatives transactions, the counterparties of such overseas derivatives transactions shall be subject to the following requirements:

3.1 Record of Transaction and Reporting Obligations

According to Article 12 of the Measures, derivatives operation institutions conducting hedging transactions on securities and futures trading venues shall comply with the provisions of the securities and futures trading venues. Securities and futures trading venues may provide necessary facilities such as position limit exemption for hedging transactions of derivatives operation institutions and strengthen the monitoring of hedging transactions. Derivatives operation institutions shall record the data and information of the counterparties, contracts, trading strategies and the trading details of the derivatives contracts relating to hedging transactions. Securities and futures trading venues may, based on the needs of monitoring, require derivatives operation institutions to provide relevant data and information. We understand this requirement is similar to the rules relating to QFI if it applies to overseas derivatives transactions, that being said, the relevant exchanges may, based on their monitoring needs, require foreign derivatives operation institutions to

report their overseas derivative transactions relating to domestic hedging transactions.

3.2 Looking-through for Shareholding Aggregation

Article 14 of the Measures states that, “For the performance of information disclosure obligations or in the acquisition activities or other activities, a derivative contract held by a trading institution with the stocks of a listed company or a company whose stocks are traded on any other national securities trading venue approved by the State Council (the "underlying stocks") as the underlying assets, shall be calculated in aggregate with the underlying stocks directly or indirectly held by the trading institution in accordance with the provisions of the securities trading venue.” This is an explicit requirement for aggregating shareholdings through both exchange trading and OTC derivatives trading. It reflects the regulator’s intention to strengthen integrated regulation over the OTC derivatives markets and the securities and futures markets to prevent the circumvention of regulation through derivatives transactions, as well as to collect information to better monitor the overall risks in both the exchange markets and the OTC markets.

3.3 Prohibited Trading Activities

The Measures codify practices and set out an independent chapter called “prohibited trading activities” (Articles 15 to 22) to prohibit illegal securities and futures activities and activities that circumvent regulations through derivatives transactions. The Measures stipulate that (1) it is prohibited to commit, through derivatives trading, any illegal acts or violations such as fraud, insider trading, market manipulation, interest tunneling and circumvention of regulations; (2) it is prohibited to indirectly conduct “short-swing” trading as provided by Article 44 of the *Securities Law* through derivatives trading; (3) any insiders aware of inside information or any person who obtains such inside information by illegal means shall be prohibited in securities and futures transactions from engaging in insider trading through derivatives trading; (4) it is prohibited to manipulate the securities markets or futures markets through derivatives trading, or to manipulate the derivatives markets through means such as securities trading, futures trading, or commodity trading; (5) it is prohibited to circumvent the rules on shareholding reduction and restricted shares through derivative trading; (6) a derivatives operation institution or trading institution is prohibited from concluding derivatives trading with a counterparty when they know or ought to know that the counterparty conducts prohibited activities as stated in Article 15 to Article 19 of the Measures through derivatives trading; (7) a derivatives operation institution is prohibited from engaging in derivatives trading with major shareholders, the de facto controller, directors, supervisors, and senior management personnel of a listed company, or with the shareholders who hold restrictive shares or hold shares subject to shareholding reduction restrictions if the underlying assets of the derivatives trading are stocks of such a listed company; and (8) listed companies and companies whose

stocks are traded on any other national securities trading venue approved by the State Council shall be prohibited from, in violation of the relevant provisions, concluding derivatives trading with stocks issued by themselves as the underlying assets.

The above provisions are not new rules in the context of domestic derivatives trading regulations, which were reiterated in the self-disciplinary rules of the Securities Association of China (SAC) and mentioned in certain circulars released by local CSRC bureaus in the past few years. Under the *Administrative Measures on TRS Businesses of Securities Companies*, for example, which was released by the SAC on December 3, 2021, a securities company is prohibited from: (1) conducting TRS transactions with any listed company or its affiliates or parties acting in concert where the underlying assets are the stocks issued by such a listed company in violation of the relevant rules; (2) facilitating regulatory arbitrage activities or other illegal activities or violations; (3) in a disguised form, functioning as a "channel" for counterparties.

Our Observations

It remains to be seen whether Article 50, Paragraph 2 of the Measures would broadly apply to overseas derivatives transactions with domestic underlying assets such as domestically listed stocks, bonds and their derivatives as well as commodity derivatives and whether the CSRC is prepared to take the first step to claim extraterritorial jurisdiction over overseas activities by formulating this provision. Foreign institutional clients are advised to pay close attention to legislative developments and assess their position from a compliance perspective.

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金融法律热点问题

监管境外衍生品交易——中国证监会行使域外管辖权的第一步？

为贯彻落实 2022 年 8 月 1 日生效的《期货和衍生品法》，中国证券监督管理委员会(以下简称“中国证监会”)于 2023 年 3 月 17 日发布《衍生品交易监督管理办法》(征求意见稿)(以下简称“《征求意见稿》”或“《办法》”)，拟以一部部门规章的形式统一规范在中国证监会监管范围内的衍生品市场。我们注意到，《办法》第五十条第二款规定，境外经营机构与境外交易者在境外开展衍生品交易，其对冲交易发生在境内的，应当符合《办法》第十二条、第十四条至第二十二条等有关规定。这是中国证监会首次拟规范交易双方均为境外机构的衍生品交易。以下我们就这一问题做一简要介绍和分析。

