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Securities Borrowing and Lending (SBL) Business – Determining Legal Relationships Concerning Collateral

Along with the implementation of the new rules concerning Qualified Foreign Investors (the "QFI or QFII/RQFII New Rules"), leading securities brokers have started opening securities borrowing and lending (SBL) credit accounts for their QFII/RQFII clients trading in the A-share market. While the SBL market welcomes onboarding of QFII/RQFII clients, it is inevitable that clients will be concerned with the legal issues on ownership and segregation of property concerning a SBL account. To respond these questions, the legal relationship between client and broker in SBL transactions needs to be determined. In particular, with the implementation of the *Civil Code of People's Republic of China* (the "Civil Code") and relevant guarantee provisions that have resulted in multiple changes, it is necessary to refresh and revisit our understanding of relevant issues.

I. Considerations in Determining Whether the Client-Broker Relationship in SBL Transactions Constitutes a Trust Relationship

There is no doubt that the client and broker establish a securities brokerage and loan relationship in SBL transactions. The question is whether the counterparties establish a trust relationship in relevant SBL transactions. Article 14 of the *Administrative Measures for the Securities Borrowing and Lending Business of Securities Companies* (the "SBL Business Administrative Measures") issued by the China Securities Regulatory Commission (CSRC) stipulate "SBL contracts shall provide that, the securities held in a client credit transaction guarantee securities account and the cash deposited in a credit transaction guarantee cash account, both opened under the names of securities companies, are trust properties used to guarantee the securities companies' claims against clients arising out of SBL transactions". Similar provisions can be seen in the *Administrative Regulations for Supervision of Securities Companies*. Moreover, Article 6 of the *Necessary Terms for Securities Borrowing and Lending Contracts* released by the Securities Association of China (SAC) provides detailed rules on the specified trust relationship in terms of the purpose of a trust, scope of trust property, establishment and effectiveness of trust, management of trust property, disposition of trust property and termination of trust. Currently in the market, these terms are widely adopted in SBL contract templates (including the contract templates used for QFII/RQFIIs) provided by securities companies.

In judicial practice, some courts have determined that the legal relationship between clients and brokers in SBL transactions shall constitute a trust relationship based on these explicit agreements in the SBL contracts. For example, see Shanghai Pudong New Area People's Court (2017) Shanghai 0115 Minchu No. 33817.

However, this determination of the client-broker legal relationship in SBL transactions to be a trust relationship was highly doubted in academic circles, where the issue was raised that it conflicts with the basic purpose and principle of

the Trust Law, namely: (i) the securities company is not qualified to conduct trust business; (ii) it violates the basic principle of a trust, that is "a trustee shall deal with trust affairs in the best interests of the beneficiaries", and (iii) in SBL transactions, the securities company, which is supposed to be the trustee, only passively holds the trust property rather than actively manages the trust property. In this regard, some courts denied the trust relationship between clients and brokers in SBL transactions, for example, in the case of Li Mou v. Company A, a dispute arising from securities misrepresentation (one of the ten significant financial and commercial trial cases in the Shanghai Courts in 2017 as released by Shanghai High People's Court), the court concluded that:

…this case clarified that investors, as the de facto holders of securities, have substantive property rights over the assets in the credit accounts. The SBL Business Administrative Measures define such assets as 'trust property' with the aim of providing guarantee for the securities companies' claims against clients, while such 'trust property' is not equivalent to the 'trust' under the Trust Law and does not directly apply the basic rules of the Trust Law.

Based on our observations of the above judicial practice, despite the CSRC determination, the possibility cannot be ruled out that the client-broker legal relationship in SBL transactions may not be determined to be a trust relationship and therefore relevant principles and rules under the Trust Law are inapplicable.

