

资本市场法律热点问题

场外期权业务——“强监管”再下一城

2018年是证监会继续“强监管”的一年，监管层正全面出击，根据其对于潜在风险的判断有优先顺序地不断推进不同领域的强监管，而这一次轮到了场外期权业务。诸位对2016年10月28日上海证监局发布的《关于进一步规范辖区证券投资基金经营机构参与场外衍生品交易的通知》（简称“《2016通知》”）可能还记忆犹新（见JunHe Client Alert“OTC Derivatives - No for Illegal Evasion”），如今，出于对无法控制潜在风险的担忧，继今年4月监管层窗口指导暂停私募及期货子公司参与场外期权业务后，监管层对券商的场外期权业务踩了一记重刹车。上周，各地证监局陆续向券商下发了《关于进一步加强证券公司场外期权业务监管的通知》（简称“《新规》”）。为便于理清监管思路和重点，我们在此简单总结此次《新规》与《2016通知》相比有何异同，以供客户参考。

一、投资者适当性

《2016通知》要求券商充分了解其场外衍生品业务的客户，确保将适当的产品销售给合适的客户。《新规》要求客户必须是符合《证券期货投资者适当性管理办法》的专业机构投资者，并满足以下条件：（一）法人参与的，最近1年末净资产不低于5000万元人民币、金融资产不低于2000万元人民币，且具有3年以上证券、基金、期货、黄金、外汇等相关投资经验；（二）资产管理机构代表产品参与的，最近一年末管理的金融资产规模不低于5

亿元人民币，且具备2年以上金融产品管理经验；（三）产品参与的，应当为合规设立的非结构化产品，规模不低于5000万元人民币，且需穿透核查其委托人和设定支付的期权费及缴纳的初始保证金占产品规模的限额。上述条件以及监管部门随后所作的有关合格对手方的窗口指导足以将市场上绝大部分私募基金管理人和部分资产管理计划排除在合格的对手方之外。

二、券商业务资质和标的限制

《新规》规定，券商参与场外期权交易的资质分为一级交易商和二级交易商。一级交易商须最近一年分类评级在A类AA级以上，且经证监会机构部认可；二级交易商须最近一年分类评级在A类A级以上。经证券业协会备案，只有一级交易商可以在沪深证券交易所开立场内个股对冲交易专用账户，直接开展对冲交易。二级交易商只能通过与一级交易商开展衍生品交易进行个股风险对冲。挂钩标的应当为境内指数或者公开上市时间不少于6个月、流通性好的非ST、*ST股票。

相比《2016通知》，《新规》的这一要求可谓杀手锏，从源头上限制了券商场外期权业务的开展，但同时也不由得让人担忧因交易商资质集中在极少数券商手中反而可能导致市场风险集中度的提高。

三、禁止的行为

《2016通知》要求券商充分了解客户参与场外衍生品交易的真实目的。《新规》则明令禁止与客户开展单纯以高杠杆投机为目的、不存在真实风险管理需求的场外期权业务。

《2016通知》列举了四类禁止的行为，分别是：(1)不得为客户提供融资或者变相融资服务；(2)不得收取明显超过履约保障需要的保证金；(3)不得依照客户指令使用保证金；(4)不得为非标资产规避监管行为提供服务或便利。《新规》增加要求经纪商(1)不得通过互联网、自媒体等任何方式向公众宣传，或诱导不合格投资者参与场外期权交易；(2)不得直接根据投资者指令进行对冲证券买卖，不得将对冲头寸出售给投资者指定的第三方；(3)不得频繁交易；(4)不得违规与“敏感客户”交易；(5)不得违规与上市公司及其关联方、一致行动人开展以本公司股票为标的的场外期权；(6)不得为涉嫌非法金融活

动或存在潜在利益冲突的主体提供场外期权服务；(7)除了不得为非标资产出表提供便利以外，还不得为其他任何监管套利行为或规避监管的行为提供便利；(8)不得向他人出借或者变相出借交易商资质。《新规》巨细无遗地全方位列举各类禁止行为，体现了监管层对“借金融创新之名行规避监管之实”的彻底否定。

四、券商的职责

《新规》强调券商应核查投资者身份、资金来源、产品合同内容等，对产品设计的适当性和合规性评估，还要求对交易对手交易行为进行持续监测分析。上述规定体现了监管者对于如何监管金融市场的清晰思路，即，管好持牌金融机构就管好了市场风险的源头。而《新规》以各地证监局向券商下发通知的形式发布，也赋予了监管者可以根据具体情况的变化随时调整的自由度。

谢青 合伙人 电话：86 21 2208 6238 邮箱地址：xieq@junhe.com
张弛 律师 电话：86 21 2208 6177 邮箱地址：zhangchi_Austin@junhe.com
卢秉 律师 电话：86 21 2208 6192 邮箱地址：lub@junhe.com

本文仅为分享信息之目的提供。本文的任何内容均不构成君合律师事务所的任何法律意见或建议。如您想获得更多讯息，敬请关注君合官方网站“www.junhe.com”或君合微信公众号“君合法律评论”/微信号“JUNHE_LegalUpdates”。



Capital Market

OTC Option Business – Further Moves to Tighten Regulation

The China Securities Regulatory Commission (“**CSRC**”) continues to tighten regulation in 2018. Against the backdrop of full-scale scrutiny of capital markets, the CSRC has been consistently tightening the regulatory reins on various business areas, with the order of priority based upon its assessment of the immediacy of potential risks. The latest action to come under the lens is the over-the-counter (“**OTC**”) option business.

