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Financial

Observations on the Draft Futures Law – Analysis on Key Provisions

On April 29, 2021, the Standing Committee of the 13th National People's Congress reviewed the Futures Law of the People's Republic of China (Draft) (the "Draft Futures Law") in its 28th session and published the full text of the Draft Futures Law for public consultation. This is the first time that the long-awaited Draft Futures Law, a milestone development of the derivatives markets, was unveiled to the public.

The Draft Futures Law proposes a total of 173 articles in 14 Chapters, bearing two predominated features: firstly, with respect to the exchange-traded derivatives, it recognizes the current legal framework established by the Administrative Regulations on Futures Trading (as amended in 2017), based on which it sets out and comprehensively improves rules for futures trading, settlement and delivery of futures and derivatives, traders protection, futures trading venues, futures clearing houses, futures operation institutions, futures service agencies; secondly, it provides, for the very first time, basic principles with regard to the regulatory framework of over-the-counter (OTC) derivatives, and authorizes the State Council to formulate detailed regulatory measures thereon, which tackles the long absence of legal provisions on the OTC derivative market.

Focusing on the common issues concerned by domestic and foreign futures market investors, this client briefing, as one of the article series that share our observations on the Draft Futures Law, highlights five key aspects, including scope of application, exchange-traded derivatives, market manipulation, insider trading and cross-border businesses. Regarding relevant analysis of OTC derivatives trading, please refer to JunHe Client Briefing "Single Agreement and Netting Provisions Concerning Other Derivatives Trading – Our Observations of the Draft Futures Law" and JunHe's subsequent legal updates in this series.

I. Scope of Application

The Draft Futures Law governs futures trading, other derivatives trading and related activities within mainland China, according to which, futures is defined as standardized contracts that are uniformly formulated by the futures trading venues for the future delivery of a certain number of underlying assets at a specified time and place, while other derivatives means non-standardized forward delivery contracts whose value depends on the changes in the value of underlying assets, such as non-standardized option contracts, swap contracts and forward contracts. It follows that this Draft Futures Law applies to trading of standardized exchange-traded derivatives and non-standardized OTC derivatives.

It seems that the Draft Futures Law broadens the concept of "futures" to include all standardized derivatives contracts traded in an open market, that is, as long as it is a "standardized derivatives contract" that "trades in an open market", which are, in fact, two closely associated characteristics that bearing one would realize the other (specifically, those traded in an open market must be standardized contracts, and vice versa), such contracts shall then fall within the scope of "futures". In addition, the Draft Futures Law introduces the concept of "other derivatives" to differentiate it from "futures" and aims to group all derivative contracts other than futures under the umbrella concept of "other derivatives". In this regard, some experts from academic institutions and the futures industry are of the view that the name "Derivatives Law" is more accurate than "Futures Law" because the former name encompasses the actual applicable scope of this law.

The Draft Futures Law provides that the futures regulatory authority of the State Council (i.e., the CSRC) shall implement centralized and unified supervision and regulation on the national futures market (i.e., exchange-traded futures market), while two specific futures (i.e., the interest rate and foreign exchange rate futures) shall be otherwise stipulated by the State Council. It further provides that for the other derivatives market, the supervisory and regulatory body shall be a department authorized by the State Council. It can be inferred that the Draft Futures Law does not intend to change the current regulatory framework that separates regulatory authorities by varieties of underlying assets and different market participants, but it does propose a high-level programmatic legislation, under the principles and framework of which, competent regulatory authorities may, based on the varieties of underlying assets and different market participants, regulate their own market according to their statutory duties.

II. Exchange-Traded Derivatives

The Draft Futures Law codifies certain stipulations for exchange-traded futures, covering trading mechanism, risk control, supervision, and regulation. In particular, it specifies that centralized trading, margin trading, position limits, mark-to-market settlement mechanism, physical delivery/cash settlement, forced liquidation and other relevant systems shall be implemented in exchange-based futures trading, which remains aligned with the Administrative Regulations on Futures Trading. It is also noteworthy that the Draft Futures Law, to some extent, codifies certain current rules and puts forward legislation on certain existing practices in futures markets for the first time. Below are our detailed analysis of these rules and their implications.

2.1 Real-Name Account System

According to the Administrative Regulations on Futures Trading, futures companies must open a separate account and set up a separate trading code for each client, mingling clients' codes is prohibited (such requirement is known as "One Client, One Code"). "One Client, One Code" is in effect the requirement for "real-name account", which is confirmed by the Draft Futures Law. To be specific, the Draft Futures Law explicitly prohibits traders from opening an account in another's name, using a false identity, or lending their own identification documents to others for opening an account. Further, drawn from relevant rules in the Securities Law (amended in 2019), it also stipulates that no entity or individual shall lend its own futures trading accounts to others or borrow others' futures trading accounts for engaging in futures trading, or it shall be ordered to rectify the matter, be issued a warning, and be fined not more than RMB 500,000.