II. Considerations in Determining Whether the Credit Guarantee Arrangement under SBL Transactions Constitutes an Assignment Guarantee Under the Civil Code

According to the SBL Business Administrative Measures and the *Necessary Terms for Securities Borrowing and Lending Contracts*,securities and cash in the SBL credit accounts are collateral for securing securities companies' claims against clients arising from SBL transactions. When the SBL pilot was first introduced to the market, both the publicity of security interests and the procedures for disposing security interests established under the then Guarantee Law and the Property Law were inefficient and fell short of the "timeliness" demand of SBL transactions, hence, subject to the old legal framework of security interest, the CSRC had no better choice but to define the credit guarantee arrangement under SBL transactions as a trust, after taking into account the interests of each party as well as other considerations, i.e., on one hand, securities companies are prohibited from embezzling or misappropriating any securities or cash in the credit accounts; on the other hand, while aiming to secure the securities company's priority on the compensation value of the securities and cash, the conflict between the timeliness of securities transactions and the inconvenience for creating security interests needs to be addressed.

Article 388 of the Civil Code recognizes the validity of other atypical guarantee contracts that function as guarantees for the first time, which provides the groundwork for exploring the legal relationships for SBL credit guarantee arrangements based on the new legal framework of security interests. Article 68 of the *Interpretation of the Supreme People's Court on the Application of the Guarantee Rules in the Civil Code of the People's Republic of China* (the "Interpretation on Guarantee Rules") stipulates that:

…where the debtor or any third party reaches an agreement with the creditor to superficially transfer property ownership to the creditor, so that the creditor has the right to convert the property into money, or to satisfy its rights with the proceeds from auction or sale of the property when the debtor is in default, the People's Court

shall confirm the validity of such an agreement; where the aforementioned parties have completed the statute publicity formalities with respect to the change in ownership of the property, the creditor then claims priority on the compensation value of the property with reference to and in accordance with relevant provisions in the Civil Code regarding security interests when the debtor is in default, the People's Court shall grant such a claim.

According to the *Understanding and Application of Interpretation on the Application of Guarantee Rules in the Civil Code* (the "Understanding and Application of Guarantee Rules") written by the Supreme People's Court, Article 68 of the Interpretation on Guarantee Rules specifies a typical form of Assignment Guarantee. An Assignment Guarantee (also known as the Trust Guarantee) have the following characteristics: (i) when setting up an Assignment Guarantee, the guarantor needs to temporarily transfer the ownership of property to the creditor so that the creditor becomes the nominal owner of the property; (ii) to enable the guarantor to continue to use the property, the creditor often enters into a separate rent or lease agreement with the guarantor so that the guarantor may use such property; (iii) the creditor shall return the ownership of the property to the guarantor after the debtor pays the debts; (iv) if the debtor fails to pay the debts, the ownership of property does not automatically goes to the creditor, rather, the value of the property must be liquidated.

According to the SBL Business Administrative Measures and the *Necessary Terms for Securities Borrowing and Lending Contracts*, the cash and securities used to secure the debts arising out of SBL transactions are deposited by clients in the client credit transaction guarantee cash accounts and the client credit transaction guarantee securities accounts opened under the names of the securities companies, and the securities companies are the nominal holders of such cash and securities, i.e., the collateral. Throughout the term of SBL transactions, clients have the right to instruct securities companies to trade securities, and after paying off the debts arising out of SBL transactions, are entitled to request the securities companies to deliver the remaining part of the collateral. If the clients fail to provide enough collateral in a timely manner or fail to repay the debts in other forms arising out of SBL transactions, the securities companies have the right to forcibly close the transaction and dispose of the collateral, and the proceeds of such a disposition shall first be used to repay the debts owed by the clients to the securities companies. In this regard, it can be inferred that the SBL credit guarantee arrangement conforms to the elements of an Assignment Guarantee under the Civil Code.

In judicial practice, early before the official implementation of the Civil Code, some courts held that the credit guarantee arrangement under SBL transactions shall constitute an Assignment Guarantee. For example, see (2018) Jiangxi 0103 Minchu No.2921.

