

金融法律热点问题

基金托管业务正式向外资分行开放

中国证券投资监督管理委员会(以下简称“证监会”)和中国银行与保险监督管理委员会(以下简称“银保监会”)于2020年7月10日联合发布修订后的《证券投资基金托管业务管理办法》(以下简称“《办法》”)与起草说明(以下简称“《起草说明》”)。《起草说明》指出,本次修订的主要目的是按照国家金融业对外开放的统一安排,落实中美第一阶段经贸协议,以支持外国银行在华分行(以下简称“外资分行”)申请证券投资基金托管业务资格(以下简称“基金托管资格”)。《办法》一经发布立即生效,外资分行即可根据《办法》申请证券投资基金托管资格。

我们简要梳理了《办法》的规定以及《办法》与证监会于2020年5月8日发布的《证券投资基金托管业务管理办法(征求意见稿)》(以下简称“《征求意见稿》”)的变化,具体如下:

一、外资分行申请基金托管资格准入条件及其境外总行职责

1. 准入条件

相较于《征求意见稿》,《办法》在一定程度上放宽了对外资分行本身以及境外总行的资质要求。就外资分行本身而言,《办法》删除了外资分行“应当持续经营3年以上,经营业绩与资产质量良好,具备与开展基金托管业务相适应的营运资金”的要求。就外资分行境外总行而言,《办法》删除了“近3年各项指标符合所在国家或者地区法律的规

定和监管机构的要求,近3年未受到所在国家或者地区监管机构或者行政、司法机关的重大处罚,无因涉嫌重大违法违规行为正受到有关机关调查的情形”的要求。外资分行在申请时,亦无需再提供所在国家或者地区相关监管机构或者证监会认可的境外机构出具的关于其境外总行是否具备前述条件的说明函。

与《征求意见稿》一致,外资分行在申请托管牌照时,其净资产等财务指标可按境外总行计算。修订后的境外总行资质要求为:

(3) 具有完善的内部控制机制,具备良好的国际声誉和经营业绩,近3年基金托管业务规模、收入、利润、市场占有率等指标居于国际前列,近3年长期信用均保持在高水平;以及

(4) 所在国家或者地区具有完善的证券法律和监管制度,相关金融监管机构已与证监会或者证监会认可的机构签订证券监管合作谅解备忘录,并保持着有效的监管合作关系。

2. 外资分行境外总行职责

与《征求意见稿》一致,《办法》明确了外资分行的民事责任由总行承担,同时要求外资分行境外总行根据其分行托管规模,建立相应的流动性支持机制。《办法》要求外资分行在申请基金托管资格时提交境外总行对分行开展基金托管业务建立相应流动性支持机制的说明,但并未给出该等流动性支持的具体要求。在证监会于同日发布的新闻稿

(以下简称“**新闻稿**”)中,证监会明确其后续将根据《办法》相应更新基金托管资格相关行政许可事项的服务指南(以下简称“**行政许可指南**”),我们预期证监会可能在行政许可指南中对相关申请资料的具体要求予以明确。

值得注意的是,证监会在新闻稿中进一步明确:“允许外国银行在华分行申请基金托管业务资格,净资产等财务指标可按境外总行计算,并明确境外总行应承担的责任,强化配套风险管控安排。执行中,外国银行在华子行一体适用”。我们理解,证监会和银保监会有权决定外国银行在华子行(以下简称“**外资子行**”)在执行中如何一体适用前述规则。

二、完善基金托管人净资产准入标准

与《征求意见稿》一致,《办法》规定将基金托管资格申请人最近3个会计年度的年末净资产的最低要求由20亿人民币提升至200亿人民币。证监会和银保监会在《起草说明》中明确了将净资产要求提升至200亿元人民币但并未与结算代理人净资产要求(即400亿元人民币)一致,是为了在有效提升托管人的抗风险能力的基础上将托管业务和结算业务分开。考虑到部分外资分行/外资子行希望获得结算代理人资质以更好地开展托管业务,但“最近3个会计年度的年末净资产不低于400亿元人民币”的要求无疑是外资分行或子行申请结算代理人资质的障碍之一,目前尚不明确:(1)外资分行是否可以申请结算代理人资质;以及(2)外资分行/外资子行在向中国证券登记结算有限公司申请结