2.2 Regulations on Suitability of Traders

Based on Article 57 of the Administrative Measures on Supervision on Futures Company, which provides that futures companies shall implement the system of suitability of investors, the Draft Futures law categorizes futures traders into “ordinary traders” and “professional traders”, of which the qualification standards for “professional traders” shall otherwise be formulated by the CSRC. We expect that such qualification standards for “ordinary traders” and “professional traders” may be drawn from the relevant criteria for determining “ordinary investors” and “professional investors” in the Administrative Measures for Suitability of Securities and Futures Investors issued by the CSRC in 2020.

In addition, under Article 57 of the Draft Futures Law, legal persons and unincorporated organizations engaging in futures trading shall establish an internal control policy and a risk control policy that adapt to the type, scale, and purpose of the contracts they trade. We note that institutional investors have been required to submit their policies with respect to internal control and risk management if they trade futures contracts in Shanghai International Energy Exchange (INE). It remains to be seen how such requirements by INE can be applied more broadly.

2.3 Regulations on Program Trading

Consistent with the Securities Law (amended in 2019), the Draft Futures Law stipulates that program trading conducted through automatic generation and delivery of trading orders by computer programming shall comply with rules prescribed by the futures regulatory authority of the State Council and shall be reported to the futures trading venues and shall not impact the system security or the normal trading order of the futures trading venues. Article 141 provides for corresponding legal liabilities for violators. For example, if any entity or individual conducts program trading without reporting it to the futures trading venues, it shall be ordered to rectify the matter, be issued a warning and may be fined not more than RMB 1 million; if an adoption of program trading impacts system security or the normal trading order of futures trading venues, the wrongdoer shall be ordered to rectify the matter and be fined not less than RMB 500,000 but not more than RMB 5 million.

Currently, each futures exchange has already had in place rules to regulate program trading for a long time, under which reporting of program trading is required. We expect that the CSRC may further consider and provide specific requirements for program trading in relation to both securities and futures markets.

2.4 Reporting a De Facto Control Relationship

Reporting a de facto control relationship is a unique system only required in futures trading. The Draft Futures Law stipulates that traders shall report the de facto control relationship to the futures operation institutions or the futures trading venues -- the first time that such a “reporting system” is specified in law, not only in a regulation or exchange rule. The definition of a de facto control relationship under the Draft Futures Law is consistent with that in the administrative measures for futures accounts with a de facto control relationship currently implemented by each futures exchange, that is, the act of having or the fact that an individual or an entity has the authority to manage, use, obtain earnings from or dispose of futures accounts of another person or entity and thus has decision-making power or significant impact upon another person or entity’s trading

decisions. According to the Draft Futures Law, those violating the "reporting obligation" shall be ordered to rectify the matter, be issued a warning, and be fined not more than RMB 500,000.

2.5 Margin System

Pursuant to the Administrative Regulations on Futures Trading, traders may post cash or other negotiable securities with stable value and high liquidity such as standard warrants and treasury bonds (the "Margin") for settlement of futures trading and guarantee of the performance of contracts. The Draft Futures Law broadens the scope of eligible margins to cash, treasury bonds, stocks, fund units, standard warehouse receipts and other negotiable securities with high liquidity, as well as other assets stipulated by the CSRC.

The ownership rights to the margins and protection of margins in a bankruptcy proceeding are key concerns of foreign institutional participants. Unlike the Administrative Regulations on Futures Trading, which stipulates that the margins collected by futures exchanges from members shall belong to members, and those collected by futures companies from clients shall belong to clients, the Draft Futures Law specifies requirements for "segregation" and "proper use", that is, margins and premiums collected by futures clearing houses and settlement participants shall be kept separately from their own funds, deposited in a special account, and managed separately; Misappropriation of such margins or premiums for any purpose other than those stipulated by the CSRC is prohibited (which is the same as the requirements in the Administrative Regulations on Futures Trading and the Administrative Measures for Supervision on Futures Company).

With respect to protection of margins and relevant assets in a bankruptcy proceeding, the Draft Futures Law provides that, where futures companies (as settlement participants), or futures traders enter into bankruptcy or liquidation proceedings, the margins and deliverable assets in the physical delivery shall be preferentially used for settlement and delivery. It also provides that, where the futures margin depository institution (i.e., the depository bank) goes bankrupt, the margins, premiums and the relevant assets shall not be treated as bankruptcy assets. However, it does not specify how to protect the margins delivered by settlement participants to futures exchanges under the circumstances that the futures exchanges go into bankruptcy. We guess that the silence of Draft Futures Law on the requirements for property segregation under the circumstances that futures exchanges go into bankruptcy may be due to the inherent particularities of China's futures exchanges.

Furthermore, we note that according to the Administrative Measures for Supervision on Futures Company, margins and other entrusting assets posted by clients shall not be seized, frozen, deducted, or forcibly enforced unless for the purpose of payment for the client's own debts, or otherwise stipulated by laws and regulations. However, the Draft Futures Law only provides that margins, premiums, settlement guarantee funds, risk reserve funds and such other assets collected and withdrawn by futures clearing houses pursuant to its business rules shall not be seized, frozen, retained, or forcibly enforced. We hope that the final Futures Law will clarify that, being consistent with the current stipulations, margins posted by clients shall not be seized, frozen, deducted, or forcibly enforced unless for the purpose of payment for the client's own

debts, or otherwise stipulated by laws and regulations.