Our Observations

Although the relevant regulations and rules of the CSRC and SAC provide that the SBL credit guarantee arrangement constitutes a trust relationship between the counterparties of SBL transactions, we have observed different opinions in judicial practice and we tend to believe that it may be improper to apply the law of trust for determination of ownership and segregation of property in the SBL credit accounts. Under the brand-new legal system of the Civil Code and relevant guarantee laws, the SBL credit guarantee arrangement should be determined as an Assignment Guarantee pursuant to the Civil Code, and we note that some courts have already made the same determination. We hope that the judicial practice in post-Civil Code era will further clarify and unify

the views to mitigate the uncertainty arising from the relevant legal issues.

We will continue to monitor these issues and keep our client appraised of important developments.

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[1] *This Client Briefing is excerpted from Legal Relationships of Collateral Concerning Securities Borrowing and Lending Business – Reviewed from a Civil Code Perspective, an article written by Jay Zhu, a partner at JunHe LLP.*

君合专题研究报告 JUNHE

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《民法典》视角下融资融券信用担保的法律性质

随着《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》的实施，多家头部券商陆续开始为 QFII/RQFII 客户开立了 A 股市场首批融资融券信用账户。融资融券交易市场迎来新客群的同时，信用交易担保账户中财产的归属、财产独立性等问题也受到了境外投资者的极大关注，而要回答这些问题首先需要厘清交易双方之间的法律关系。在《民法典》及相关担保制度已经正式施行的大背景下，我们也借此机会重新审视该问题，供业界参考。

一、 融资融券交易双方是否成立了信托关系

融资融券交易过程中，客户与证券公司之间会形成证券经纪、借贷法律关系，这点应无疑问。根据证监会《证券公司融资融券业务管理办法》（下称**“《业务管理办法》”**）第十四条的规定，“融资融券合同应当约定，证券公司客户信用交易担保证券账户内的证券和客户信用交易担保资金账户内的资金，为担保证券公司因融资融券所生对客户债权的信托财产”。《证券公司监督管理条例》也有类似的规定。[1]而中国证券业协会发布的《融资融券合同必备条款》第六条，[2]更是从信托目的、信托财产范围、信托的成立和生效、信托财产的管理、信托财产的处分、信托的终止多个维度对该特定的财产信托关系作出了详细规定。目前市场上证券公司采用的融资融券合同（包括适用于 QFII/RQFII 的版本），基本也仍保有上述信托关系的合同条款。

基于融资融券合同的前述明确约定，司法实践中，确有部分法院直接认定交易双方构成信托关系，如上海市浦东新区人民法院在（2017）沪 0115 民初 33817 号案中认定：“原、被告之间通过《融资融券业务合同》不仅就账户内的保证金等财产设立了信托关系，而且就融资融券业务的具体操作进行了约定”。

然而，前述信托关系的定性在理论界受到诸多质疑，即认为该定性违背信托法的宗旨和原理，主要理由包括：（1）证券公司没有从事信托业务的资质；（2）违背受托人应当为受益人的最大利益处理信托事务的基本信托法理；（3）在融资融券交易中，作为受托人的证券公司并不积极进行管理，而仅仅

[1] 《证券公司监督管理条例》第五十三条　客户证券担保账户内的证券和客户资金担保账户内的资金为信托财产。证券公司不得违背受托义务侵占客户担保账户内的证券或者资金。

