

## Financial

### CBIRC Solicits Comments on Custody Business Regulations

On December 29, 2022, the China Banking and Insurance Regulatory Commission (CBIRC) issued the *Measures for the Supervision and Administration of Custody Business of Commercial Banks (Draft for Comments)* (the “Measures”) for public consultation. The Measures establish for the first time a unified rule on commercial banks’ offerings of custody and ancillary services, collectively defined as “custody business”, for a variety of financial products as well as investment portfolios derived from a variety of dedicated funding sources (dedicated funds) at the departmental rule level.

#### **I. Higher-Level Legal Basis of the Measures**

The higher-level legal basis referenced by the Measures include the *Civil Code of the People's Republic of China*, the *Law of the People's Republic of China on Banking Supervision and Administration*, the *Commercial Bank Law of the People's Republic of China*, the *Guiding Opinions on Regulating Asset Management Business of Financial Institutions*, and other laws and administrative regulations without explicitly referring to the *Trust Law of the People's Republic of China*. This may indicate that the Measures intend not to recognize trust relationships as the basic legal relationship of custody business.

Notably, the *Securities Investment Fund Law of the People's Republic of China* is also not referenced as a legal basis of the Measures. Since the relevant laws, regulations, and departmental rules have detailed and comprehensive provisions for the custody of public funds, it remains to be seen how the overlapping or conflicting rules in the Measures and these existing provisions will be addressed.

#### **II. Definition of Custody Business and the Scope of Custody Products**

Custody Business under the Measures refers to the activities whereby a commercial bank, as an independent third party, accepts the entrustment of a property owner or its authorized agent to offer custody and relevant services for the products under its custody pursuant to the laws and regulations, as well as the custody agreement. It can be seen that Custody Business covers a wide range of activities and the custody of portfolio assets and ancillary services may fall under the regulation of these Measures.

Custody Products may include a variety of financial products as well as investment portfolios derived from a variety of dedicated funds, in which (1) financial products include various asset management products and other financial

products stipulated by the financial administrative departments of the State Council. The foregoing definition indicates that financial products may include asset management products that invest funds in the form of portfolios and other financial products that are not asset management products but may be held in custody as explicitly stipulated by the financial administrative departments of the State Council; (2) dedicated funds include national social security funds, basic pension funds, enterprise annuities, occupational pension funds, money from insurance companies, and other funds held in the custody of commercial banks according to law. In other words, the products to which a commercial bank can provide custody service cover all types of financial products and investment portfolios derived from dedicated funds.

By a literal reading of the above definition, proprietary funds or funds managed by a qualified foreign investor (QFI) may be regarded as “other funds held in the custody of commercial banks according to law” as mentioned in the above item (2).

### **III. Separation of Custody Property**

Examples of Custody Property include bank deposits and other funds, stocks, bonds, equities of non-listed enterprises, other debts, commodities, and financial derivatives. The Measures are in line with the *Measures on Supervision and Administration of Wealth Management Business of Commercial Banks* in respect to the separation of property of wealth management products. It stipulates that Custody Property shall be separate from the proprietary property of the commercial bank and the property of other products held in custody. When a commercial bank enters into liquidation procedures due to dissolution, deregistration, or bankruptcy pursuant to the law, the Custody Property shall not be deemed as its liquidated property. In addition, the Measures provide that a commercial bank shall create a separate

accounting book and conduct separate accounting for each product under its custody, which ensures an effective separation of the Custody Assets.

### **IV. Principles for Custody Business and Ongoing Requirements**

Differing slightly from the principles provided by the *Guidelines for Asset Custody Business of Commercial Banks* issued by the China Banking Association in March 2019, the Measures set out the principle of “being in good faith, diligent, independent and prudent and ensuring risk isolation” for commercial banks engaged in custody business. They require that commercial banks ensure their management capacity matches the size of the assets under their custody, its business complexity, and the custody responsibilities they take, and to effectively prevent conflicts of interest and interest tunneling.

The Measures provide ongoing requirements that commercial banks need to comply with while carrying out custody business, such as risk indicators, internal governance, staffing, premises and systems.