2.6 Central Counterparty

In April 2012, the Committee on Payment and Settlement Systems (CPSS) and the International Organization of Securities Commissions (IOSCO) issued the Principles for Financial Market Infrastructures (PFMI), which establishes international standards for central counterparties in terms of general organization, credit and liquidity risk management, settlement, defaulting management, general business and operational risk management as well as access, efficiency and transparency, under which only those that satisfy the PFMI requirements and are recognized by regulatory authorities in their home jurisdictions can be deemed as qualified central counterparties.

The Draft Futures Law, for the first time at the statute level, recognizes the futures clearing houses, as well as the futures trading venue with an internal settlement department, as central counterparties that are responsible for carrying out net settlement and provide guarantees for centralized performance of futures trading. Up to now, the CSRC has approved five futures exchanges to be "qualified central counterparties". Moreover, the Draft Futures Law explicitly confirms the rule for settlement finality, in line with the Securities Law (amended in 2019), meaning that the outcome of a transaction conducted pursuant to the business rules formulated by the futures trading venues shall not be varied, and net settlement made pursuant to the relevant provisions shall not be affected by the commencement of bankruptcy proceeding of either party. Under this provision, the futures exchanges may settle and arrange delivery of cash and contracts for futures trading on a net basis, and the settlement results therefrom shall be final and cannot be invalidated and rescinded by an administrator in accordance with the Bankruptcy Law of the People's Republic of China.

Additionally, in relation to the fast disposal of collaterals, the Draft Futures Law provides that futures clearing houses and settlement participants (as each case may be) may directly dispose of collaterals such as negotiable securities used as margins under the circumstances that margins posted by settlement participants or traders do not comply with the required standards, and they fail to provide additional margins or voluntarily close positions within the prescribed time limit.

III. Futures Market Manipulation

The market manipulation activities set out in Article 24[1] of the Draft Futures Law basically remain consistent with those in Article 70[2] of the

[1] *The Draft Futures Law, Article 24:* The following misconduct that affects or has the intention to affect the futures trading prices or futures trading volumes, each of which shall be determined as futures market manipulation activity and is prohibited: (1) independently or in collusion with others, concentrating advantages of funds or positions, or taking advantage of information to trade or conducting consecutive trading; (2) conspiring with others to carry out mutual futures trading at an agreed time, price and method; (3) conducting self-trades of futures contracts; (4) making use of significant information that is false or uncertain to induce traders to trade futures; (5) without genuine transaction purposes, frequently placing and then canceling orders or placing and canceling large-value orders; (6) having held relevant contracts, making public evaluation or forecast, or providing investment recommendations with respect to relevant futures trading or trading of underlying assets of relevant contracts; (7) stocking up physical products with the intention to affect the futures markets; (8) gaining position advantages by using improper means to circumvent position limits on the futures contracts which are near or in their delivery month; (9) making use of activities in other related markets to manipulate the futures markets; (10) other means of manipulating the futures markets as determined by the futures regulatory authority of the State Council.

[2] *The Administrative Regulation on Futures Trading*, Article 70: Any entity or individual committing one of the following acts, manipulating futures trading prices shall be ordered to rectify the matter, its illegal gains shall be confiscated, and be fined not less than one time but not more than five times the amount of illegal gain: (1) manipulating the futures trading prices by, independently or in collusion with others, concentrating advantages of funds or positions, or taking advantage of information to trade or conducting consecutive trading; (2) colluding with others and engaging in futures trading with each other at such time and price as agreed to affect the trading prices or trading volume of futures contracts; (3) conducting self-trades of futures contracts to affect the trading prices or trading volume of futures contracts; (4) cornering spot

Administrative Regulations on Futures Trading and the Provisions for "Other Acts of Futures Trading Price Manipulation" in Section 5, Article 70 of the Administrative Regulations on Futures Trading (the "Provisions for 'Other Acts of Futures Trading Price Manipulation'"). Notably, both item (4) (commonly known as "false information manipulation") and item (6) (commonly known as "scalping manipulation") in Article 24 of the Draft Futures Law prescribe criteria different from the current Provisions for "Other Acts of Futures Trading Price Manipulation". We would suggest the criteria for such specific futures market manipulations be further clarified.

IV. Insider Trading

Based on the Administrative Regulations on Futures Trading, the Draft Futures Law further specifies insider trading with respect to the following aspects:

4.1 Expand the scope of Insider Information. Insider Information means any non-public information that may have a significant impact on the futures trading prices in futures trading activities, which include:

(1) Policies, information, or data being formulated or yet to be released by the futures regulatory authority of the State Council or other relevant departments that may have a significant impact on the futures trading prices;

(2) Decisions made by the futures trading venues, futures clearing houses or futures industry associations that may have a significant impact on futures trading prices;

(3) Trends of funds and trading activities of members and traders in the futures trading venues;

(4) Information on significant abnormal trading in other related markets;

(5) Other information that has a significant impact on the futures trading prices as determined by the futures regulatory authority of the State Council.

