

资本市场法律热点问题

证监会就境外交易所代表机构管理办法征求意见

2018年9月28日，中国证券监督管理委员会(以下简称“证监会”)就《境外证券期货交易所驻华代表机构管理办法(征求意见稿)》(以下简称“《征求意见稿》”)公开征求意见。《境外证券期货交易所驻华代表机构管理办法》(以下简称“《办法》”)正式发布后将取代2007年5月20日证监会发布的《境外证券交易所驻华代表机构管理办法》(以下简称“《旧规》”)。下面我们简要介绍可能对境外交易所在中国的活动产生影响的重要修改并提出我们的修改意见和建议。

1、明确备案要求和程序

《征求意见稿》适用于所有境外证券交易所、期货交易所、证券期货自动报价或者电子交易系统或者市场以及证监会认定的其他境外交易所在中国设立代表处或从事代表处活动。此处的代表处活动特指联络、调研等活动，而不包括任何营利性的活动。

值得注意的是，证监会同时发布的《修订说明》引述了全国金融工作会议有关“所有金融业务都要纳入监管”的要求，并特别指出部分境外期货交易所在中国设立了类代表处性质的办公室或者公司，游离于监管之外，因此为实现监管全覆盖，《征求意见稿》将《办法》的适用范围从证券交易所扩大到证券或期货交易所。同时，《征求意见稿》明确了备案的材料要求和程序，要求境外交易所应当在代表处完成工商登记后五个工作日内向其所在地证监

会派出机构提交备案材料，逾期未提交备案材料可能导致处罚。

但《征求意见稿》未明确未经备案代表处及其员工是否不得从事活动，也未明确证监会派出机构反馈需要补充提供备案材料的时限以及完成备案审查并公示的时限。我们建议《征求意见稿》明确规定未经备案代表处不得以代表处名义开展联络和市场调研活动，只可进行相关筹备工作，并明确证监会派出机构对备案材料的意见反馈时限以及完成备案审查并公示的时限。

2、有关市场介绍的报备

《旧规》第三十六条规定：“代表处未经事先报告擅自组织举办面向企业的大型推介活动的”，证监会将依法予以处罚。《修订说明》特地澄清《旧规》使用的“推介”一词可能有歧义，因此将其改为“市场介绍”，并将“市场介绍”定义为代表处及其工作人员对机构或者企业举办的培训、会议、座谈等活动，要求代表处组织或参与举办面向机构或者企业的市场介绍时，应当事先将活动方案(包括时间、地点、日程、会议资料等信息)报送代表处所在地证监会派出机构，并承诺严格遵守《办法》规定。只有代表处所在地证监会派出机构自受理之日起五个工作日内未提出异议的，方可进行市场介绍活动。

我们的观点是，要求对市场介绍活动进行报备

有助于规范代表处的活动以确保合规，体现了金融审慎监管的精神，但为提高监管效率和降低境外机构的运营成本和合规负担，建议将“事前报告及无异议”修改为“事后报备”，并且豁免对小规模市场介绍活动(如一对一或其他面向特定机构或企业的会议)的报备要求。

3、明确禁止的活动

《征求意见稿》保留了《旧规》列举的以下禁止性活动：代表处及其工作人员不得从事或者变相从事任何经营性活动，不得以任何形式进行广告宣传，不得与法人或者自然人签订可能给代表处或者其境外交易所带来收入的协议或者合同，还新增了“不得向境内单位或者个人提供交易直接接入服务，不得通过境外交易所会员等机构以任何形式向境内单位或者个人提供交易服务以及其他法律、法规规定的禁止性活动”。

根据国务院于2010年11月19日颁布并于2013年7月18日修改的《外国企业常驻代表机构登记管理条例》(以下简称“《常驻代表机构条例》”)第十三条，代表处不得从事营利性活动。为避免疑义，我们建议《征求意见稿》与《常驻代表机构条例》保持一致，即全文统一以“营利性活动”代替“经

营性活动”的表述，并明确代表处从事的市场调查研究和联络活动不属于营利性活动。

4、管辖权问题

《征求意见稿》的第十四条和第十五条规定了不同的管辖权行使情形：一是未经工商部门登记而设立代表处或从事代表处活动的，证监会派出机构通知当地工商行政管理部门依法予以处理；二是办理代表处工商登记后未向其代表处所在地证监会派出机构备案或者逾期未提交备案材料而设立代表处或者从事代表处活动的，由证监会或其派出机构处罚；三是已经备案的代表处及其工作人员非法经营证券期货业务的，由证监会或者其派出机构处罚；四是已经备案的代表处及其工作人员违法从事证券期货业务以外营利性活动的，证监会派出机构通知工商等相关部门依法予以处理。此外，《征求意见稿》要求自《办法》施行起180天以内，已在境内设立办事机构或者从事代表处活动的境外交易所，应当向证监会相关派出机构进行备案。由此可见，一旦《办法》正式颁布，境外交易所可能需要评估其在境内设立各类实体的业务活动并根据《办法》完成代表处的备案，否则可能导致被证监会或登记机关处罚。

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Capital Market

CSRC Solicits Comments on Administrative Measures for Foreign Exchange Representative Offices

On September 28, 2018, the China Securities Regulatory Commission (CSRC) announced that it is soliciting public comment on the Administrative Measures on the Representative Offices of Foreign Securities and Futures Exchanges in China (Consultation Paper) (“**Consultation Paper**” or “**Measures**”). The Consultation Paper if enacted will replace the Administrative Measures on the Representative Offices of Foreign Securities Exchanges in China issued by the CSRC on May 20, 2007 (“**Old Measures**”). Below we provide an overview of key amendments that may have implications for foreign exchanges’ activities in China and our comments and suggestions on the Consultation Paper.