### **V. Scope of Custody Business and Custody Responsibility**

Compared with the current rules for custody business, the most notable stipulation of the Measures is that commercial banks shall, based on whether they have *de facto* controls, divide custody property into two categories, i.e., (i) the assets of which commercial banks may have custody, and (ii) other assets. The term “*de facto* control” cover the following circumstances: (1) commercial banks open capital accounts for custody products and hold deposits and other funds of the custody products for safekeeping; (2) commercial banks participate in the control of securities accounts opened with the securities depository and clearing institutions for custody products and have access to the account

information on any change of type and quantity of the securities assets such as stocks and bonds; (3) commercial banks may, pursuant to market rules and the custody agreement, control the trading process, fund transfer, and asset flow of the custody assets; or (4) other circumstances of “*de facto* control” stipulated by the CBIRC. For other assets that do not fall under any of the foregoing circumstances of “*de facto* control”, commercial banks shall not take on responsibilities such as property custody, asset valuation, and investment supervision, while commercial banks may offer so-called “administrative management services” through contractual arrangements, such as fund transfers, asset ownership verification, maintaining investment-related documents, and recording relevant information. We understand the foregoing definition of “*de facto* control” excludes custodian banks having custody of the equities of non-listed enterprises and certain types of non-standardized debts. This would mean that custodian banks do not need to take investment supervisory responsibility over these underlying assets when they are unable to obtain sufficient information.

The Measures reiterate and enhance the requirement to “open a separate account for each asset management product” provided by the *Guiding Opinions on Regulating Asset Management Business of Financial Institutions*. Specifically, the Measures require commercial banks to clearly identify the capital accounts of each custody product in their business systems so that the account name corresponds to the name of the custody products. Commercial banks shall be prohibited from opening any securities accounts in their own name with the securities depository and clearing institution for the custody products or opening commingled accounts for different custody products.

Article 21 of the Measures lists the responsibilities that commercial banks shall not undertake when offering custody services. This is a “negative list”

that puts boundaries around the responsibilities of custodians and managers. In particular, it explicitly prohibits custodians from taking on management responsibilities following circumstances whereby a product fails to pay its investors. It prohibits custodians from taking on responsibilities relating to the loss of custody assets caused by force majeure events or losses not caused by the custodian’s error or fault, which narrows down the liabilities of custodians. Notwithstanding such provisions, it remains to be tested by judicial practice how commercial banks achieve a balance between performing their custody duties and reasonably discharging their liabilities.

## **VI. Requirements on the Management of Custody Business**

The Measures provide requirements on commercial banks for the management of custody business. Commercial banks shall establish and improve their internal governance structure for custody business, establish risk management systems suitable to the size and complexity of their custody business, have sound internal management policies for custody business, have the custody business authorization under a unified authorization management mechanism, and establish a position balance mechanism and a process constraint mechanism. Notably, the Measures highlight the requirements on the independence of custody business and the enhancement of data protection. The Measures require commercial banks to strengthen the due diligence and management of custody products and external institutions, establish a list of the custody products and the relevant clients to manage and prevent risks arising from partners of custody business, and take effective measures to prevent improper related-party transactions and interest tunneling to enhance risk isolation.

The Measures specify marketing management requirements. Commercial banks shall prohibit

their business partners, such as managers or distributors, from taking advantage of the brand or reputation of commercial banks to conduct marketing activities. If a business partner uses the name of a custodian bank to carry out improper marketing activities and fails to make rectifications, the custodian bank has the right to suspend the business partnership with them according to the Measures.

## **VII. Regulatory Principles of Custody Business**

The Measures enhance the supervision and administration of commercial banks' custody business from both a regulatory and law enforcement perspective. Firstly, the Measures take the compliance and prudence of custody business as an important basis for the regulatory rating of commercial banks and highlight the CBIRC's and its branch offices' ongoing supervision of custody businesses. The CBIRC and its branch offices may, in accordance with the laws and regulations, order commercial banks that violate the Measures while offering custody services to rectify their behavior within a specified time and may impose corresponding regulatory measures. If a commercial bank fails to satisfy the qualifications for custody business, is

incompetent in its custody business, or fails to carry out its custody business in a prudent manner, the CBIRC and its branch offices may, according to the laws, regulations and principles of prudent regulation, suspend the relevant business of the commercial bank. Furthermore, the Measures authorize the banking self-disciplinary organization to implement self-disciplinary management pursuant to the law. With the authorization, the banking self-disciplinary organization may take measures such as issuing a warning or suspending or canceling the membership of the relevant member.

