

金融法律热点问题

保监会加强对非法销售境外保险产品的监管

随着中国对外开放日益扩大，中国居民与境外经贸联系日渐紧密，涉及境外金融产品的各类跨境活动层出不穷。相比成熟市场而言，我国在规范跨境金融产品销售方面的法律法规尚未达到全面细致的程度，远不足以应付实践中纷繁复杂的情况。因此，金融监管者们不得不通过不断完善监管和执法实践以指导市场行为，并需要及时采取执法行动以防止违规违法行为的蔓延。

继2016年4月保监会发布《关于内地居民赴港购买保险的风险提示》后，2016年5月11日，保监会向各地保监局发出《关于加强对非法销售境外保险产品行为监管工作的通知》（保监寿险[2016]46号）（“以下简称《通知》”），针对《通知》中所称“有所抬头”的变相违规在境内销售境外保险产品的情况，要求各地保监局采取相应的执法行动。其实早在2004年和2005年，保监会就曾针对非法销售“地下保单”发出通知，明确非法销售行为的范围以及相应的执法对象，而本次《通知》则特别关注了变相非法销售的方式以及对境内机构或个人收受境外机构利益的事实认定。

一、非法销售行为的危害性

《通知》首先指出了非法销售境外保险产品行为的四方面危害，即：(i)扰乱境内保险市场竞争；(ii)干扰国家外汇管理秩序；(iii)导致境内消费者被误导和权益维护成本高；以及(iv)可能存在非

法向境外转移和藏匿财产的违法犯罪行为。

二、非法销售行为的表现方式

《通知》要求各保监局对两类非法宣传行为采取执法行动：一是境内咨询、理财、保险中介等机构或个人收受境外机构利益，在境内以产品说明会、理财高峰会、理财知识讲座等名义进行宣传、推介境外保险产品；二是该等机构或个人收受境外机构利益，安排有意投保境外保险产品者赴境外投保。上述两种行为都构成为促成交易而开展宣传、招徕的销售境外保险产品的行为，因此应当被取缔和处罚。

就非法销售境外保险产品的两种方式，《通知》不但要求查处“境内签单、境内承保”的行为；也要求高度关注通过“境内介绍、境外签单、境外承保”的方式变相到境内非法销售保险产品的情况。

《通知》还要求对境内的保险机构以及保险从业人员组织或协助非法销售境外保险产品行为进行查处，查处的手段包括纳入保险从业人员黑名单、给予行政处罚，追究相关机构主要负责人的责任。

三、对境外保险机构可能采取的执法措施

值得注意的是，保监会还要求查明非法销售境外保险产品的境内机构或个人接收境外保险机构以各类名义支付的报酬和利益往来情况。如果发现此类情况，保监会将对境外保险机构构成事实上

委托境内机构或个人非法在境内销售保险产品的行为和事实进行认定，并“通过相关渠道”对境外保险机构依法进行处理。

四、我们的观察

由于金融产品的共同特征，中国金融监管者们

(包括证监会、保监会或银监会)就延伸到中国境内的境外金融产品推广活动可能会采用相同或类似的观点，并采取相应的执法行动。这也预示着境外金融产品的跨境推广和销售的合规性可能成为中国金融监管者们下一阶段的执法重点之一。

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Financial

CIRC Action against Illegal Sale of Overseas Insurance Products

As China continues to open its economy to the rest of the world, and there are an increasing number of economic and trade interactions between Chinese residents and overseas players, various kinds of cross-border activities emerge involving foreign financial products. Compared to mature markets, PRC laws and regulations governing the sales of cross-border financial products are yet to be comprehensive and detailed enough to be able to handle the complicated situations that arise in practice. Therefore, financial regulators have had to continue improving their regulation and enforcement practices to guide market behaviors and take swift action to prevent illegal activities from spreading.

After the China Insurance Regulatory Commission (“**CIRC**”) released *the Risk Disclosure on the Purchase of Hong Kong Insurance Products by Mainland Residents* in April 2016, on May 11, 2016, the CIRC issued *the Notice on Strengthening Regulations on Illegal Sales Activities of Overseas Insurance Products* (Bao Jian Shou Xian [2016] 46 Hao)(the “**Notice**”) to all local bureaus, and required local bureaus to take relevant enforcement actions with respect to those so called “resurgent” covert violations of the sale of overseas insurance products inside China.

In fact, as far back as in 2004 and 2005, the CIRC had released notices addressing the illegal sale of “underground insurance policies,” explicitly defining the scope of illegal sale behaviors and the related targets of law enforcement. However, this Notice focuses on methods of covert illegal sales and determining whether domestic institutions or individuals have obtained illegal gains from overseas institutions.

Hazards of Illegal Sales Behavior

The Notice first points out that there are four hazards with respect to the illegal sale of overseas insurance products, i.e.: (i) disturbing domestic insurance market competition, (ii) disturbing the national foreign exchange administration order, (iii) leading domestic consumers to be misled and causing them to assume high costs for protection of their interest, and (iv) possibly allowing illegal outbound transfers and obfuscation of illegal properties involved therein.

Forms of Illegal Sales Activities

The Notice requires local bureaus to proactively enforce rules on two kinds of illegal promotional activities: first, domestic wealth management consultants, insurance agencies

or similar intermediary institutions or individuals receiving benefit from overseas institutions while advertising and promoting their insurance products in product presentations, wealth management summits or money management knowledge lectures, etc., and secondly, these kinds of institutions or individuals receiving benefit while intending to arrange for potential purchasers, who are seeking to buy insurance products, to purchase those products abroad. These two activities constitute illegal sale of overseas insurance products by promotion and solicitation to facilitate a deal, and thus shall be banned and punished.

In addition to these two forms of illegal sale of overseas insurance products, the Notice not only requires the investigation and punishment of the activities of “signing (an insurance contract) and concluding (an insurance transaction) domestically,” but also requires special attention on the covert act of the sale of overseas insurance products by “introducing the insurance product domestically, signing (the insurance contract) and concluding (the insurance transaction) abroad.” The Notice additionally requires both the domestic insurance institutions and insurance industry practitioners organizing or assisting in the illegal sale of overseas insurance products to be punished, and the punishments include blacklisting the individuals, imposing administrative penalties, and pursuing liabilities against the primarily responsible persons of the relevant institutions.

Possible Enforcement Actions against Overseas Insurance Institutions

It is worth noting that the CIRC also requires the investigation of the status of all payments and benefits in whatever name received by domestic institutions or individuals for the illegal sale of overseas insurance products from overseas insurance institutions. If the CIRC identifies this kind of situation, it will determine whether such activity and circumstances constitute a *de facto* entrustment relationship between the overseas insurance institutions and the domestic institutions or individuals for the sale of overseas insurance products inside China, and will penalize such overseas insurance institutions “through the relevant channels” according to the law.

Our Observations

Given the comparable features of financial products, the Chinese financial regulators (including CSRC, CIRC or CBRC) may take the same or similar views in terms of the promotion of foreign financial products to the extent that such promotional activities are extended to the jurisdiction of China, and may take law enforcement action accordingly. This also indicates that the compliance of cross-border promotion and sales of overseas financial products is likely to be one of the priorities of law enforcement for China’s financial regulators in the next stages.

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