

## 金融法律热点问题

### 中国证券业协会出台收益互换业务规则

今年堪称场外衍生品立法的重要年份。首先，《期货和衍生品法》(草案)一年之内接连两次提交人大常委会审议(分别是4月和10月)，两次审议中，场外衍生品业务都是当仁不让的焦点。其次，一行两会一局出台《关于促进衍生品业务规范发展的指导意见(征求意见稿)》(以下简称“《指导意见》”)，专门规范场外衍生品业务，对银行等机构的场外衍生品业务必将产生深远影响。再次，证监会监督管理下的自律监管组织也在不断完善场外衍生品的自律监管体系。无巧不巧，2021年12月3日，也即《指导意见》发布的当日，中国证券业协会(以下简称“中证协”)颁布了《证券公司收益互换业务管理办法》(以下简称“《互换办法》”)以及《自律规则适用意见第4号-关于《证券公司收益互换业务管理办法》保证金管理有关规定的适用意见》(以下简称“《保证金适用意见》”)。《互换办法》延续了去年9月中证协《证券公司场外期权业务管理办法》(以下简称“《期权办法》”)相同的监管原则和体系，对证券公司从事收益互换业务(以下简称“互换业务”)从交易商管理、投资者适当性管理、交易标的及合约管理、保证金管理、风险控制、禁止的行为、数据报送和监测监控等七个方面作出了全面规定。

通观《互换办法》，其主要规定相比正在执行的监管要求和政策并无实质性的变化，但选择在《指导意见》出台的同时出台，不由让人觉得证监会对场外衍生品业务的审慎监管模式有可能复制到银行业，不排除要求银行业“抄作业”的可能性。以下梳理《互换办法》的重点，以供讨论。

#### 1、开展收益互换业务的资质

《互换办法》适用于证券公司和交易对手方在柜台及中证协认可的其他场所开展的收益互换。收益互换指交易双方根据约定在约定日期交换收益金额的互换交易，其中交易一方或交易双方支付的金额与标的的表现相关。与《期权办法》一致，《互换办法》要求证券公司从事互换业务应以服务实体经济、服务客户资产配置和风险管理需求为导向。证监会认可的场外期权一级交易商或中证协备案的场外期权二级交易商(以下统称“交易商”)均可以开展收益互换业务，但未获得证监会认可或中证协备案的交易商资质的证券公司则只能与交易商开展基于自营目的的收益互换交易，不得与客户开展收益互换交易。交易商资质管理和动态调整适用《期权办法》的规定。

《互换办法》同时明确，证券公司不得通过与其他衍生工具合约嵌套、拆分、组合形成非线性收益互换合约，变相开展场外期权业务。此前，由于无法取得开展场外期权业务的无异议函，市场上出现过以非线性收益互换名义实质上进行场外期权的情况。随着《期权办法》逐步收紧场外期权的交易资质管理，《互换办法》此次进一步明确禁止此类通过名义上的收益互换交易变相开展期权业务的现象，为证券公司合规开展柜台业务提出了更高的要求。

#### 2、交易对手方的真实需求以及风险揭示

同样类似于《期权办法》的规定，《互换办法》要求证券公司互换业务的交易对手方必须具有资

产配置、风险管理的真实需求，且满足《证券期货投资者适当性管理办法》规定的专业机构投资者标准。毫无疑问，具有资产配置、风险管理的真实需求的私募基金管理人将成为证券公司互换业务的主要交易对手类型之一。《互换办法》同时要求证券公司应当充分尽职调查，采取要求交易对手方提供证明材料、查询公开信息等必要措施，对交易对手方是否具有真实需求进行核实。

另一方面，《互换办法》要求证券公司应当全面了解交易对手方情况，充分揭示风险，与合格的交易对手方开展收益互换交易。根据此前《证券公司金融衍生品柜台交易业务规范》的要求，与专业交易对手方开展衍生品交易时，证券公司仅需要按协议约定执行衍生品的风险揭示。但从《互换办法》前述条款的文义看，即便是针对专业机构投资者，在进行互换交易时证券公司也负有充分揭示交易风险的法定义务。

### 3、 穿透原则

《互换办法》在投资者适当性管理和交易标的的限制两方面均严格贯彻穿透原则。首先，产品参与收益互换的，应当为合规设立的非结构化产品；穿透后的委托人中，单一投资者在产品中权益超过 20% 的，该投资者应满足《证券期货投资者适当性管理办法》规定的专业投资者标准。证券公司不但需要对交易对手方履行 KYC (Know-Your-Customers)，而且要求尽职调查的范围较为广泛，包括交易对手方的真实需求、资金来源、合同依据等等。有意思的是，在有关投资者适当性管理的章节，《互换办法》全文用“交易对手方”一词而非《期权办法》中使用的“投资者”以及《指导意见》中使用的“合格投资者”，更契合市场对于衍生品交易当事人之间地位的认识。其次，《互换办法》规定互换业务挂钩标的应当具备公允的市场定价、良好的流动性，包括但不限于股票、股票指数、大宗商品等，但互换业务不得挂钩私募基金及资管计划等私募产品、场外衍生品，证监会认可的情形除外。