Market observers may recall the issue of a regulatory circular on October 28, 2016, on the subject of OTC derivatives trading conducted by securities and fund operation institutions (“**2016 Circular**”) (see *JunHe Client Alert “OTC Derivatives - No for Illegal Evasion*”). More recently, due to concerns that potential risks could spiral out of control, and following the window guidelines released in April this year which suspend private funds and subsidiaries of futures companies from conducting OTC option trading, the regulators are now applying the brakes to securities brokers’ OTC option trading business activities.

Last week, the CSRC’s local agencies successively issued the *Circular on Further Strengthening the Regulation of OTC Option Business by Securities Companies* (“**New Circular**”) to securities brokers. In order to understand the current regulatory mindset and

priorities, we have summarized the similarities and differences between the New Circular and the 2016 Circular for our clients’ reference.

I. Suitability of Investors

The 2016 Circular requires securities brokers to have familiarity with their clients with whom they undertake OTC derivative business and to ensure that correct products are being sold to appropriate clients. The New Circular requires that such clients must be professional institutional investors satisfying the requirements of the *Measures on the Suitability Management of Securities and Futures Investors*, and that they must meet the further following conditions,

- (i) if it is a legal person, its net assets at the end of the previous year shall not have been less than RMB 50 million, financial assets shall not have been less than RMB 20 million, and it shall have at least three years relevant experience in securities, fund, futures, gold or foreign exchange investment,
- (ii) if it is an asset management institution that trades on behalf of a product managed by it, the financial asset under its management at the end of the previous year shall not have been less than RMB 500 million, and the institution shall have at least two years

experience in financial product management, and

- (iii) if it is a product, it shall be a non-structured product duly established with assets under management (AUM) of no less than RMB 50 million, and the securities broker is required to verify the identity of the ultimate investor of such product and the limits on the agreed option fees and initial margin fees in proportion to the AUM.

The conditions set forth above and the subsequent window guidance given by the regulators relating to eligible counterparties will likely exclude the majority of private fund managers and at least some of the asset management plans currently operating in the market from being eligible counterparties.

II. Restrictions on Securities Broker Eligibility and Underlying Assets

Securities brokers that meet the criteria to engage in OTC option trading can be divided into two categories: first-class dealers and second-class dealers. First-class dealers are those that have been ranked as Class AA or higher for the past year and that have obtained an approval by the Institutional Department of the CSRC, while second-class dealers are those that have been ranked at Class A or higher for the past year and that have obtained a filing approval by the Securities Association of China. Only first-class dealers are allowed to open dedicated trading accounts in the Shanghai and Shenzhen Stock Exchanges and to directly conduct individual stock hedging. By contrast, a second-class dealer can only hedge individual stock risks by entering into derivative transactions with first-class dealers.

Underlying assets of an OTC option transaction shall be either the indexes of the onshore market or non-ST or non-*ST stocks that have been listed

on the Exchanges for at least six months and that have good liquidity. Compared to the 2016 Circular, the New Circular's most effective device is to "restrict the supply", that is, restrict the securities brokers' capability to offer OTC option products. However, it has given rise to concerns that concentrating transactions in the hands of the reduced number of qualified OTC dealers will ultimately increase market risk.

III. Prohibited Activities

The 2016 Circular only requires securities brokers to identify the true intention of a client for entering into an OTC derivatives transaction, while the New Circular expressly prohibits securities brokers from undertaking OTC option business with clients for the sole purpose of high leveraged speculation or where there is no real need for risk management.

Specifically, the 2016 Circular defines four types of prohibited activities in relation to OTC derivative businesses, i.e. (i) providing financing to clients directly or in a disguised form, (ii) collecting margins that are significantly beyond the need to guarantee contract performance, (iii) applying margins as instructed by clients, and (iv) providing services or convenience to facilitate any non-standard credit assets to circumvent regulation.

The New Circular further proposes new requirements that, no brokers shall:

- (i) advertise to the public in any form through the internet or social-media, or encourage unqualified investors to trade OTC options,
- (ii) trade securities for hedging directly as instructed by a client, or sell the hedging positions to a third party specified by such client,
- (iii) conduct trading frequently,

- (iv) enter into transactions with any “sensitive clients” in violation of certain provisions,
- (v) conduct OTC option transactions in violation of certain provisions with any listed company or its affiliates or parties acting in concert where the underlying assets are the stocks issued by the listed company,
- (vi) provide OTC option services for any suspected illegal financial activities or to any institutions having a potential conflict of interest,
- (vii) facilitate off-balance-sheet non-standard credit assets or any other regulatory arbitrage activities or activities designed to circumvent regulation, or
- (viii) allow others to trade under its name as a dealer directly or in a disguised form.

The New Circular is exhaustive in listing various kinds of prohibited activities, indicating the

regulators’ determination to firmly suppress all activities that “evade regulation in the name of financial innovation”.

IV. Duties of Securities Brokers

The New Circular emphasizes that a securities broker shall verify the identity and source of funding of the investors and the contract terms of the relevant product, evaluate the suitability and legality of product design, and conduct continuous monitoring and evaluation on the trading activities of any counterparties. The requirements demonstrate the regulators’ clear thinking on their approach to regulation and supervision of the financial market and their intention to control the source of market risks by reining in licensed financial institutions. We also note that the New Circular has been issued to securities brokers by the CSRC’s local counterparts, offering the regulators with more freedom to make adjustments from time to time based on the development of market conditions.

Natasha XIE	Partner	Tel: 86 21 2208 6238	Email: xieq@junhe.com
Chi ZHANG	Associate	Tel: 86 21 2208 6177	Email: zhangchi_Austin@junhe.com
Bing LU	Associate	Tel: 86 21 2208 6192	Email: lub@junhe.com

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of Jun He Law Offices. For more information, please visit our official website at www.junhe.com or our WeChat public account “君合法律评论”/WeChat account “JUNHE_LegalUpdates”.