4.2 Expand the scope of the definition of insider. Under the Draft Futures Law, insider is defined as any entity or individual who has access to or is able to obtain insider information due to their management status, supervisory status, business status or convenience of their positions. Apart from staff of the CSRC and other relevant departments, it explicitly broadens the scope of insiders by specifying that insiders may also include relevant personnel of the futures operation institutions, futures trading venues, futures clearing houses, futures service agencies and futures industry associations, and any other entity or individual that has access to insider information due to their positions as determined by the CSRC.

In addition, it is worth noting that:

4.3 The Draft Futures Law considerably increases the ceiling on and the range of the fine amounts, for example:

(1) Besides a confiscation of illegal gains, a concurrent fine has been increased from five times the amount of illegal gain to ten times;

(2) In the event of market manipulation, where there is no illegal gain or the illegal gain is less than RMB 1 million, the maximum fine has been increased to RMB 10 million; where any entity engages in market manipulation, the maximum fine imposed on the relevant responsible person has been increased from RMB 100,000 to RMB 5 million.

commodities in order to affect the futures market conditions; (5) other acts of futures trading price manipulation as stipulated by the CSRC.

(3) In the event of insider trading, where there is no illegal gain or the illegal gain is less than RMB 500,000, the maximum fine has been increased to RMB 5 million; where any entity conducts insider trading, the maximum fine imposed on the relevant responsible person has been increased from RMB 300,000 to RMB 2 million.

4.4 It is noteworthy that same as exchange-traded derivatives, the regulatory authorities may also impose relevant administrative penalties as stipulated by the Draft Futures Law on anyone who, in OTC derivatives trading, engages in market manipulation, insider trading, fabricating or disseminating any false or misleading information, and other illegal activities.

V. Extraterritorial Jurisdiction and Cross-Border Businesses

5.1 Extraterritorial Jurisdiction

With reference to the Securities Law (as amended in 2019), Article 2 of the Draft Futures Law stipulates that futures trading, other derivatives trading and related activities conducted outside mainland China that disrupt domestic market order and impair the legitimate rights and interests of domestic traders shall be subject to this Futures Law.

Up to now, foreign investors may engage in domestic futures trading and other derivative trading mainly via the following channels:

(1) A foreign investor with a Qualified Foreign Institutional Investors (QFII) license or RMB Qualified Foreign Institutional Investors (RQFII) license (the QFI Scheme) is allowed to trade permissible listed futures and options products.

(2) A foreign investor who satisfies the requirements for access to China Interbank Bond Market (CIBM Direct) (including QFI) is allowed to trade bond-type, interest rate-type and foreign exchange-type derivatives;

(3) Trading specific domestic-listed futures products;

(4) Setting up a wholly foreign-owned entity (WFOE) or joint venture in mainland China to trade domestic futures products with their legitimate RMB income;

(5) Trading foreign structured investment products or OTC derivatives products that link to domestic underlying assets such as futures, options and others.

Such foreign OTC derivatives transactions (for example, Total Return Swap (TRS)), usually tailor-made by foreign brokers for their institutional clients, enable foreign investor to gain economic exposure to domestic underlying assets indirectly without inconvenience and high costs for pursuing relevant cross-border qualifications (such as QFI). Although Chinese laws and regulations do not explicitly prohibit or restrict such OTC derivatives trading, it may give rise to concerns about contradicting with the look-through regulatory principle. In the 2021 Boao Forum for Asia held on April 19, 2021, Fang Xinghai, the Vice-Chairman of the CSRC, said that the CSRC attaches great importance to the regulation on foreign investors and the CSRC can look through to the ultimate beneficiary owner of investors engaging in domestic securities markets via QFI Scheme and Stock Connect. Though only the securities market was mentioned in his speech, the CSRC's regulatory approach of look-through, we believe, may also be applied to the futures markets.

5.2 Cross-Border Businesses

The Draft Futures Law puts forward the applicable rules for the registration and exemption of cross-border futures businesses at the statute level for the first time:

(1) Overseas Futures Trading Venues: The Draft Futures Law requires overseas futures trading venues that provide domestic entities or individuals with direct access services to their trading systems to register with or apply for an exemption of registration to the CSRC. In addition, derivatives contracts listed on overseas futures trading venues and settled according to the prices of contracts listed on domestic futures trading venues shall comply with the provisions stipulated by the CSRC.

(2) Overseas Futures Operation Institutions: According to the Draft Futures Law, an overseas futures operation institution is required to register with or apply for an exemption of registration to the CSRC under any of the following two circumstances: (a) it is sub-entrusted by a domestic futures operation institution to conduct overseas futures trading; (b) it is entrusted by overseas entities or individuals to directly engage in futures trading in domestic futures trading venues. Pursuant to the relevant provisions on trading specific domestic-listed futures products, subject to approval by the futures exchanges, qualified overseas brokerage institutions may be entrusted by overseas traders to directly trade specific domestic-listed futures products in its own name. Up to now, INE has approved two overseas brokers to engage in INE-listed futures trading as entrusted by overseas entities or individuals. However, it needs to be clarified whether such brokers are also required for registration or exemption with the CSRC.