[2] 《融资融券合同必备条款》第六条　合同应约定融资融券特定的财产信托关系，具体如下：（一）信托目的。甲方自愿将保证金（含充抵保证金的证券，下同）、融资买入的全部证券和融券卖出所得全部资金以及上述资金、证券所产生的孳息等转移给乙方，设立以乙方为受托人、甲方与乙方为共同受益人、以担保乙方对甲方的融资融券债权为目的的信托。（二）信托财产范围。上述信托财产的范围是甲方存放于乙方“证券公司客户信用交易担保证券账户”和“证券公司客户信用交易担保资金账户”内相应的证券和资金，具体金额和数量以乙方“证券公司客户信用交易担保证券账户”和“证券公司客户信用交易担保资金账户”实际记录的数据为准。（三）信托的成立和生效。自甲乙双方签订合同之日起，甲方对乙方“证券公司客户信用交易担保证券账户”和“证券公司客户信用交易担保资金账户”内相应证券和资金设定的信托成立。信托成立日为信托生效日。（四）信托财产的管理。上述信托财产由乙方作为受托人以自己的名义持有，与甲、乙双方的其他资产相互独立，不受甲方或乙方其他债权、债务的影响。（五）信托财产的处分。乙方享有信托财产的担保权益，甲方享有信托财产的收益权，甲方在清偿融资融券债务后，可请求乙方交付剩余信托财产。甲方未按期交足担保物或到期未偿还融资融券债务时，乙方有权采取强制平仓措施，对上述信托财产予以处分，处分所得优先用于偿还甲方对乙方所负债务。（六）信托的终止。自甲方了结融资融券交易，清偿完所负融资融券债务并终止合同后，甲方以乙方“证券公司客户信用交易担保证券账户”和“证券公司客户信用交易担保资金账户”内相应的证券和资金作为对乙方所负债务的担保自行解除，同时甲乙双方之间信托关系自行终止。

是消极地持有信托财产。司法实践中也同样有法院否定信托关系的定性，如黎某诉甲公司证券虚假陈述责任纠纷案（该案为上海市高级人民法院发布的2017年度上海法院金融商事审判十大案例之一），法院在总结该案的裁判意义时提到“本案裁判结果明确了投资者作为股份的实际持有人，对信用账户内资产享有实质性的财产权利。我国《证券公司融资融券业务管理办法》中将信用账户内资产界定为‘信托财产’，目的在于为证券公司的债权提供担保，它不等同于《信托法》上的信托，不直接适用信托的基本规则”。**因此，即便有来自证监会的官方定性，融资融券信用担保制度仍存在不能直接定性为信托关系，进而不能直接适用《信托法》相关规则的风险。**

二、 融资融券信用担保机制符合《民法典》体系下的让与式担保

《业务管理办法》及《融资融券合同必备条款》的相关条文均强调，信用账户中的资金及证券是用以担保证券公司对客户的融资融券债权的担保物。但在融资融券业务试点之时，《担保法》以及《物权法》下的法定担保物权在公示及处分程序等方面均难以满足融资融券交易及时性的特定需要。因此，证监会将融资融券交易定性为特定的财产信托关系，也是囿于当时的法律框架而尝试兼顾交易双方的利益，即一方面不允许证券公司侵占或挪用担保账户内的资金或证券，另一方面则在保障证券公司的优先受偿权的前提下，尝试解决证券交易的及时性与担保物权设立的不便捷性之间的冲突[3]。

而随着《民法典》第388条首次在法律层面认可了其他具有担保功能的非典型担保合同的效力，这也为在担保物权法律框架下解释融资融券信用担保机制奠定了基础。《最高人民法院关于适用〈中华人民共和国民法典〉有关担保制度的解释》（“下称**《担保制度解释》**”）第六十八条规定：“债务人或者第三人与债权人约定将财产形式上转移至债权人名下，债务人不履行到期债务，债权人有权对财产折价或者以拍卖、变卖该财产所得价款偿还债务的，人民法院应当认定该约定有效。当事人已经完成财产权利变动的公示，债务人不履行到期债务，债权人请求参照民法典关于担保物权的有关规定就该财产优先受偿的，人民法院应予支持”。根据最高人民法院撰写的《〈关于适用民法典有关担保制度的解释〉的理解与适用》（下称“**《担保制度理解与适用》**”），上述规定是让与担保的典型表现形式，让与担保（又称为信托让与担保）的要点包括：第一，在设定这一担保时，担保人需将标的物所有权暂时转让给债权人，债权人成为形式上的所有人；第二，为使担保人保持对担保标的物的使用效益，债权人往往与担保人签订标的物的借用或租赁合同，由担保人使用担保标的物；第三，债务人履行债务后，债权人应返回标的物所有权；第四，在债务人未偿还债务时，债权人并不是当然的取得担保标的物所有权，而是进行清算。[4]