一、作为上位法的域外管辖权条款

《期货和衍生品法》第二条赋予了该法域外管辖的效力。根据该条，在中华人民共和国境外的期货交易和衍生品交易及相关活动，扰乱中华人民共和国境内市场秩序，损害境内交易者合法权益的，依照《期货和衍生品法》有关规定处理并追究法律责任。《办法》第五十条第二款的上位法依据正是《期货和衍生品法》第二条。正如我们在此前法评中提及，与 QFI、股票通和特定期货品种准入等机制并行，境外机构投资者投资中国证券和期货市场的常见方式还包括通过在境外市场达成与境内上市流通的底层资产(如股票和债券及其衍生品以及商品衍生品等)挂钩的衍生品交易间接交易境内资产，如总收益互换(Total Return Swap，即 TRS)，该等交易通常由境外投行或券商为其机构类客户度身定制，可以帮助境外投资者间接获得境内底层资产的经济收益。尽管《期货和衍生品法》并未明确规范此类境外衍生品交易，《期货和衍生品法》第二条有关域外管辖的规定如何实施将对上述境外衍生品交易的合法合规性产生直接影响。

二、何谓“对冲交易发生在境内”？

《征求意见稿》第五十条第二款仅仅适用于与境外衍生品交易相关的对冲交易发生在中国境内的情形下达成的境外衍生品交易，此处发生在境内的相关对冲交易的含义尚不清楚。与此相关的是，《关于实施<合格境外机构投资者和人民币合格境外机构投资者境内证券期货投资管理办法>有关问题的规定》第 10 条规定，中国证监会可以根据监管需要，要求合格境外投资者报告其在境外开展的与境内证券期货投资相关的对冲交易头寸等信息，但该规定也没有明确如何认定“相关的对冲交易头寸”。如《办法》第五十条第二款所述发生在境内的对冲交易涵盖任何在中国境内发生的相关交易，则只要境外 TRS 挂钩某一在中国证监会监管的市场上市流通的底层资产而境外衍生品经营机构获得、持有或出售该等底层资产的仓位，境外 TRS 将落入第五十条第二款的适用范围。因此，此处如何

解读发生在境内的相关对冲交易直接决定了境外经营机构和境外交易者在境外达成的衍生品交易是否需要遵守《办法》第十二条、第十四条至第二十二条的规定。

三、对境外衍生品交易的合规性要求

若某一境外衍生品交易适用《办法》第五十条第二款，则境外交易双方需要遵守如下规定：

3.1 交易的记录和提供义务

《办法》第十二条规定，衍生品经营机构在证券期货交易场所进行对冲交易的，应当遵守证券期货交易场所的规定。证券期货交易场所可以为衍生品经营机构的对冲交易行为提供持仓限额豁免等必要的便利，并对对冲交易行为进行重点监控。衍生品经营机构应当记录与对冲交易相关的衍生品合约的交易对手方、交易合约、交易策略、交易明细等数据信息。证券期货交易场所根据监测需要，可以要求衍生品经营机构提供上述相关数据信息。我们理解本条如果适用于境外衍生品交易，则其效果类似于上述对 QFI 的要求，即境内相关交易所可以根据监测需要，要求境外衍生品经营机构报告其与境内对冲交易相关的境外衍生品合约的信息。

3.2 穿透合并计算

《办法》第十四条规定，在履行信息披露义务或者收购等活动中，交易者持有的以上市公司或者股票在国务院批准的其他全国性证券交易场所交易的公司的股票(以下简称标的股票)为标的资产的衍生品合约，应当按照证券交易场所的规定与其直接和间接持有的标的股票合并计算。本条明确了场内场外合并持仓的要求，反映了监管机关旨在加强场外衍生品市场与证券市场、期货市场的统筹监管，防范利用衍生品交易规避场内监管，并通过数据收集掌握场内场外总体风险。

3.3 禁止的交易行为

针对实践中存在利用衍生品交易实施证券期货违法行为或者规避监管的情况，《办法》进行了系统梳理，专设第三章(第十五条至第二十二条)“禁止的交易行为”进行规范，如：1. 以概括性的条款规定禁止通过衍生品交易实施欺诈、内幕交易、操纵市场、利益输送、规避监管等违法违规行为。2. 禁止通过衍生品交易间接实施《证券法》第四十四条规定的短线交易行为。3. 禁止证券期货交易中的内幕信息的知情人和非法获取内幕信息的人通过衍生品交易从事内幕交易。4. 禁止通过衍生品交易操纵证券市场或者期货市场，禁止通过证券交易、期货交易或者商品交易等方式操纵衍生品市场。5. 禁止通过衍生品交易规避股份减持、限售规则。6. 禁止衍生品经营机构、交易者在明知或者应当知道其交易对手方通过衍生品交易实施《办法》第十五条至第十九条规定的行为，仍与其达成衍生品交易。7. 为避免上市公司大股东、实际控制人、董监高、限售股东、减持限制股东通过衍生品交易非法获利或者规避监管，禁止衍生品经营机构与其达成以该上市公司股票为标的的衍生品交易。8. 禁止上市公司或者股票在国务院批准的其他全国性证券交易场所交易的公司违反规定达成以其发行的股票为标的资产的衍生品交易。

对于中国证监会监管的境内衍生品交易，上述禁止类的规定并不新鲜，其基本原则和精神早已于过去几年在中国证券业协会(“中证协”)的自律规则以及地方证监局的监管通知中有所体现，例如中证协于 2021 年 12 月 3 日颁布的《证券公司收益互换业务管理办法》明确禁止证券公司从事以下几类行为，如(1)违规与上市公司及其关联方、一致行动人开展以本公司股票为标的的收益互换交易；(2)为监管套利等违法违规行为提供便利；(3)变相成为交易对手方交易通道等。

我们的观察

《办法》第五十条第二款是否会广泛适用于以境内上市流通的股票和债券及其衍生品以及商品衍生品作为底层资产的境外衍生品交易以及中国

证监会是否会藉此作为行使域外管辖权的第一步仍有待观察。我们建议境外机构客户密切注意这一立法动态并及时做出相应的合规评估。

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