进一步，《互换办法》要求证券公司建立收益互换挂钩标的穿透核查机制，并对逐笔核查情况进行

留痕，严禁通过挂钩标的变相投资于非标准化资产。证券公司不得新增和展期被交易所实行风险警示或进入退市程序的股票为挂钩标的的收益互换交易。由此看出，证监系统在场外衍生品业务领域仍然严格贯彻了“穿透监管”的原则。

### 4、 禁止行为

与《期权办法》基本一致，《互换办法》也列举了几类禁止行为，包括：(1)违规与敏感客户交易。证券公司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收益互换交易，且不得与涉嫌非法金融活动或存在潜在利益冲突的主体开展收益互换交易。(2)为监管套利等违法违规行为提供便利。证券公司不得为违规资产出表、资金腾挪或者规避信息披露、投资范围、交易限制、杠杆约束等监管要求的行为提供服务或向他人出借或变相出借交易商资质。(3)变相成为交易对手方交易通道。证券公司不得向交易对手方出借证券账户，不得直接根据交易对手方指令进行对冲交易，不得依照交易对手方指令使用其保证金。上述禁止行为在此前地方证监局的通知中都有提及，不算新鲜；但在目前的监管环境下以完整的自律监管规则纳入上述要求，说明了证监系统对场外衍生品业务审慎监管的态度，通过对证券公司的合规要求引导市场机构合规地从事场外衍生品业务。

### 5、 保证金管理

《保证金适用意见》对证券公司开展收益互换业务的保证金管理做出了规定，明确：挂钩标的为股票、窄基股票指数及其产品、信用债的，向单一交易对手方收取的保证金比例不得低于合约名义本金的 100%；证券公司与单一交易对手开展的权益类收益互换交易的，在规定的四种情形下，其收取的保证金应在覆盖交易或衍生品风险敞口同时，不低于多头或空头名义本金孰高的 25%；收益互换业务挂钩其他标的的，证券公司收取的保证金比例也应执行《保证金适用意见》的相关规定。此外，中证协有权根据监管要求、市场和业务发展情况、交易商合规风控能力和水平，适时调整上述保证金管理要求。

## 6、报送和记录保存

中证机构间报价系统股份有限公司在中证协的指导下负责场外业务交易报告库的建设及维护，承担收益互换业务的日常监测等职责。证券公司需要报送的业务信息包括但不限于 SAC、NAFMII、ISDA 主协议项下的收益互换交易信息，也显示出监管机构对证券公司使用各类主协议所达成的收益互换交易进行统筹管理的立场。《互换办法》还要

求证券公司保存收益互换交易所有交易记录和与交易有关的文件、账目、原始凭证等资料至少 20 年。

总体而言，《互换办法》以自律监管规则的形式完善了场外衍生品业务的规范，充分体现了审慎监管的原则，我们预期《互换办法》将在较长时间指导市场实践，且不排除其监管原则和体系复制到证监会监管之外的银行场外衍生品业务领域的可能性。

谢青	合伙人	电话：86 21 2208 6238	邮箱地址：xieq@junhe.com
朱嘉寅	合伙人	电话：86 21 2208 6252	邮箱地址：zhujiy@junhe.com
张弛	律师	电话：86 21 2208 6177	邮箱地址：zhangchi_Austin@junhe.com
罗丹晨	律师	电话：86 21 2283 8320	邮箱地址：luodch@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](http://www.junhe.com)”或君合微信公众号“君合法律评论”/微信号“JUNHE\_LegalUpdates”。



## Financial

### The SAC Proposed Rules for TRS Business

2021 has witnessed remarkable developments in China's legislation of the over-the-counter (OTC) derivatives businesses. First and foremost, the Draft Futures and Derivatives Law was tabled for review to the Standing Committee of the National People's Congress ("NPC Standing Committee") twice in 2021 (April and October respectively), where the provisions related to OTC derivatives business were the focus of both deliberations. Secondly, "Yi Hang Liang Hui Yi Ju" (i.e. PBOC, CBIRC, CSRC, SAFE) jointly released the *Guiding Opinions on Promoting the Regulation of Derivatives Business (Consultation Paper)* ("Guiding Opinions") to regulate OTC derivatives businesses specifically, which undoubtedly will have a profound impact on the OTC derivatives businesses of financial institutions such as commercial banks. In the meantime, the self-regulatory organizations supervised by the China Securities Regulatory Commission (CSRC) have been improving the management of OTC derivatives businesses. Coincidentally, on the same day that the Guiding Opinions were released, the Securities Association of China (SAC) released the *Administrative Measures on TRS Businesses of Securities Companies* ("TRS Measures") and the *Opinions on the Application of Self-Disciplinary Rules No. 4 - Opinions on the Application of the Provisions on the Management of Margins under the Administrative Measures on TRS Businesses of Securities Companies*

