

Financial

CFA Issues New Guidelines on Futures Brokers' Risk Management Subsidiary Businesses

It has been more than six years since the China Futures Association (“CFA”), a self-disciplinary organization under the supervision of the China Securities Regulatory Commission (“CSRC”), initiated pilot work relating to the establishment of risk management subsidiaries (“RMSs”) by futures brokers, with its December 2012 publication of the *Guidelines on the Pilot Work Concerning Futures Brokers' Establishment of Subsidiaries to Mainly Engage in Risk Management Services* (the “Old Guidelines”). By February 27, 2019, according to the CFA website, 79 risk management subsidiaries had filed with the CFA.¹ On February 15, 2019, the CFA released a new set of guidelines, the *Guidelines on the Pilot Work Concerning Futures Brokers' Risk Management Subsidiary Businesses* (the “New Guidelines”), which replaced the Old Guidelines, and took effect on the date of issuance. Key elements of the New Guidelines are as follows:

1. Business Scope of RMS

Despite the six years that have passed since the Old Guidelines were introduced, the New Guidelines continue to treat RMSs as pilot

businesses. This is indicative of the continuing cautious attitude of the regulatory authorities towards such business activity. The New Guidelines require that a futures broker shall take a prudent approach to establishing an RMS, that is, the brokers shall have first fully assessed their own business strength, reserve of talents and risk control capacities to determine whether they have the capacity to set up an RMS and shall have taken measures to adequately prepare for the establishment of an RMS. Additionally, futures brokers are required to first file with the CFA before engaging in such businesses.

The New Guidelines classify and provide definitions for six categories of RMS business activity, namely: (i) basis trading; (ii) services related to warehouse warrants; (iii) collaboration hedging; (iv) over-the-counter (OTC) derivatives business;² (v) market making; and (vi) other businesses related to risk management.

- i. Basis trading. An RMS provides customers with relevant quotation at a pre-determined price, or via a method of pricing or averaging price and conducts spot transactions with the customer.

¹ Please refer to http://www.cfachina.org/CXFW/zgsyw/xxgszgs/201804/t20180418_2494997.html.

² The “pricing service” listed as item (iv) in the Old Guidelines has been replaced in the New Guidelines by “OTC derivatives business.”

- ii. Warehouse warrant. An RMS provides services to customers by means of exchange, receipt pledge or agreed repurchase of the warehouse warrant of spot commodity.
- iii. Collaboration hedging. In which an RMS enters into hedging transactions with its customers in order to mitigate all or partial price risks of the hedged items with the aim of managing the customer's own market risks in the conduct of producing or operating spot commodities.
- iv. OTC derivatives business. This new category is defined as business activity in which an RMS enters into an OTC transaction in accordance with an agreement drawn up with its counterparty. An OTC derivative refers to a contract traded out of a futures exchange, as approved by the State Council's futures regulatory authorities, whose contract value is determined by one or several underlying assets. The underlying assets may include but are not limited to, commodities, stocks, indexes, funds, interest rates, exchange rates, credit or any of their derivatives. Such derivative contracts may include forwards, swaps, options or a combination of the aforesaid, and may have one or several characteristics of the same.
- v. Market making. An RMS provides continuous quotes or responds to quotes for specific futures, options or other derivatives contracts in accordance with the relevant rules of the exchange.

2. Filing Requirements

When compared with the Old Guidelines, the New Guidelines impose more stringent requirements in terms of both the set-up of an RMS and the launch of a few types of risk management businesses. A futures broker that sets up an RMS is required to have its latest rating no lower than BB level of Class B for the filing of an RMS, no lower than BBB level of Class B if the RMS

engages in OTC derivative businesses, and no lower than AA level of Class A if the RMS engages in the OTC derivatives business in which the underlying assets are individual stocks.

The New Guidelines provide for restrictions on any RMSs that fail to meet the relevant requirements. For example, if the parent company of an RMS fails to meet the relevant rating level, or its latest rating is Class D or lower for two consecutive years, the business size of such an RMS shall be restricted correspondingly, no new business shall be developed and any existing business shall be terminated at its expiry date unless the rating of such futures broker returns to the requisite level.

Growth in the RMS OTC options business has led to an increasing demand from RMS for capital. As a result, the CFA has substantially increased the minimum registered capital requirements for RMSs, and there are differing requirements according to the relative risk exposures of the various types of business. The New Guidelines explicitly stipulate that the paid-in capital of an RMS shall not be less than RMB 100,000,000. For an RMS engaging in the OTC derivatives business in which the underlying assets are individual stocks, the paid-in capital shall not be less than RMB 200,000,000.

