

## 金融法律热点问题

### 央行就金融基础设施监督管理办法征求意见

早在2020年2月，中国人民银行(“央行”)、国家发展和改革委员会(“发改委”)、财政部、中国银行保险监督管理委员会(“银保监会”)、中国证券监督管理委员会(“证监会”)、国家外汇管理局(“外汇局”)联合印发《统筹监管金融基础设施工作方案》，要求央行与有关部门积极推进相关工作，制订金融基础设施管理办法。日前，央行公布了由其牵头起草的《金融基础设施监督管理办法(征求意见稿)》(“《办法》”)并公开征求意见。《办法》明确了金融基础设施监督管理的总体制度框架，完善了金融基础设施准入和监管原则，强化了金融基础设施运营要求及风险管理。以下我们对《办法》的若干重点条款进行分析以供参考。

#### 一、金融基础设施相关定义

《办法》规定的金融基础设施包括六大类，即金融资产登记存管系统、清算结算系统(含开展集中清算业务的中央对手方)、交易设施、交易报告库、重要支付系统、基础征信系统。金融基础设施运营机构则指根据法律法规、国务院相关决定及《办法》规定，经批准负责建设、运营和维护金融基础设施的企业法人或事业单位法人。国务院金融管理部门(即一行两会一局，央行、银保监会、证监会、外汇局)将公布金融基础设施及运营机构的名单。值得注意的是，《办法》区分了国务院金融管理部门和国务院金融监督管理机构，前者是一行两会一局，后

者则仅指银保监会和证监会。同时，《办法》中所称国家宏观经济管理部门包括三个部门，即发改委、财政部和央行。

《办法》还特别提及国务院财政部门依法履行对金融基础设施的监督管理职责。此外，国务院财政部门还应当按照《中共中央国务院关于完善国有金融资本管理的指导意见》、《国有金融资本出资人职责暂行规定》等有关规定要求，对国家及其授权投资主体直接或间接出资设立的金融基础设施运营机构加强国有金融资本管理，会同相关国务院金融管理部门依法建立金融基础设施财务管理制度，依法收取国有金融资本收益，法律法规另有规定的，从其规定。

#### 二、金融基础设施规划及发展的基本原则

《办法》提出了金融基础设施规划及发展的基本原则，要求国务院金融管理部门加强规划引领，促进金融基础设施之间有序互联互通，适度竞争，亦要求金融基础设施运营机构服从大局、优先维护公共利益，防止金融基础设施运营机构过度追求利润和承担风险。《办法》特别要求对于涉及国家金融安全、外溢性强的金融基础设施类机构，应保持国家绝对控制力。考虑到金融基础设施的特殊性和对金融体系的影响，我们猜测金融基础设施的任何上市计划都可能会基于上述发展原则而搁置。

### 三、准入与监管原则

《办法》规定金融基础设施的准入和监督管理应当遵循“谁审批、谁监管、谁负责”的原则。《办法》的适用范围仅限于经国务院或国务院金融管理部门批准设立的金融基础设施，省级人民政府批准设立的金融基础设施仍由省级人民政府负责监督管理。《办法》还规定了设立金融基础设施的运营机构及其高管应当具备的条件，并列举了申请设立金融资产登记存管、清算结算、交易及交易报告四类金融基础设施的应当递交的申请材料，以及发生规定事项的批准程序。

央行、银保监会和证监会于 2018 年发布的《关于完善系统重要性金融机构监管的指导意见》(“《指导意见》”)规定的系统重要性金融机构是指因规模较大、结构和业务复杂度较高、与其他金融机构关联性较强，在金融体系中提供难以替代的关键服务，一旦发生重大风险事件而无法持续经营，将对金融体系和实体经济产生重大不利影响、可能引发系统性风险的金融机构，其具体范围包括系统重要性银行业机构、系统重要性证券业机构、系统重要性保险业机构，以及国务院金融稳定发展委员会(以下简称“金稳委”)认定的其他具有系统重要性、从事金融业务的机构。而《指导意见》中金稳委认定的其他具有系统重要性、从事金融业务的机构是否包括金融基础设施并不明确。新出台的《办法》首次提出了系统重要性金融基础设施的界定标准。《办法》规定经认定符合以下部分或全部标准且由国务院金融管理部门按职责分工负责提出认定意见并监管的，属于系统重要性金融基础设施：(1)参与者数量大、分布广；(2)市场占有率较高；(3)业务复杂，与金融机构关联性强，或者与其他系统重要性金融基础设施相互连接；(4)在金融市场中提供难以替代的关键服务，一旦发生重大风险事件等导致无法持续经营，可能对金融体系和实体经济产生重大不利影响。就监管职责分工，《办法》规定系统重要性金融基础设施及其运营机构，在维持由国务院金融管理部门负责监管的现行监管体制不变基础上，由央行负责宏观审慎监管。这意味着《办法》并不会改变现有的监管体制，而只是在此基础