(3) Marketing and Relevant Activities: Pursuant to the Draft Futures Law, overseas futures operation institutions and any other overseas organizations that, directly or through their branches established in mainland China, engage in activities of marketing, promotion and solicitation traders in domestic futures markets shall obtain approval of the CSRC. Without approval of the CSRC, no entity or individual shall engage in marketing, promotion or solicitation activities for overseas futures trading venues and overseas futures operation institutions. This is the first time that, the futures-related legislation proposes regulations on overseas institutions engaging in marketing, promotion and solicitation activities in domestic futures markets, however, determination factors of marketing, promotion and solicitation activities require further clarification.

(4) Cross-Border Regulatory Cooperation Mechanism: According to the Draft Futures Law, the CSRC may establish a cooperative mechanism for supervision and regulation with overseas futures regulatory authorities to implement cross-border supervision and regulation, carry out cross-border investigations and collect evidence, pursue legal liability and cope with cross-border market risks; without judicial agreements or reciprocal arrangements, an overseas futures regulatory authority is prohibited from directly carrying out law enforcement activities such as investigation and evidence collection within mainland China. In addition, without consent of the CSRC and the relevant departments of the State Council, no entity or individual shall

provide documents and materials relating to futures business activities to an overseas party. We note that the foregoing requirements are also consistent with the Securities Law (as amended in 2019).

VI. Our Observations

Following the amendment to the Securities Law in 2019, the Draft Futures Law is undoubtedly another milestone in the history of China's legislation on financial markets and marks a new era for China's derivatives markets, with a far-reaching positive impact on the growth of such markets. We will continue to monitor the situation and keep our clients apprised of any important developments

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金融法律热点问题

期货法草案观察二：重点条款分析

第十三届全国人大常委会第二十八次会议对《中华人民共和国期货法(草案)》(以下简称“期货法草案”)进行了审议，并于 2021 年 4 月 29 日向社会公开征求意见。经过多年酝酿，这部对衍生品市场有着重要影响的法律草案首次和公众见面。

本次公布的草案共 14 章 173 条，可总结为两大特点，一是延续了现有场内期货交易管理的法律框架，即基于现行《期货交易管理条例》(2017 年修订)的架构，对期货交易、期货结算与交割基本制度，期货交易者保护制度，期货交易场所、期货结算机构、期货经营机构以及期货服务机构的监督管理进行了系统性完善，二是首次设专章对其他衍生品市场做了原则性规定，并授权国务院制定其他衍生品市场的监管办法，填补了场外衍生品市场的立法空白。

结合过往境内外期货市场投资者普遍关注的问题，本文作为系列观察文章之一，将围绕着期货法草案的适用范围、场内期货交易、市场操纵、内幕交易、跨境业务等重点条款做以下简要分析。关于“其他衍生品交易”章节相关分析，请关注《期货法草案观察：关于其他衍生品交易的单一协议及净额结算条款》一文和本系列后续的评论文章。

一、适用范围

期货法草案规定其管辖的范围是在中华人民共和国境内的期货交易和其他衍生品交易及相关活动。其中，期货是指由期货交易场所统一制定的、将来在某一特定的时间和地点交割一定数量标的物的标准化合约；而其他衍生品指价值依赖于标的物价值变动的、 非标准化的远期交割合约，包括非标准化的期权合约、互换合约和远期合约。由此可见，期货法草案的适用范围包括标准化的场内衍生品交易和非标准化的场外衍生品交易。

期货法似乎扩大了“期货”的概念，使之涵盖所有在公开市场交易的标准化衍生品合约，即具有公开市场交易和标准化两个特征的衍生品合约构成“期货”，且两个特征似乎无法分割，如果在公开市场交易，则构成标准化的，反之亦然。同时，期货法创设“其他衍生品”的概念，与“期货”相对应，实际上将所有不属于期货的衍生品合约均归入“其他衍生品”的范畴。为此，亦有理论和实务界人士认为，“衍生品法”的名称比“期货法”更能准确地反映该法试图管辖的范围。

期货法草案明确国务院期货监督管理机构(即中国证券监督管理委员会，以下简称“证监会”)依法对全国期货市场，即场内期货交易市场，实行集中统一监督管理，但利率、汇率期货由国务院依法另行规定。其他衍生品市场则由国务院授权的部门实行监督管理。由此可见，期货法草案并没有试图改变按标的资产和参与主体划分管辖权的现行衍生品监管体系，而只是规范场内外衍生品市场的顶层设计和纲领性文件，各监管机构在期货法的原则和框架下按不同标的资产以及参与主体各司其职依法监管。

二、场内期货交易

期货法草案对场内期货交易从交易机制、风险控制、监督管理等方面进行了全面梳理，明确期货

交易实行集中交易、保证金交易、持仓限额、当日无负债结算、实物或现金交割、强行平仓等制度，与现行《期货交易管理条例》保持一致。同时，期货法草案也首次将期货市场的一些现有制度与实践以法律的形式确定下来。下面逐一论述。