The New Guidelines also set out various differentiated qualification requirements in relation to RMSs' internal controls, business experience, and personnel qualifications.

3. Prohibited Behavior

The Old Guidelines provided a list of the prohibited behavior in an RMS's business operations. The New Guidelines include various new items, including that an RMS and its employees shall not in the conduct of business operations violate the real name requirements for

securities or futures accounts, and shall not use other person's securities or futures account, or lend or authorize other person to use its own securities or futures account.

The New Guidelines list six categories of conduct which are specifically prohibited in the OTC derivatives service, namely: (i) entering into service agreement or making OTC derivatives transaction with an individual; (ii) entering into OTC derivative transactions or other business collaborations with an institution that is engaging in illegal securities or futures activities, as a result of failing to prudently evaluate the eligibilities of counterparties; (iii) providing financing to clients directly or in a disguised form; (iv) receiving a margin that exceeds the necessary amount for guaranteeing the performance of a contract; (v) using a margin in accordance with client's instruction; and (vi) provide the means for other institutions to circumvent regulation or conduct regulatory arbitrage.

4. Joint Venture RMS

Futures brokers may establish an RMS wholly owned by it or jointly with other investors, though the equity stake held by a futures broker shall not fall below 51%. The New Guidelines further clarify that a futures broker, as the major shareholder of the joint venture RMS, shall not in any form transfer its controlling power over the RMS to other investors. In addition, each shareholder of an RMS shall exercise its right to vote in accordance with the proportion of its capital contribution, or its respective shareholding ratio. The percentage of the directors as recommended

and designated by each shareholder in the members of the board of directors shall correspond to the proportion of each shareholder's capital contribution or respective shareholding ratio. An RMS and its shareholders shall not conclude any agreements contrary to the above requirements by entering into any other contract or making any other arrangement. According to the New Guidelines, it will no longer be possible to implement any arrangement to transfer the management controlling power of an RMS that contravenes these regulations.

5. Futures Brokers' Supervisory Duties

To ensure there is clear delineation between a futures broker and the operation of its RMS, the New Guidelines include the requirements to segregate personnel, properties and belongings, and to clarify the duties of both the parent and the subsidiary. The New Guidelines strengthen the supervisory requirements of a futures broker for its RMS. Futures brokers are required to formulate relevant internal policies for their RMSs, such as policies of internal control, compliance and risk management, to incorporate the compliance and risk control of RMS into the overall risk management system of the parent company, and to conduct, at least once a year, a compliance inspection on the RMS.

The requirements of the New Guidelines suggest that the regulatory mindset continues to be focused on the supervision of licensed financial institutions in an effort to minimize market risk at the source.

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金融法律热点问题

中期协发布期货公司风险管理子公司业务指引

六年前，中国证监会监管下的自律监管组织中国期货业协会（以下简称“中期协”）启动了期货公司设立风险管理子公司（以下简称“风险管理子公司”）的试点工作。2012年12月，中期协发布了《期货公司设立子公司开展以风险管理服务为主的业务试点工作指引》（以下简称“《旧指引》”）。截止2019年2月27日，中期协网站上公布的期货公司风险管理子公司的数量共计79家¹。2019年2月15日，中期协发布了《期货公司风险管理公司业务试点指引》（以下简称“《新指引》”）及配套文件取代《旧指引》，《新指引》已于发布之日起实施。我们在此简单总结《新指引》的要点供各位参考。

一、风险管理子公司的业务范围

时隔六年，《新指引》仍将期货公司的风险管理子公司业务视作一项试点业务，这体现了监管机构对此类业务一以贯之的审慎态度。《新指引》要求期货公司在充分评估自身业务优势、人才储备、风险控制能力等条件和准备充分的基础上，审慎设立风险管理子公司，并规定只有通过中期协的备案后方可开展该项试点业务。