## **Outlook**

The Measures respond to pressing issues in the custody practices of commercial banks and add boundaries to the responsibilities of custodian banks. Considering that the Measures also apply to certain products regulated by the China Securities Regulatory Commission (CSRC), the CBIRC may need to further coordinate with the CSRC to address issues regarding the application of laws and potentially conflicting rules on custody business. We will continue to monitor the situation and keep our clients apprised of the latest developments.

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## 金融法律热点问题

### 银保监会就托管业务新规公开征求意见

2022年12月29日,中国银行保险监督管理委员会(以下简称“银保监会”)就《商业银行托管业务监督管理办法(征求意见稿)》(“《办法》”)公开征求意见,首次拟通过部门规章的形式以“托管业务”的名义对商业银行向各类金融产品以及各类专项资金形成的投资组合所提供的财产保管及相关服务进行规范。

#### 一、上位法

《办法》援引《民法典》《银行业监督管理法》《商业银行法》等法律、行政法规以及《关于规范金融机构资产管理业务的指导意见》作为其上位法,但未将《信托法》列为其上位法之一。这可能意味着《办法》并未认定信托关系是托管业务的基础法律关系。此外,《办法》亦未将《证券投资基金法》作为其上位法。由于相关法律法规和规章对公募基金托管有较为详细全面的规定,《办法》如何避免与该等规定的重叠甚至冲突仍有待观察。

#### 二、托管业务的定义和托管产品的范围

《办法》将托管业务界定为“商业银行作为独立第三方,接受财产所有人或其授权代理人的委托,按照法律法规规定和托管合同约定,为所托管产品提供财产保管及相关服务的行为”。由此可见,《办法》规范的范围非常广泛,对于涉及投资组合的财产保管及相关服务的,都可能落入《办法》规

范的范围。

提供托管服务的产品范围可以包括各类金融产品以及各类专项资金形成的投资组合等,其中,1、金融产品包括各类资产管理产品以及国务院金融管理部门规定的其他金融产品;从上述金融产品的定义可以推断,此处的金融产品应指以专门的资金进行组合投资的资管产品以及虽未归入资管产品但国务院金融管理部门明确规定可以对其提供托管服务的其他金融产品;2、专项资金包括来源于全国社会保障基金、基本养老保险基金、企业年金、职业年金、保险公司的资金以及商业银行依法托管的其他资金。商业银行可提供托管服务的产品范围涵盖了所有类型的金融产品或由专项资金形成的投资组合。

此外,从上述定义的字面意思不排除合格境外投资者(QFI)项下自有或者管理的资金亦将落入上述第2项专项资金中商业银行依法托管的其他资金的范畴。

#### 三、托管产品财产的独立性

托管产品持有的财产包括各类银行存款等资金款项、股票、债券、未上市企业股权、其他债权、商品、金融衍生品等。有关托管财产的独立性的问题,《办法》延续了《商业银行理财业务监督管理办法》中有关理财产品财产独立性的规定,明确商



业银行所托管的产品财产与商业银行自有财产相互独立，与商业银行所托管的其他产品财产相互独立，且商业银行因依法解散、被依法撤销或者被依法宣告破产等原因进行清算的，所托管的产品财产不属于其清算财产。《办法》还规定商业银行应当为所托管的每只产品单独建账、单独核算，从而为实现实质性独立托管提供了保障。

#### **四、开展托管业务的原则以及持续性的要求**

与中国银行业协会于 2019 年 3 月发布的《商业银行资产托管业务指引》中规定的原则略有不同，《办法》明确商业银行开展托管业务的原则是“诚实信用、勤勉尽责、独立审慎、风险隔离”，并强调商业银行应确保自身管理水平与所托管资产的规模、业务复杂程度和承担托管职责相匹配，切实防范利益冲突和利益输送