上增加央行负责的宏观审慎监管。

《办法》还提出了与国际准则的衔接，要求金融基础设施的建设、运营和维护在立足我国实际情况的前提下与《金融市场基础设施原则(PFMI)》等国际准则相接轨。早在 2013 年，央行和证监会曾分别发布关于实施《金融市场基础设施原则》有关事项的通知(分别为银办发[2013]187 号，证监办发[2013]42 号)，要求金融市场基础设施运行单位遵守 PFMI 有关标准，并对照 PFMI 开展自评和评估活动。此次《办法》再次重申有关原则，要求金融基础设施在立足我国实际情况的同时，对标国际准则要求。

《办法》强调，未经批准，任何单位或者个人不得设立或者以任何形式运营金融基础设施，不得使用“金融”、“交易所”、“交易中心”、“登记结算”、“清算”、“交易报告”等涉及金融基础设施服务或近似的名称。

### 四、境外金融基础设施跨境交付

我们注意到，在央行的诸多规章中首次出现对境外金融基础设施跨境交付<sup>1</sup>的规定，这预示着在金融领域跨境交付适用的准入和管理将越来越成为常见的立法规范对象。《办法》确定了跨境交付情形下的准入要求和条件以及报告义务：第一，相关法律法规允许境外金融基础设施向境内单位或者个人提供跨境交付服务的，应由国务院金融管理部门按职责分工依据相关法律法规实施准入；第二，为境内居民或机构提供跨境交付服务的境外金融基础设施及其运营机构，应开展金融基础设施服务 3 年以上，受到其所在国家或地区相应政府机构的具有可比性且全面的监管与规制，未出现重大风险事故或受到相关监管机构处罚且情节严重的情形；第三，按照监管对等原则，上述境外金融基础设施运营机构应就业务开展情况根据职责分工向相关国务院金融管理部门及有关部门报告，报告的内容包括境外展业合规情况、在境外取得监管授权与豁免、业务牌照和许可的情况、基于《金融市场基础设施原则(PFMI)》开展的自评报告以及国务院金

<sup>1</sup> 跨境交付一般指服务的提供者在一成员方的领土内，向另一成员方领土内的消费者提供服务的方式。

融管理部门规定的其他事项，并应遵守相关业务管理要求。国家另有规定的，从其规定。

实践中，《中华人民共和国期货和衍生品法》（“《期货法》”）已明确规定境外期货交易所向境内单位或者个人提供直接接入该交易所交易系统进行交易服务的，应当向证监会申请注册，接受证监会的监督管理，但证监会另有规定的除外。境外机构（包括境外交易所和其他境外金融基础设施）在境内从事期货市场营销、推介及招揽活动，应当经证监会批准，并适用《期货法》的相关规定。此外，境内机构为境外机构在境内从事期货市场营销、推介及招揽活动，也应当经证监会批准。然而截至目前，境外期货交易所向境内提供跨境服务的注册要求以及境外机构在境内从事营销相关活动的批准流程均未出台任何具体规定。在《办法》出台后，国务院金融管理部门是否会对境外金融基础设施跨境交付进一步做出规定，仍有待观察。

## 五、运营要求、风险管理及数据安全

《办法》明确了金融基础设施运营机构在关键业务岗位管理、技术规范、系统故障应急处理机制和灾难备份机制等方面的运营准则。同时，《办法》对金融基础设施及其运营机构面临的法律、信用、流动性、业务及运营风险等提出具体管理规定，要求金融基础设施运营机构监测所在市场整体运行风险，维护市场秩序，强化风险管理。

根据《办法》，金融基础设施运营机构应当按照有关规定，以保证金、一般风险准备等方式储备充足的风险准备资源，用于弥补因违约交收、技术故障、操作失误、不可抗力及其他尚未识别的风险事件造成的损失。金融基础设施的各项收益安排应当首先用于保证场所和设施的风险防范、正常运行与逐步改善，合理设置利润留存项目，做好长期资金安排。金融基础设施运营机构不得为实现商业利益而缩减风险管理方面的投入，且应当具有必要的财务资源，以保障系统效率和运维安全。目前国内

的期货交易所、上海清算所等作为中央对手方已经建立了保证金、风险准备金等多防线违约处置机制和瀑布式风险准备资源(Default Waterfall)，可以在日常监测中掌握会员的风险状况，在会员发生违约时通过违约处置流程缓解违约影响，从而保护未违约的市场参与者。