1、 账户实名制

《期货交易管理条例》中规定期货公司应当为每一个客户单独开立专门账户、设置交易编码，不得混码交易。期货交易一户一码的要求在实践中即为账户实名制要求的体现。期货法草案为加强账户管理，明确要求期货交易实行账户实名制。禁止以他人名义或者使用虚假身份开立账户。禁止出借身份证件供他人开立账户。此外，草案也借鉴了 2019 年修订的《证券法》有关不得出借或借用账户的规定，即任何单位和个人不得出借自己的期货账户或者借用他人的期货账户从事期货交易。如有违反，其法律责任也与《证券法》相关规定一致，即要求责令改正，给予警告，并可处五十万元以下的罚款。

2、 交易者适当性管理

期货法草案将期货交易者分为普通交易者和专业交易者，专业交易者的标准由国务院期货监督管理机构另行规定。我们理解，普通交易者和专业交易者的区分标准较大可能会沿用证监会于 2020 年颁布的《证券期货投资者适当性管理办法》中对“普通投资者”与“专业投资者”的认定标准。

此外，期货法草案第五十七条要求参与期货交易的法人和非法人组织，应当建立与其交易合约类型、规模、目的等相适应的内部控制制度和风险控制制度。我们注意到，目前境内外机构投资者在交易上海国际能源交易中心(“上期能源”)的上市品种前需要提交该机构的内部控制、风险管理等期货交易管理相关制度。该等要求如何推广落地尚待观察。

3、 程序化交易管理

与 2019 年证券法一致，期货法草案规定了通过计算机程序自动生成或者下达交易指令进行程序化交易的，应当符合国务院期货监督管理机构的规定，并向期货交易场所报告，不得影响期货交易场所系统安全或者正常交易秩序。期货法草案第一百四十一条规定了相应的法律后果，如进行程序化交易未向期货交易场所报告的，责令改正，给予警告，可处以一百万元以下的罚款。采取程序化交易如影响期货交易场所系统安全或者正常交易秩序的，责令改正，给予警告，并可处以五十万元以上五百万元以下的罚款。

目前，各期货交易所规则已将程序化交易纳入监管，期货市场实践中程序化交易报备的要求也施行了一段时间。我们预期证监会将通盘考虑并制定证券和期货市场程序化交易具体规定。

4、 实际控制关系报备

实际控制关系报备制度是期货交易特有的制度。期货法草案首次在法律层面明确了期货交易实行交易者实际控制关系报备管理制度，规定交易者应当向期货经营机构或者期货交易场所报备实际控制关系。草案沿用了各期货交易所现有实际控制关系账户管理办法中对“实际控制关系”的定义，即指任何单位和个人对他人的期货账户具有管理、使用、收益或者处分等权限，从而对他人的期货账户交易决策拥有决定权或者重大影响的行为或者事实。违反该等报备要求的，可要求其责令改正，给予警告，并处以五十万元以下的罚款。根据期货法草案，证监会将就期货交易实际控制关系报备进一步制定具体管理办法。

5、 保证金制度

根据《期货交易管理条例》的规定，期货交易者目前可以按照规定缴纳现金或提交价值稳定、流动性强的标准仓单、国债等有价证券，用于期货交易的结算和保证履约。期货法草案将保证金的形式扩大到了现金、国债、股票、基金份额、标准仓单等流动性强的有价证券，以及证监会规定的其他财产。

保证金归属以及破产保护始终是境外机构参与者的关注重点。《期货交易管理条例》规定期货交易所向会员收取的保证金，属于会员所有；期货公司向客户收取的保证金，属于客户所有。期货法草案虽未沿用该表述，但在保证金隔离和使用上做出了与《期货交易管理条例》以及《期货公司监督管理办法》一致的规定，即要求期货结算机构、结算参与人收取的保证金、权利金，应当与其自有资金分开，专户存放，分别管理。除用于国务院期货监督管理机构规定的用途外，禁止挪作他用。

期货法草案还对保证金及相关财产的破产保护进行了规定。期货交易者或作为结算参与人的期货公司进入破产或者清算程序的，保证金、进入交割环节的交割财产应当优先用于结算和交割。期货保证金存管机构(即存管银行)破产时，保证金、权利金及相关款项等不属于其破产财产。期货法草案未对期货交易所破产时，结算参与人向交易所支付的保证金应如何保护作出规定，我们理解可能是基于中国期货交易所的特殊性，因此期货法草案并未考虑期货交易所破产情况下财产隔离的问题。

此外，我们还注意到《期货公司监督管理办法》规定客户已提交的保证金和委托资产，非因客户本身的债务或者法律、行政法规规定的其他情形，不得查封、冻结、扣划或者强制执行,但期货法草案仅规定了期货结算机构依照其业务规则收取和提取的保证金、权利金、结算担保金、风险准备金等资产，不得被查封、 冻结、扣押或者强制执行。我们期待《期货法》正式颁布时延用《期货交易管理条例》中有关期货交易者已提交的保证金非因交易者本身的债务或者法律、行政法规规定的其他情形，不得查封、冻结、扣划或者强制执行的规定。

6、 中央对手方

2012 年国际清算银行支付结算体系委员会(CPSS)与国际证监会组织(IOSCO)发布的《金融市场基础设施原则》(PFMI)，从总体架构、信用和流动性风险管理、结算、违约管理、一般业务和运行风险管理、准入、效率和透明度等方面对中央对手方提出了相关要求。只有符合 PFMI 的相关要求并获得所在司法辖区监管机构认可的中央对手方为合格中央对手方。