("Opinions on Application of the Provisions on Margins"). The TRS Measures have inherited the regulatory principles and mechanisms embodied in the *Administrative Measures for Over-the-Counter Option Businesses of Securities Companies* ("Option Measures"), issued by the SAC in September last year, and provide comprehensive regulations for securities companies engaging in TRS businesses in terms of dealer management, investor suitability management, underlying assets and contracts management, margin management, risk control, prohibited activities, data reporting, supervision and monitoring. The TRS Measures remain generally consistent with the current regulatory requirements and policies. However, the simultaneous release of the TRS Measures and the Guiding Opinions leads us to speculate that the prudent regulation of OTC derivatives businesses by the CSRC may be duplicated in the banking industry that is regulated by the China Banking and Insurance Regulatory Commission (CBIRC). The possibility cannot be excluded that regulators may regulate the banking industry by reference to the regulatory requirements applicable to the securities industry in terms of OTC derivatives businesses. Below we have highlighted some of the key points of the TRS Measures to facilitate further discussion.

#### 1. Qualification Requirements for TRS

## Business

The TRS Measures apply to any TRS transaction conducted between a securities company and counterparties over-the-counter or in a venue recognized by the SAC. A TRS is a swap agreement in which the parties pay each other the returns on an agreed date, and one party (or both parties) will make the payments based on the performance of the underlying assets. As with the Option Measures, the TRS Measures require securities companies to be oriented towards serving the real economy and serving a clients' asset allocation and their risk management needs when engaging in TRS businesses. The first-class dealers for OTC option transactions that have been recognized by the CSRC and the second-class dealers for OTC option transactions that have been filed with the SAC (collectively, the "Dealers") may both engage in the TRS businesses. Securities companies that are not recognized by the CSRC, nor filed with the SAC to be qualified dealers, are allowed to conduct TRS transactions with qualified dealers for proprietary trading purposes only and shall not conduct TRS transactions with outside clients. The Option Measures will apply to the management and adjustment of a dealer's qualification. The TRS Measures also prohibit securities companies from engaging in OTC option businesses in a disguised form by nesting, splitting or combining with other derivatives contracts to form non-linear TRS contracts. Before this, due to the difficulty in obtaining a no-objection letter for carrying out OTC options businesses, there have been market practices in which OTC options businesses were carried out in a concealed form of non-linear TRS transactions. In line with the tightening of the management of dealer qualifications for OTC options businesses as proposed in the Option Measures, the TRS Measures also explicitly prohibit any OTC option businesses to be carried out in a disguised form of TRS transaction, thereby imposing higher compliance requirements for securities companies engaging in OTC

businesses.

## 2. Genuine Needs of the Counterparties and Risk Disclosure

Like the Option Measures, the TRS Measures require the counterparties with whom a securities company conducts a TRS transaction to have a genuine need for asset allocation and/or risk management, as well as satisfying the requirements for a professional institutional investor under the *Measures on the Suitability Management of Securities and Futures Investors*. Undoubtedly, private fund managers will become one of the main types of such qualified counterparties provided they have been verified to have a genuine need of asset allocation and risk management. According to the TRS Measures, a securities company shall conduct comprehensive due diligence on the counterparties to verify whether they have genuine needs, whereby a securities company shall take necessary measures such as collecting supporting documents from the counterparties and doing public research on the counterparties.

The TRS Measures require securities companies to fully understand the counterparties, disclose fully any risks and conduct TRS transactions with only qualified counterparties. Under the previous *Business Rules for Over-the-Counter Financial Derivatives Trading by Securities Companies*, securities companies were only required to perform risk disclosure obligations according to the financial derivatives contracts when conducting derivatives trading with professional counterparties; under the TRS Measures, it is mandatory for financial institutions to fully disclose trading risks even when conducting TRS transactions with professional institutional investors.