《办法》明确了金融基础设施运营机构应对金融基础设施参与者的业务数据信息、相关资料，以及提供服务过程中产生的其他数据信息进行保密，且应当为参与者及时获得与其相关数据信息及资料提供便利。

## 六、统筹监管需要的检查权和评估权

《办法》还规定了央行的检查权以及评估权。根据金融基础设施统筹监管需要和业务相关性，央行将会同银保监会或证监会（视各自职责权限而定）对金融基础设施及其运营机构进行检查。检查内容包括以下内容：（一）是否符合系统重要性金融基础设施标准；（二）是否违反审慎经营原则及公平竞争审查制度相关规定；（三）财务状况是否能合理匹配承担的风险与成本；（四）是否遵守中国人民银行宏观审慎监管相关要求。但除上述检查内容外，其他相关监管活动应按照现行国务院部门职责分工组织开展。央行还将会同相关国务院金融管理部门与国务院财政部门联合组织成立专家组，开展金融基础设施评估。而金融基础设施运营机构则需要每年开展自评。

## 展望

随着金融市场快速发展，特别是在当前跨市场交易日益活跃、金融科技迅猛发展的新形势下，《办法》的出台可以有效地对金融基础设施监管治理中现存的问题进行梳理，并将在金融基础设施的准入与退出、日常运营、内部治理、风险管理等方面建立既符合我国实际又与国际准则有效衔接的统一监管标准，健全我国金融基础设施的监管体系。

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## Financial

### People's Bank of China Solicits Comments on the Measures for the Supervision and Administration of Financial Infrastructures

In February 2020, the People's Bank of China (PBOC), the National Development and Reform Commission (NDRC), the Ministry of Finance (MOF), the China Banking and Insurance Regulatory Commission (CBIRC), the China Securities Regulatory Commission (CSRC) and the State Administration of Foreign Exchange (SAFE) jointly released the *Work Plan on the Overall Regulation of Financial Infrastructures* ("Work Plan"). The PBOC shall take the lead and actively coordinate all work of the relevant regulatory authorities to facilitate the formulation of the relevant administrative measures for financial infrastructures according to the Work Plan. To implement the Work Plan, the PBOC issued the *Measures for the Supervision and Administration of Financial Infrastructures (Draft for Comment)* ("Measures") for public consultation last month. The Measures aim to clarify the overall regulatory framework for financial infrastructures, improve the market entry and regulatory principles, and enhance the operational requirements and risk management. Below are some of the key provisions of the Measures:

#### I. **Financial Infrastructure-Related Definitions**

The Measures specify six types of Financial Infrastructures (FIs), i.e., (1) the financial asset registration and depository systems, (2) the clearing and settlement systems (including central counterparties engaged in centralized clearing business), (3) the trading facilities, (4) the trading repositories, (5) the important payment systems, and (6) the basic credit reference systems. Financial Infrastructure Operators shall refer to enterprise-type legal persons or public institution-type legal persons that are approved in accordance with the laws, regulations and relevant decisions of the State Council and the Measures to take charge of the construction, operation, and maintenance of FIs (FI Operators). The financial administrative departments of the State Council, namely, the PBOC, the CBIRC, the CSRC and the SAFE, shall publicize the list of FIs and FI Operators. Notably, the Measures distinguish the "financial administrative departments of the State Council" from the "financial regulatory authorities of the State Council", specifying that the former refers to the PBOC, the CBIRC, the CSRC and the SAFE, while the later only refers to the CBIRC and the CSRC. Additionally, the national macroeconomic administrative departments as stipulated in the Measures refer to the NDRC, the MOF and the PBOC.

Particularly, the Measures specify that the finance department of the State Council (i.e., the MOF) shall perform the supervision and administration of FIs in accordance with the law. The finance department of the State Council shall, pursuant to the *Guiding Opinions of the State Council on Improving the Administration of State-Owned Financial Capital*, the *Interim Provisions on the Responsibilities of Contributors to State-Owned Financial Capital* and other requirements in relevant regulations, strengthen the regulation of state-owned financial capital in FI Operators funded directly or indirectly by the State or its authorized entities. It shall also work jointly with the relevant financial administrative departments of the State Council to formulate the financial management rules for FIs to collect the returns of state-owned financial capital in accordance with the law, unless otherwise provided by the laws and regulations.