1. Filing Requirements and Procedures

The Consultation Paper applies to the establishment of and activities carried out by representative offices (“**Representative Office Activities**”) of all foreign securities exchanges, futures exchanges, securities or futures automatic quotation or electronic trading systems or any other foreign exchanges recognized by the CSRC. Representative Office Activities include activities such as liaison and research, but exclude any for-profit business activities.

Of note, in the draft statement released by the CSRC at the same time as the Consultation Paper, there is a reference to the National Financial Work Conference’s requirement that “all financial businesses shall be regulated”. The draft statement draws attention to foreign futures exchanges that have established offices or businesses in China along the lines of representative offices but have not been filed with the CSRC and hence their activities are currently beyond the reach of financial regulation. In order to extend its supervisory and regulatory coverage, the Consultation Paper expands the scope from only securities exchanges to include both securities and futures exchanges.

The Consultation Paper sets out the documents required and procedures for filing. A foreign exchange is required to submit filing materials to the local office of the CSRC where it is domiciled within five working days after the completion of Administration of Industry and Commerce (AIC) registration. Failure to submit the filing materials on time may result in a penalty. However, the Consultation Paper does not specify whether a representative office and its staff may carry out activities without filing, nor does it indicate the time limit for a local office of the CSRC to provide feedback on any supplementary materials that

may be required, nor on the time limit for the completion of the review and publication of the filing.

We suggest that the Consultation Paper should explicitly stipulate that, prior to filing, a foreign exchange is not allowed to engage in liaison or market research activities in the name of representative office, though it should be allowed to conduct any relevant preparation work for the business; and that there should be specific time limits stipulated for the local CSRC office to provide its feedback and for review and publication of filing.

2. Filing of Marketing Event

Articles 36 of the Old Measures stipulates that where a representative office organizes and holds large-scale promotion activities targeting enterprises without prior filing, the CSRC will impose penalties on such representative office in accordance with the law. The draft statement clarifies that the word “promotion” used in the Old Measures is ambiguous, and therefore replaces it with “marketing event”, which is defined to include training session, conference, or seminar targeting institutions or enterprises organized or held as a sponsor by a representative office or its staff. The Consultation Paper further requires a representative office to submit plans - including details such as time, location, agenda, meeting materials - for any proposed event which it organizes or holds as a sponsor to the local office of the CSRC where it is domiciled, and to undertake that it will strictly abide by the provisions of the Measures. Only if the local office of the CSRC does not raise any objections within five working days after the date of acceptance of filing, will the representative office be able to proceed with the marketing event.

In our view, the requirement to file marketing event activities reflects the intended spirit of prudential regulation of the financial sector and will serve to regulate the activities of representative offices and help to ensure compliance. However, in order to ensure efficiency in regulation and supervision and to reduce the operational costs and burden of compliance on foreign institutions, it is recommended to change “prior filing and no objections” to “post filing” and to exempt the filing requirements of small-scale marketing events, for example one-on-one meetings, or other meetings that target specific institutions or enterprises.

3. Clarification of Prohibited Activities

The Consultation Paper retains the following prohibited activities that were included in the Old Measures: a representative office and its staff shall not (i) engage in any operational activities directly or in a disguised form; (ii) conduct any advertising in any form; or (iii) enter into any agreement or contract with any legal person or individual which may generate income for the representative office or the foreign exchange, and adds that a representative office and its staff “shall not provide any direct-access trading services to any domestic institution or individual; shall not provide trading services to any domestic institution or individual through institutions such as the members of the foreign exchange in any form or other prohibited activities as stipulated in laws or regulations”.

According to Article 13 of the Administrative Regulation on the Registration of Resident Representative Office of Foreign Enterprises (“**Regulation on Resident Representative Offices**”) ¹, a representative office shall not engage in any for-profit activities. For the avoidance of doubt, we would recommend the

¹ Promulgated by the State Council on 19 November, 2010 and amended on 18 July, 2013.

Consultation Paper should retain its consistency with the Regulation on Resident Representative Offices by replacing “operational activities” with “for-profit activities”, and should explicitly stipulate that market research and liaison activities are excluded from the definition of for-profit activities.

4. Jurisdiction Issues

Article 14 and Article 15 of the Consultation Paper stipulate that jurisdiction should be exercised under different scenarios: (i) where a foreign exchange has established a representative office or engaged in the Representative Office Activities without AIC registration, the local office of the CSRC will notify the local AIC to handle such case in accordance with the law; (ii) where a foreign exchange has established a representative office and conducted activities of a representative office upon registration with AIC but failed to file with the local office of the CSRC where the representative office is domiciled or did not submit the filing materials on time, the CSRC or its local offices are entitled to impose punishment; (iii) where a representative office has filed with the local office

of the CSRC, it or its staff illegally engage in any securities and futures businesses, the CSRC or its local offices are entitled to impose punishment; (iv) where a representative office has filed with the local office of the CSRC, it or its staff illegally engage in any for-profit activities outside the scope of securities and futures businesses, the local office of the CSRC will notify the local AIC or other relevant authorities to handle such case in accordance with the law.

Moreover, the Consultation Paper requires all foreign exchanges that have established an office or engaged in the Representative Office Activities to file with the relevant local offices of the CSRC within 180 days of enactment of the Measures. In light of the above, once the Measures are formally released, foreign exchanges may need to evaluate the business activities that may be conducted by various types of entities they have established in China and complete the filing of the representative office as required, or face punishment by the CSRC and/or registration authorities if they fail to abide by the Measures.

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