期货法草案首次在法律层面确认了期货结算机构以及内部设有结算部门的期货交易场所为中央对方，进行净额结算，为期货交易提供集中履约保障。实践中，证监会也已正式批复五家期货交易所为“合格中央对手方”。与《证券法》一致，期货法草案对结算最终性做出了明确规定，依照期货交易场所依法制定的业务规则进行的交易，不得改变其交易结果。依照规定作出的终止净额结算行为，不因结算参与人依法进入破产程序而无效或者撤销。草案以此确认期货交易所作为合格中央对手方，其所有交易可以按照轧差净额计算后的结果进行资金或合约的结算交收，该结算交收的结果不应被破产企业管理人依据《中华人民共和国企业破产法》撤销或认定为无效。

此外，期货法草案还规定出现保证金不符合规定标准，且未在规定时间内追加保证金或者自行平仓的情形时，期货结算机构、结算参与人可以对作为保证金的有价证券等直接变卖处置，以此实现担保品的快速处置。

三、期货市场操纵

期货法草案第二十四条规定了操纵期货市场的情形[1] ，所列举的禁止行为与《期货交易管理条例》第七十条[2] 以及《关于〈期货交易管理条例〉

[1] 《中华人民共和国期货法(草案)》第二十四条：禁止以下列手段操纵期货市场，影响或者意图影响期货交易价格或者期货交易量：(一) 单独或者合谋，集中资金优势、持仓优势或者利用信息优势联合或者连续买卖合约；(二)与他人以事先约定的时间、价格和方式相互进行期货交易；(三)在自己实际控制的账户之间进行期货交易； (四)利用虚假或者不确定的重大信息，诱导交易者进行期货交易；(五)不以成交为目的，频繁或者大量申报并撤销申报；(六)持有相关合约，对相关期货交易或者合约标的物的交易作出公开评价、预测或者投资建议；(七)为影响期货市场行情囤积现货；(八)在临近交割月或者交割月，利用不正当手段规避持仓限额，形成持仓优势；(九)利用在其他相关市场的活动操纵期货市场；(十)国务院期货监督管理机构认定的其他操纵市场手段。

[2] 《期货交易管理条例》第七十条：任何单位或者个人有下列行为之一，操纵期货交易价格的，责令改正，没收违法所得，并处违法所得 1 倍以上 5 倍以下的罚款；没有违法所得或者违法所得不满 20 万元的，处 20 万元以上 100 万元以下的罚款：(一)单独或者合谋，集中资金优势、持仓优势或者利用信息优势联合或者连续买卖合约，操纵期货交易价格的；(二)蓄意串通，按事先约定的时间、价格和

第七十条第五项“其他操纵期货交易价格行为”的规定》(《其他操纵期货交易价格行为规定》)中列明的操纵期货价格的行为基本保持一致。但第(4)款“蛊惑操纵”和第(6)款“抢帽子操纵”在具体构成要件表述上都与《其他操纵期货交易价格行为规定》有所不同。我们期待后续进一步澄清相关操纵期货市场行为的具体构成要件。

四、内幕交易

期货法草案在《期货交易管理条例》的基础上对内幕交易以下几方面做了更详细的规定：

1、 对“内幕信息”的范围进行了扩展。内幕信息指在期货交易活动中，可能对期货交易价格产生重大影响的尚未公开的信息，包括：

(1) 国务院期货监督管理机构以及其他相关部门正在制定或者尚未发布的对期货交易价格可能产生重大影响的政策、信息或者数据；

(2) 期货交易场所、期货结算机构、期货行业协会作出的可能对期货交易价格产生重大影响的决定；

(3) 期货交易场所会员、交易者的资金和交易动向；

(4) 其他相关市场中的重大异常交易信息；

(5) 国务院期货监督管理机构认定的对期货交易价格有重大影响的其他信息。

2、 对“内幕信息的知情人”的范围进行了扩展，内幕信息的知情人明确定义为由于管理地位、监督地位、经营地位或者职务便利等，能够接触或者获得内幕信息的单位和个人。除包括国务院期货监督管理机构和其他有关部门的工作人员，将期货经营机构、期货交易场所、期货结算机构、期货服务机构、期货行业协会的有关人员以及国务院期货监督管理机构认定的由于任职可以获取内幕信息的其他单位和个人全部纳入了“内幕信息的知情人”的范围。

3、 期货法草案大幅提高了操纵期货市场以及内幕交易的行为的处罚幅度和金额，例如：

(1) 罚款倍数从没一罚五提高到没一罚十；

(2) 对于操纵期货市场行为没有违法所得或违法所得不足一百万元的，提高至最高可处以一千万元的罚款；对于单位从事市场操纵中相关责任人员的处罚，最高罚款金额从十万元提高到五百万元。

(3) 对于内幕交易行为没有违法所得或违法所得不足五十万的，提高至最高可处以五百万元的罚款；对于单位从事内幕交易中相关责任人员的处罚，最高罚款金额从三十万元提高到二百万元。