## 3. Look-through Principle

The look-through principle is strictly implemented in the TRS Measures regarding the suitability of

investors and the restriction of underlying assets. Firstly, if the counterparty is a product, it shall be a lawfully manufactured non-structured product and a single ultimate investor of the product shall meet the criteria of a professional investor under the *Measures on the Suitability Management of Securities and Futures Investors* if it holds more than 20% interest in the product. A securities company shall perform the duty of Know-Your-Customers (KYC) on the counterparties and conduct due diligence on a wide range of issues such as the counterparties' genuine needs, sources of funding and the contractual basis. Interestingly, the TRS Measures use the term "counterparty" throughout the section of "investor suitability management", rather than "investor" as used in the Option Measures, or "qualified investor" as used in the Guiding Opinions, which is more in line with the public understanding of the roles of parties to derivative transactions. Second, the TRS Measures stipulate that the underlying assets linked to TRS transactions shall have a fair market value and good liquidity, such as stocks, stock indexes and bulk commodities, with the exclusion of private products such as private funds and asset management plans, as well as OTC derivatives, unless otherwise approved by the CSRC. In this respect, it further requires securities companies to establish a mechanism for looking through down to the underlying assets of TRS transactions and to keep records of the "looking-through" process for each transaction and strictly prohibits investing in non-standardized assets in any disguised form by taking advantage of linking multiple layers of underlying assets. Furthermore, securities companies are not allowed to engage in new TRS transactions nor extend the old TRS transactions to which the underlying stocks are subject to special treatment or delisting procedures taken by the exchanges. From the above, we can see that the CSRC adheres to the look-through principle in the regulation of OTC derivatives businesses.

#### **4. Prohibited Activities**

Consistent with the Option Measures, the TRS Measures define several types of prohibited activities, i.e. (1) unlawfully entering into transactions with any "sensitive clients". A securities company shall not conduct TRS transactions with any listed company or its affiliates or parties acting in concert where the underlying assets are the stocks issued by the same listed company in violation of certain rules, nor with any entity that is suspected of being involved in illegal financial activities or having a potential conflict of interest; (2) facilitate regulatory arbitrage activities or other illegal activities or violations. A securities company shall not provide services for illegal off-balance-sheet arrangements, the misappropriation of funds, or other activities that circumvent the regulatory requirements for such as information disclosure, investment scope, trading restrictions, and leverage limitations, nor lend its dealer qualification to others directly or in a disguised form; (3) in a disguised form, function as a "channel" for counterparties. A securities company shall not lend securities accounts to counterparties, shall not directly conduct hedging transactions as instructed by counterparties, nor apply margins as instructed by counterparties. These activities were also prohibited according to certain circulars previously released by the local bureaus of the CSRC and are reiterated and unified in this TRS Measures as self-disciplinary rules, showing the CSRC's prudent regulation of OTC derivatives businesses. By imposing these requirements on securities companies, we believe that the CSRC aims to guide the compliant engagement of OTC derivatives businesses of all market participants.

#### **5. Management of Margins**

The Opinions on Application of the Provisions on Margins have specified requirements for the management of margins, namely, (1) if a securities company conducts TRS transactions that link to stocks, narrow-based stock indexes and their products or credit debts, (i) the margins collected

from a single counterparty shall not be less than 100% of the notional principal of the TRS contract; (ii) if a securities company conducts equity-based TRS transactions with a single counterparty, in the four prescribed circumstances, the margin collected from the counterparty shall cover the risk exposure of the transactions or derivatives and shall not be less than 25%, whichever the higher of the notional principal of the counterparty's long position and short position; and (2) if the TRS transactions link to other underlying assets, the percentage of margins collected by a securities company shall be subject to the Opinions on Application of the Provisions on Margins. Additionally, the SAC has the power to adjust the foregoing margin management requirements as appropriate according to regulatory requirements, market and business developments, and the dealer's ability and level of compliance and risk control.

## 6. Reporting and Record Filing

Under the guidance of the SAC, the Inter-Institutional Price Quoting and Service System is

responsible for the construction and maintenance of the OTC transactions reporting database and undertakes the daily monitoring of TRS businesses. A securities company shall report information regarding TRS transactions under the master agreement of each of the SAC, NAFMII and ISDA, showing the position of the regulators on the uniform regulation of all TRS transactions concluded under different master agreements. The TRS Measures also require securities companies to keep all TRS transaction records and relevant documents, accounts, original vouchers and other materials for at least 20 years.

In summary, the TRS Measures contribute to the improved self-regulatory regime of OTC derivatives businesses, which fully reflects the principles of prudent regulation. We expect that the TRS Measures will guide the market practice for a long time, while leaving a little to the imagination that the regulatory principles and regimes embodied therein may provide a model for the future regulation of banking OTC derivatives businesses outside the jurisdiction of the CSRC..

Natasha XIE	Partner	Tel: 86 21 2208 6238	Email: xieq@junhe.com
Jay Zhu	Partner	Tel: 86 21 2208 6252	Email: zhuji@junhe.com
Chi Zhang	Associate	Tel: 86 21 2208 6177	Email: zhangchi_Austin@junhe.com
Danchen Luo	Associate	Tel: 86 21 2283 8320	Email: luodch@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](http://www.junhe.com) or our WeChat public account “君合法律评论”/WeChat account “JUNHE\_LegalUpdates”.