《新指引》将各项试点业务分为六类，并做了明确的定义，即（1）基差贸易；（2）仓单服务；（3）

合作套保；（4）场外衍生品业务²；（5）做市业务；（6）其他与风险管理服务相关的业务。

（1）基差贸易是指风险管理子公司以确定价格或以点价、均价等方式提供报价并为客户提供现货交易的业务行为。

（2）仓单服务是指风险管理子公司以商品现货仓单串换、仓单质押、约定购回等方式为客户提供服务的业务行为。

（3）合作套保是指为规避客户现货生产经营中的市场风险，风险管理子公司为客户提供套期保值服务，以抵销被套期项目全部或部分价格风险的业务行为。

（4）场外衍生品业务是指风险管理子公司根据与交易对手达成的协议直接进行场外衍生品交易的业务行为。场外衍生品是指在国务院期货监督管理机构批准的期货交易场所以外进行交易的，价值取决于一种或多种标的资产的合约。其中标的资产包括但不限于：商品、股票、指数、基金、利率、汇率、信用及其相关衍生品；合约的类型包括远期、互换（掉期）、期权或具备其中一种或多种特征的组合。

（5）做市业务是指风险管理子公司按照交易所相关规则，为特定的期货、期权等衍生品合约提供连续报价或者回应报价等服务。

¹ 请参见：
http://www.cfachina.org/CXFW/zgsyw/xxgszgs/201804/t20180418_2494997.html。

² 《旧指引》中的第（iv）项“定价服务”被明确为“场外衍生品业务”。

二、备案条件

《新指引》提高了期货公司设立风险管理子公司和开展部分风险管理业务的备案门槛要求。期货公司备案风险管理子公司的，该期货公司的最近一期分类评级不低于 B 类 BB 级。风险管理子公司开展场外衍生品业务的，期货公司分类评级不低于 B 类 BBB 级；开展个股场外衍生品业务的，期货公司分类评级持续不低于 A 类 AA 级。

《新指引》新增了对未能达到相应条件风险管理子公司的限制措施。如母公司分类评级连续两年未达到上述规定的相应级别或最新一期分类评级为 D 类及以下的，则对风险管理子公司相应试点业务规模进行控制，不得新增业务，存续业务到期终止，直至期货公司的分类评级恢复至规定的相应级别。

随着风险管理子公司场外期权业务的发展，风险管理子公司对于资本金的需求不断增加。针对不同类型业务的风险程度，中期协也因此大幅提高风险管理子公司的注册资本要求。《新指引》明确要求风险管理子公司的实缴资本不得低于人民币 1 亿元，开展个股场外衍生品业务的风险管理子公司，其实缴资本不低于 2 亿元。

与此同时，《新指引》还对风险管理子公司的内控制度，业务经验和人员要求等事项做了差异化的资质要求。

三、禁止行为

《旧指引》列举了风险管理子公司展业过程中的禁止行为。在此基础上《新指引》新增了一项，即风险管理子公司及其工作人员开展业务过程中不得违反账户实名制要求，使用他人证券、期货账户，或将自有证券、期货账户出借或授权给他人使用。

《新指引》还列举了六类开展场外衍生品业务的禁止行为，分别是：（1）与自然人签订业务合同或开展场外衍生品交易；（2）未审慎评估交易对手资质，与从事非法证券期货活动的机构开展场外衍生品交易或其他业务合作；（3）为客户提供融资或变相融资服务；（4）收取超过履约保障需要的保证金；（5）依照客户指令使用保证金；（6）为其他机构规避监管或实施监管套利提供便利。

四、合资风险管理子公司

期货公司可以设立全资风险管理子公司，也可以与其他投资者共同出资设立风险管理子公司，但期货公司的持股比例不得低于 51%。《新指引》进一步明确，在合资的情况下，期货公司作为大股东不得以任何形式向风险管理子公司的其他投资者让渡对风险管理子公司的控制权。此外，合资风险管理子公司应当由各股东按照出资比例或者持有股份的比例行使表决权，各股东推荐并经选任的董事占董事会成员的比例应当与其出资比例或者持有股份的比例相对应。风险管理子公司及其股东不得通过协议或者其他安排约定与上款规定相冲突的事项。

五、期货公司的管理责任

《新指引》一方面要求期货公司与子公司在人、财、物方面严格隔离，有效地明确了各方主体的职责；另一方面加强了期货公司对于其子公司的管理责任。要求期货公司制定对风险管理子公司的内部控制、合规和风险管理等制度，将风险管理子公司的合规风控纳入公司全面风险管理体系，并且对其至少每年开展一次合规检查。上述规定体现了监管者对于风险管理子公司的基本监管思路，即管好持牌金融机构，从源头防范整体市场风险。

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