算代理人资质时是否亦可使用其境外总行的财务数据。

三、统一托管资格准入标准与监管要求

根据新闻稿,《办法》统一了商业银行及其他金融机构的准入标准与监管要求,将非银行金融机构开展基金托管业务有关规定整合并入《办法》。

我们注意到,在《征求意见稿》的基础上《办法》新增一条明确证监会和银保监会各自的管辖权限,即(1)商业银行作为托管人的,由证监会和银保监会依法对其开展基金托管业务实施日常监管;(2)如果商业银行开展基金托管业务违反法律法规和相关规定的,证监会和银保监会均可采取监管措施;(3)证监会和银保监会对商业银行开展基金托管业务加强信息共享和监管协作。

同时,在新闻稿中,证监会明确,其将会同银保监会加强对基金托管人及基金托管业务的日常监管,持续强化执法力度,惩处违法违规行为。我们理解,这亦体现了监管对于我国金融行业分业监管结构的调整。

我们的观察

我们预期,随着《办法》的正式发布,证监会和银保监会可能会根据《办法》批准若干家已经递交基金托管资格核准申请的外资子行的申请(包括汇丰银行、花旗银行以及德意志银行等),基金托管业务将正式向外资银行开放。

我们将持续关注并及时与我们的客户分享最新的进展。

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Financial

China Opens Funds Custody Business to Local Branches of Foreign Banks

On July 10, 2020 the China Securities Regulatory Commission (CSRC) and the China Banking and Insurance Regulatory Commission (CBIRC) jointly issued the amended *Administrative Measures on Securities Investment Funds Custody Businesses* (“Measures”) and the relevant drafting statement (“Drafting Statement”). Pursuant to the Drafting Statement, the proposed amendments are meant to implement the first-phase of the Economic and Trade Agreement between China and U.S. and facilitate the applications for securities investment funds custody business qualification (“funds custody qualification”) by local branches of foreign banks (“foreign bank branches”) under a centralized framework for the opening up of China’s financial industry. The Measures became effective upon release, and foreign bank branches are now able to apply for funds custody qualification in accordance with the Measures.

We briefly summarize below the relevant provisions of the Measures and the differences between the Measures and the *Administrative Measures on Securities Investment Funds Custody Businesses (Consultation Paper)* (“Consultation Paper”) issued by the CSRC on May 8, 2020.

I. Requirements for Foreign Bank Branches Applying for Funds Custody Qualification and Liabilities of Parent Banks

1. Requirements

In contrast to the Consultation Paper, the Measures lower the qualification requirements to some extent for a foreign bank branch and its parent bank. For a foreign bank branch, the Measures remove the requirement that it must have been in continuous operation for more than three years with good business performance and asset quality, and have operating capital compatible with the funds custody business. The Measures also abolish the following requirements for the parent bank of a foreign bank branch, namely, (i) relevant indicators of the parent bank in the past three years shall comply with the requirements of the laws and regulatory requirements of the country or region where it locates; (ii) the parent bank must not have been subject to any severe penalty imposed by any regulatory authority, or administrative or judicial authority in the country or region where it locates during the past three years; and (iii) the parent bank cannot be under active investigation by relevant authorities due to any suspected major

violation of laws or regulations. Accordingly, when applying for the funds custody qualification, a foreign bank branch is no longer required to provide a statement issued by the relevant regulatory authorities in the country or region where its parent bank is located or a foreign institution recognized by the CSRC, as to whether the parent bank has met the aforementioned three requirements.

Similar to the Consultation Paper, under the Measures, a foreign bank branch is allowed to refer to its parent bank's net assets and other financial indicators when applying for the funds custody qualification. The revised qualification requirements for a parent bank are set forth below.