《办法》还列举了商业银行开展托管业务所应当持续符合的基本要求，包括风险指标、内部治理、人员场所和系统配备等。

#### **五、托管业务的范围和托管职责**

与之前有关托管业务的规定相比，《办法》最为重大的一个变化在于要求商业银行按照是否能够实际控制，将托管产品财产分为可托管资产和其他资产。实际控制的情形包括：1、商业银行为托管产品开立资金账户，保管托管产品所持有的各类银行存款等资金款项；2、商业银行参与控制托管产品在证券登记结算机构开立的证券账户，掌握证券账户内股票、债券等证券资产种类变动和数量增减信息；3、商业银行根据市场规则和托管合同安排，能够控制托管产品项下的资产的交易过程、资金划转、资产流转；4、银保监会规定的其他实际控制的情形。对于不属于上述实际控制情形的其他资产，商业银行不得承担财产保管、资产估值、投资监督等职责，但可在托管合同中约定提供事务管理类服务，包括提供资金划转、资产所有权验证、投资相关材料保管及相关信息记录等事务管理服务。上述规定实际上将非上市股权、部分非标债权投资等排除在托管行可实际控制情形之外，从而明确规定对于此类托管行无法掌握足够信息进行

监督的底层资产，托管行无需承担投资监督义务。

此外，《办法》在《关于规范金融机构资产管理业务的指导意见》的基础上重申并强化了资管产品单个产品单独开户的要求。《办法》要求商业银行在其业务系统中对所托管产品的资金账户进行明确标识，实现账户名称与所托管的产品名称相对应，禁止商业银行在证券登记结算机构单独以自身名义为托管产品开立证券账户，或为不同的托管产品开立混同账户。

《办法》第二十一条还列举了商业银行开展托管业务不得承担的职责事项，通过负面清单的方式划定托管人与管理人的职责边界，尤其是明确禁止托管人负责未兑付产品的后续管理，以及禁止托管人因不可抗力和非托管人错误或过失造成的托管资产损失承担责任，限制了托管人应承担责任的范围。尽管有上述规定，商业银行如何在适当履行托管职责及合理规避自身责任之间取得平衡仍有待司法实践的检验。

#### **六、托管业务管理要求**

《办法》对商业银行托管业务的内外部管理提出了明确要求。一方面，商业银行对内应当建立健全托管业务治理架构，建立与其托管业务规模和复杂程度相适应的风险管理体系，具备健全的托管业务内部管理制度，将托管业务授权纳入统一授权管理，并建立岗位制衡与流程约束机制。同时，《办法》还强调了托管业务的独立性和强化数据保护的要求。另一方面，《办法》要求商业银行对外加强托管产品和外部机构的尽职调查和管理，对托管产品及相关客户实行名单制管理以防范托管业务合作方所带来的风险，采取有效措施防范不当关联交易和利益输送以强化风险隔离。

此外，《办法》还特别规定了营销宣传管理要求，商业银行在对外合作过程中应当禁止产品管理人、产品销售机构等合作方借助托管银行品牌、声誉开展营销宣传。如合作方借用托管银行名义开展不当营销且不予纠正的，《办法》还赋予托管行中止业务合作的权利。

#### **七、托管业务监管原则**

在监管和处罚方面，《办法》强化了商业银行托管业务的监督管理。首先，《办法》将托管业务的合规性和审慎性作为监管评级的重要依据，强调银保监会及其派出机构对商业银行托管业务的持续监管。此外，《办法》规定银保监会及其派出机构依照法律法规责令违反《办法》开展托管业务的商业银行限期整改，并对其采取相应监督管理措施。对于不符合托管业务资质、不满足托管业务能力要求、托管业务开展不审慎的商业银行，银保监会及其派出机构可依照法律法规和审慎监管原则，暂停其相关业务。同时，《办法》还明确了银行业

自律组织依法实施商业银行托管业务的自律管理，并可以采取警示、暂停或取消相关成员单位会员资格等措施。

## 展望

《办法》的出台回应了实践中商业银行开展托管业务的争议热点，对于厘清托管银行责任边界具有重要意义。但考虑到《办法》规范的托管产品也包括证监会监管的产品，有关托管业务的法律适用及潜在冲突问题尚有待银保监会与证监会进一步沟通协调以避免法规之间的重叠和冲突。我们将持续关注并及时与我们的客户分享最新进展。

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