## **II. Basic Principles for the Planning and Development of Financial Infrastructures**

The Measures propose basic principles for the planning and development of FIs. The financial administrative departments of the State Council are required to carry out their responsibilities of systematic planning and direction, encourage orderly interconnection and promote moderate competition among FIs, require FI Operators to serve the overall situation, give priority to safeguarding the public interest and prevent FI Operators from excessively pursuing profits and taking risks. Particularly, the Measures stipulate that the State shall maintain absolute control over FIs that involve the financial security of the State and may cause risk contagion. We guess that FIs that have their IPO plans may have to put on hold in the context of the foregoing principles due to the uniqueness of FIs and their impact on the financial system.

## **III. Market Entry and Regulatory Principles**

The market entry and regulation of FIs shall abide by the principle of “those who approve it shall regulate it and take relevant responsibility”. The Measures only apply to FIs established upon the approval of the State Council or the financial administrative departments of the State Council, while those established upon the approval of provincial governments shall continue to be regulated by the relevant provincial governments. The Measures also specify the market entry requirements for FI Operators and their senior officers and enumerate the application materials required for the establishment of the following FIs, i.e., the financial asset registration and depository institutions, the clearing and settlement institutions, the trading facilities, and the trading repositories, as well as the approval procedures for reviewing the application upon the occurrence of certain events.

According to the *Guiding Opinions on Improving the Regulation on Systemically Important Financial Institutions* (the “Guiding Opinions”) jointly issued in 2018 by the PBOC, the CBIRC and the CSRC, Systemically Important Financial Institutions refer to financial institutions that are large in scale, have highly complex structures and businesses, and are relevant to other financial institutions. They provide key and irreplaceable services in the financial system, and as a result, their incapacity to continuously operate due to major risk events will result in significant adverse impacts on the financial system and the real economy and may trigger systemic risks. Systemically Important Financial Institutions include systemically important banking institutions, systemically important securities institutions, systemically important insurance institutions and other systemically important institutions engaging in financial business as determined by the Financial Stability and Development Committee of the State Council (Financial Stability Committee). It is not clear in the Guiding Opinions whether FIs shall be determined by the Financial Stability Committee

as other systemically important institutions engaging in financial business. For the first time, the Measures propose the criteria for determining Systemically Important Financial Infrastructures (SIFIs). According to the Measures, a FI shall be regarded as a SIFI where any FI satisfies part or all of the following criteria and is subject to the determination opinion issued by and the regulation of the financial administrative departments of the State Council according to their division of functions: 1) having a large amount of and widespread participants; 2) having a relatively high market share; 3) conducting complex businesses, and being closely relevant to financial institutions or being interconnected with other SIFIs; and 4) providing key services that are irreplaceable in the financial market, and their incapability to continuously operate due to major risk events may lead to a significant adverse impact on the financial system and the real economy. In terms of the division of regulatory functions, the Measures are aligned with the current regulatory regime and the financial administrative departments of the State Council shall be responsible for the regulation of SIFIs and their operators. The Measures further provide that the PBOC shall be responsible for the macro-prudential regulation, which means that the current regulatory regime does not change while acknowledging the macro-prudential regulation responsibility of the PBOC.

The Measures provide that the regulation should be in line with international standards, i.e., the construction, operation, and maintenance of FIs shall align with the *Principles for Financial Market Infrastructure (PFMI)* and other international standards while taking local situation into consideration. In 2013, the PBOC and the CSRC respectively issued *Circulars on Relevant Matters Concerning the Implementation of the Principles for Financial Market Infrastructure (PFMI)* (respectively, Yin Ban Fa [2013] No.187 and Zheng Jian Ban Fa [2013] No.42), requiring the

operators of financial market infrastructures comply with the relevant standards of the PFMI and carry out self-assessment and evaluation according to the PFMI standards. The Measures reiterate pertinent principles and require that FIs should follow international standards while taking the local situation into consideration.

The Measures highlight that no entity or individual shall establish FIs or operate FIs in any manner, nor shall they use such names as “financial”, “exchange”, “trading center”, “registration and settlement”, “clearing”, “trading repository” or other names that relate to FI services or similar names without proper approval.