- (1) It has a good internal control system, good international reputation and business performance, with the business scale, revenue, profits, market share and other indicators of its funds custody business ranking forefront internationally in the past three years, and maintaining a high long-term creditworthiness over the past three years.
- (2) The country or region where it is located has well-established legal and regulatory regimes for securities; relevant financial regulatory authorities in such country or region have entered into a securities memorandum of understanding with the CSRC or other regulatory authority recognized by the CSRC, and maintain effective regulatory cooperation.

2. Liabilities of overseas parent bank

Consistent with the Consultation Paper, the Measures specify that civil liabilities imposed on a foreign bank branch shall be borne by the parent bank, while simultaneously requiring the parent

bank to establish a liquidity support mechanism based on the size of assets under the local branch's custody. The Measures require a foreign bank branch, when applying for the funds custody qualification, to provide a description of the liquidity support mechanism provided by its parent bank for the local branch's proposed funds custody business. However, the Measures do not provide the specific requirements for such liquidity support. In the press release issued by the CSRC on the same day ("Press Release"), the CSRC made it clear that it would subsequently update the guidelines for administrative approvals regarding funds custody qualification ("Guidelines for Administrative Approvals") in accordance with the Measures. We expect that the CSRC would clarify the detailed requirements for relevant application materials in the Guidelines for Administrative Approvals.

Notably, in the Press Release, the CSRC further clarified the following: a foreign bank branch is allowed to refer to the net assets and other financial indicators of its parent bank when applying for the funds custody business qualification; the liabilities assumed by the parent bank shall be specified and the relevant risk control measures shall be strengthened; when implementing the Measures, the locally incorporated subsidiaries of foreign banks shall be subject to the same regulatory requirements as a whole. We understand the CSRC and the CBIRC have the discretion to decide how the foregoing rules would equally apply to the local subsidiaries of foreign banks ("foreign bank subsidiaries") when implementing the Measures.

II. Refine Net Asset Requirements for Fund Custodians

Same as the Consultation Paper, the Measures raise the minimum net assets threshold imposed on an applicant for funds custody qualification, namely, the applicant's minimum net assets at the

end of the last three fiscal years shall be RMB 20 billion instead of 2 billion. The CSRC and the CBIRC pointed out in the Drafting Statement that, the reason for raising the net assets threshold for fund custodians to RMB 20 billion rather than applying the same net assets threshold for clearing agents (i.e. RMB 40 billion) is to separate the funds custody business and clearing business while effectively increasing the risk tolerance of fund custodians. Some foreign bank branches/subsidiaries desire to obtain the clearing agent qualifications to better carry out the funds custody business, but the requirement for the net assets at the end of the last three fiscal years to not be less than RMB 40 billion undoubtedly becomes one of the obstacles for them to apply for the clearing agent qualifications. Currently, it remains unclear as to (a) whether a foreign bank branch can apply for the clearing agent qualification; and (b) whether a foreign bank branch/subsidiary can refer to the financial indicators of its parent bank when applying to the China Securities Depository and Clearing Corporation Limited for the clearing agent qualification.

III. Unify the Entry Criteria and Regulatory Requirements for Funds Custody Qualifications

The Measures unify the entry criteria and regulatory requirements for commercial banks and other financial institutions applying for funds

custody qualifications, and also incorporate the relevant provisions for non-bank financial institutions carrying out funds custody business.

We note that on the basis of the Consultation Paper, the Measures add a new article to clarify the respective responsibilities of the CSRC and the CBIRC, namely (1) if a commercial bank acts as a fund custodian, both the CSRC and the CBIRC have the power to supervise the bank's daily operation of funds custody business according to law; (2) if a commercial bank violates relevant laws, regulations and rules in carrying out the funds custody business, both the CSRC and the CBIRC may take regulatory measures against relevant violations; and (3) both the CSRC and the CBIRC will strengthen information sharing and regulatory collaboration with respect to the funds custody businesses conducted by commercial banks.

Our Observations

We expect that with the official release of the Measures, applications already submitted by foreign banks subsidiaries (such as HSBC, Citibank and Deutsche Bank) for funds custody qualifications will be approved soon. It would indicate that from now on, funds custody business is officially open to all foreign banks.

We will continue to monitor the situation and keep our clients apprised of any important developments.

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