根据《业务管理办法》及《融资融券合同必备条款》的相关规定，用于担保融资融券交易债务的资金、证券分别由客户交存于证券公司名下的客户信用交易担保资金账户、客户信用交易担保证券账户，证券公司为名义持有人。融资融券交易期间，客户也有权指令证券公司进行证券买卖交易。客户在清偿融资融券债务后，可请求证券公司交付剩余担保物。客户未按期交足担保物或到期未偿还融资融券债务时，证券公司有权采取强制平仓措施，对上述担保物予以处分，处分所得优先用于偿还客户对证券公司所负债务。**从上述规定看，融资融券信用担保机制是符合《民法典》项下的让与担保的要件的。**

司法实践中，早在《民法典》正式施行前，就有部分法院认为融资融券的信用担保机制符合让与担保。如在（2018）赣0103民初2921号案中，审理法院认为：“根据该合同第八条、第十四条、第三

[3] “陈卓著：《融资融券担保之法律定性分析（一）：信托—官方的定性》，《天元研究》”

[4] 最高人民法院 林文学 杨永清 麻锦亮 吴光荣著：《<关于适用民法典有关担保制度的解释>的理解与适用》，《人民司法》2021年第4期。

十三条、第三十七条、第三十八条约定，本院认为杨招领所提供担保应系让与担保，国盛公司强制平仓系实现让与担保权之表现……而在股票市场这种高风险的虚拟经济中，资本流转速率高，为控制市场风险，同时兼顾效率与安全，简便快捷、低成本、灵活地发挥担保物的效用，本院在尊重双方约定的基础上认为唯让与担保与之相符”。

三、 《民法典》担保体系下的保证金制度是否适用于融资融券交易

《担保制度解释》第七十条规定了设立专门保证金账户的担保制度。我们认为，虽然融资融券的担保物表面上符合交存于专门账户的外观，但适用《民法典》体系下的保证金制度仍存在一定障碍。

一方面，《民法典》担保体系下的保证金制度从条文表述上限于账户内资金作为担保物的情形，而融资融券交易中的担保品还包括证券。从《担保制度理解与适用》中的相关表述看，《担保制度解释》第七十条规定的保证金制度应属于一种非典型性的质押形态。鉴于《民法典》第四百四十三条已经明确规定以股份出质的，质权自办理出质登记时设立，那么仅交存于特定账户而未经过证券登记结算机构登记的，则难以认定已经设立了有效担保。

另一方面，保证金担保的有效要件包括金钱质物的特定化。虽然《担保制度解释》第七十条规定了保证金账户内款项的浮动不影响担保权益，但从现有司法判例来看，保证金的浮动仍应当与被担保的主债权数额（或者至少是或有债权的数额）保持一定的对应关系。但从融资融券交易的特点来看，虽然合同约定了担保物价值与融资融券债务之间相应的维持担保比例，但担保物价值的计算至少包括了信用账户内的资金及证券的价值总额，在维持保单比例符合合同约定的情况下，融资融券交易通常并不限制客户的证券买卖交易。因此，在不断进行证券交易的情况下，担保物的资产形态相应地不断在资金和证券之间转换，担保物难以保持特定化，这与《担保制度解释》中允许的保证金款项浮动应当存在着较大的差异。

综上，我们认为，虽然证监会以及中国证券业协会的相关文件都认为融资融券交易的担保机制在当事人之间创设了信托关系，但司法实践中也存在不同的认定，故完全适用《信托法》相关规则判断信用账户内财产归属、财产独立性等问题可能有失偏颇。在《民法典》及相关担保制度的全新体系下，融资融券交易的信用担保机制应当能够被认定为《民法典》项下的让与担保，部分法院也早已有类似的认定。我们期待后《民法典》时代的司法实践能够进一步明确并统一对该问题的认识以降低相关法律问题的不确定性。

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