#### **IV. Cross-Border Delivery of Services by Overseas FIs**

The PBOC, for the very first time, provides for the cross-border delivery of services by overseas FIs, which indicates that it will become more common in imposing market entry and administration requirements applicable to cross-border delivery of services in the financial sector. The Measures specify market entry requirements, conditions, and reporting obligations in cross-border delivery. Firstly, if the relevant laws and regulations permit overseas FIs to provide services to domestic institutions or individuals in a cross-border way, the financial administrative departments of the State Council shall implement the market entry administration according to the division of their functions and the relevant laws and regulations. Secondly, overseas FIs and their operators that provide cross-border services to domestic residents or institutions shall have been offering financial infrastructure services for more than three years, be subject to the comparable and comprehensive regulations of the corresponding authorities of their home countries or regions and have not been involved in any major risk events nor have been punished by the relevant regulators for serious violations. Thirdly, under the principle of regulatory reciprocity, the operators of overseas FIs shall report their business operation

status to the financial administrative departments of the State Council and the relevant authorities according to their division of functions, and comply with the relevant business operation requirements, unless otherwise provided by the State. Specifically, the operators of overseas FIs shall report their compliant operating status in overseas markets, any regulatory authorization and exemptions, business licenses and permits they have obtained in overseas markets, the self-assessment reports they prepared according to the PFMI standards, and other information required by the financial administrative departments of the State Council.

The *Futures and Derivatives Law of the People's Republic of China* (FDL) requires overseas futures trading venues that provide domestic entities or individuals with direct access to their trading systems to register with the CSRC and be subject to supervision and administration by the CSRC, unless otherwise stipulated by the CSRC. Overseas institutions (including overseas exchanges and other overseas FIs) are required to obtain approval from the CSRC and shall be subject to the relevant provisions of the FDL if they engage in futures marketing, promotion or solicitation activities within the territory of the PRC. Domestic institutions shall also obtain approval from the CSRC if they conduct futures marketing, promotion or solicitation activities within the territory of the PRC for any overseas institutions. The registration requirements for overseas futures exchanges to offer cross-border services to China domestic clients and the approval process for overseas institutions to engage in pertinent futures marketing activities in China, however, have not yet been specifically formulated. After the promulgation of the Measures, it remains to be seen whether the financial administrative departments of the State Council will develop further provisions on the cross-border delivery of services by overseas FIs.

## **V. Requirements for Operation, Risk**

### **Management and Data Security**

The Measures provide operational guidelines for FI Operators with respect to the management of key business positions, technical specifications, emergency response systems, and disaster backup mechanisms. The Measures also provide specific requirements for the management of legal, credit, liquidity, business and operational risks faced by FIs and FI Operators and require FI Operators to monitor the overall operational risks of the market, maintain market order and enhance risk management.

Pursuant to the Measures, FI Operators shall, in accordance with the relevant regulations, maintain sufficient risk reserves in the forms of margins, general risk reserves or take other measures to cover losses caused by delivery defaults, technical failures, operational errors, force majeure events and other unidentified risk events. FIs shall firstly apply their revenue to ensure risk prevention, the operation and improvement of their venues and facilities, reasonably set up profit-retention regimes, and make long-term capital arrangements. FI Operators shall not reduce investment in risk management measures for the purpose of realizing additional commercial benefits and shall maintain necessary financial resources to ensure system efficiency and the security of operations and maintenance. Domestic central counterparties such as futures exchanges and the Shanghai Clearing House have to date established multi-layered mechanisms for default handling (including margin and risk reserves) as well as Default Waterfall, so that they can monitor their members' risk status and mitigate the impact of the default of members via default handling procedures, to protect non-defaulting market participants.

The Measures specify that FI Operators shall keep confidential the business data and relevant materials of the participants of FIs, and other data and information generated from the provision of



services, as well as provide facilities to participants to obtain in a timely manner any relevant data and materials.

## **VI. Inspection and Appraisal Powers for Overall Regulation**

The Measures grant inspection and appraisal powers to the PBOC. Based on the needs of overall regulation and the business relevance of FIs, the PBOC may work with the CBIRC or the CSRC (based on the division of supervision and administration functions) to carry out inspections on FIs and/or FI Operators. Inspections may cover aspects including 1) whether they meet the criteria of SIFIs; 2) whether they violate the principles of prudent operation or the relevant provisions of the fair competition review mechanism; 3) whether their financial status reasonably matches the risks and costs they bore; and 4) whether they comply with the macro-prudential regulation requirements of the PBOC. FIs and FI Operators are still subject to other regulatory activities performed by the departments of the State Council based on their existing division of functions. In addition, the

PBOC may set up expert groups with the relevant financial administrative departments and finance departments of the State Council to jointly perform the assessment on FIs, while FI Operators shall conduct self-assessments on an annual basis.

## **Outlook**

The promulgation of the Measures may effectively address the challenges encountered in the regulation of FIs by PRC regulators given the rapid development of the China financial markets, especially the increasingly active cross-border trading activities and rapid development of financial technologies. The Measures establish uniform regulatory standards on market entry and exit, daily operation, internal governance, risk management and other aspects of FIs. These standards are based on China's unique situation while are in line with international practices, aiming to improve China's regulatory framework on FIs.

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