4、 值得注意的是，在场外衍生品交易活动中，如果从事操纵市场，内幕交易，编造、传播虚假信息或者误导性信息等违法行为的，相关监管机构同样可以依照期货法草案中针对操纵期货市场以及内幕交易的规定采取相应的行政处罚措施。

五、域外管辖与跨境业务相关规定

1、 域外管辖

与《证券法》一致，期货法草案第二条规定：“在中华人民共和国境外的期货交易和其他衍生品交易及相关活动，扰乱中华人民共和国境内市场秩序，损害境内交易者合法权益的，适用本法。”

目前境外投资者可主要通过以下方式开展中

方式相互进行期货交易，影响期货交易价格或者期货交易量的；(三)以自己为交易对象，自买自卖，影响期货交易价格或者期货交易量的；(四)为影响期货市场行情囤积现货的；(五)国务院期货监督管理机构规定的其他操纵期货交易价格的行为。

国境内期货交易和其他衍生品交易：

(1) 取得合格境外机构投资者和人民币合格境外机构投资者的资格(QFI)交易其可投资的期货、期权合约；

(2) 符合银行间市场直接投资准入条件的合格境外机构投资者(包括 QFI)在银行间市场交易债券类、利率类、外汇类衍生品；

(3) 从事境内特定品种期货的交易；

(4) 在境内设立外商独资或合资企业，以其合法的人民币资金交易境内期货产品；

(5) 交易与中国境内期货、期权合约或其他基础资产等标的物挂钩的境外结构性投资产品或场外衍生产品。

此类境外结构性投资产品或场外衍生产品，如总收益互换(Total Return Swap)通常由境外券商为其机构性客户度身定制，可以帮助境外投资者间接获得境内底层资产的经济收益，同时还免去申请相关跨境交易资质(如 QFI)的不便和成本。尽管现行法律法规并未明文禁止或限制此类场外衍生品交易，但其合法合规性可能并不完全符合穿透监管的原则。证监会副主席方星海在今年 4 月 19 日出席博鳌亚洲论坛 2021 年年会时亦表示，证监会对于外资监管高度重视。对于境外机构通过 QFI、沪深港通开展投资境内证券市场，证监会“是看的清楚的”。方副主席的发言虽然仅提及 A 股市场，但穿透原则应同样适用期货其他衍生品市场。

2、 跨境业务相关规定

此次期货法草案首次从法律层面对跨境期货业务的注册和豁免做出了规定。

(1) 境外期货交易场所：期货法草案要求境外期货交易场所向境内单位或者个人提供直接接入该交易场所交易系统进行交易服务的，应当向国务院期货监督管理机构注册或者申请豁免注册。境外期货交易场所上市的衍生品合约，如以境内期货交易场所上市的合约价格进行结算的，则应当符合国务院期货监督管理机构的规定。

(2) 境外期货经营机构：(a)境外期货经营机构接受境内期货经营机构转委托，从事境外期货交易的，该境外期货经营机构应当向国务院期货监督管理机构注册或者申请豁免注册；(b) 境外期货经营机构接受境外单位或者个人委托，直接参与境内期货交易场所期货交易的，该境外期货经营机构应当向国务院期货监督管理机构注册或者申请豁免注册。根据境内特定品种期货交易的相关规定，经境内的期货交易所批准，符合条件的境外经纪机构可以接受境外交易者委托，直接在期货交易所以自己的名义为境外交易者进行境内特定品种期货交易。目前实践中，上期能源已经批准两家境外机构的境外特殊经纪参与者资格，可以接受境外单位或者个人委托，直接参与境内期货交易场所期货交易的。前述期货境外特殊经纪参与者是否需要按照上述规定向国务院期货监督管理机构注册或者申请豁免注册仍有待明确。

(3) 营销及相关活动：境外期货经营机构以及其他境外机构在境内直接或者设立分支机构从事期货市场营销、推介及招揽交易者，应当经国务院期货监督管理机构批准。未经批准的，任何单位或者个人不得为境外期货交易场所、期货经营机构从事期货市场营销、推介以及招揽活动。这也是期货立法首次对境外机构在境内从事市场营销、推介及招揽活动做出规定，但如何界定营销、推介及招揽活动尚待澄清。

(4) 跨境监管协作：国务院期货监督管理机构可以和境外期货监督管理机构建立监督管理合作机制，实施跨境监督管理，进行跨境调查取证，追究法律责任，处置跨境

市场风险，但禁止境外期货监督管理机构在没有司法协定或对等安排另有规定的情形下，在中华人民共和国境内直接进行调查取证等执法活动。境内任何单位或个人在未经国务院期货监督管理机构和国务院有关主管部门同意的情形下，不得擅自向境外提供与期货业务活动有关的文件和资料。该要求亦与 2019 年修订的《证券法》保持一致。

六、我们的观察

继《证券法》于 2019 年大幅修改，《期货法》的制定和出台无疑是我国金融法治历程的又一个里程碑，标志着我国衍生品市场进入新的发展阶段，对衍生品市场的长远发展将产生积极深远的影响。我们也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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