

## Financial

### Client Briefing: Regulation of Cross-Border Supply of Foreign Financial Services – What's Next?

Unlike certain mature financial markets having established a relatively comprehensive registration regime, China has not yet established a legal system for the registration or approval by which foreign providers may offer financial services or products to Chinese domestic residents in a cross-border manner without needing to set up a commercial presence in China. The *Futures Law of People's Republic of China (Consultation Paper)* (released by China's highest legislative body on April 29 of this year and renamed the "*Futures and Derivatives Law of People's Republic of China (Consultation Paper)*" on October 23) has specified that foreign futures exchanges shall register with the futures regulatory authority of the State Council if they intend to provide Chinese domestic entities or individuals with direct access to the trading system for their trading activities, as do foreign futures operation institutions if they would like to conduct relevant futures trading abroad for Chinese clients based on an entrustment of a Chinese domestic futures operation institution, which is the very first time in a financial statute level, that China has imposed the registration requirement on cross-border financial service providers, a step forward from the 2019 *Securities Law of People's Republic of China* that was silent in this respect. Given the complexity of cross-border financial services, it is expected that

the registration requirements for different types of cross-border financial services will be gradually introduced in financial legislature documents, instead of rushing to launch a comprehensive registration regime covering all types of cross-border financial services, which we believe is consistent with how China's legislative bodies are accustomed to developing new laws. Having said that, the industry also expects that it will take a long time for China to establish a comprehensive cross-border financial services registration system.

In reality, the cross-border supply of financial services via the Internet has developed rapidly in recent years. More and more foreign Internet financial service providers are seeking customers in China, these cross-border activities are happening on a huge scale and expanding rapidly. Chinese regulators have noted the arising challenges to the current financial regulatory system of China and the likelihood of adversely impacting our financial stability. Given that such business activities currently fall into a gray area, a certain level of regulation is urgently needed. The regulators may decide to draw a line between "lawful" and "illegal" for these activities based on legal principles and the spirit of the current law to give clear signals to the market, as well as mobilize the limited law enforcement resources

available to actively respond to these regulatory challenges.

On October 24, 2021, Sun Tianqi, head of the Financial Stability Department of the People's Bank of China (PBOC), delivered a speech entitled *Realization of National Boundaries and Client Group Boundaries of Financial Licenses in the Digital Context*, presented at the Third Bund Financial Summit (the "2021 Speech"). Mr. Sun published a prior article on the same issues in 2020 entitled *Opening-up and Supervision of Cross-Border Supplied Financial Services in the Financial Technology Context* (the "2020 Article"). In the absence of explicit legislation for cross-border financial services, reading Mr. Sun's speech and article can provide some insight into the perspective of a senior official of PBOC, the so-called "Super Financial Regulator," regarding the legitimacy and limits of cross-border financial services.

## **1. Prohibited Foreign-Provided Financial Services**

In the 2021 Speech, Mr. Sun first iterated the very limited scope of foreign-provided financial services which China has committed to allowing under the *Schedule of Specific Commitments for Trade in Services* of the *General Agreement on Trade in Service* (the "GATS"). Mr. Sun further referred to the *Special Administrative Measures for Cross-Border Service Trade at Hainan Free Trade Port (Negative List) (2021 Edition)* released by the Ministry of Commerce of the People's Republic of China (MOFCOM) on July 26, 2021, under which certain foreign-provided financial services related to securities are permissible, slightly expanding the aforesaid committed scope under the GATS. Based on the foregoing, Mr. Sun clearly indicated that except for certain financial services explicitly permitted by the Chinese laws, regulations, and regulatory policies, China does not permit any other foreign-provided financial services. As for the recent global practices, even under the *Comprehensive and Progressive*

*Agreement for Trans-Pacific Partnership* (the "CPTPP"), a relatively liberal framework for service trade, service providers without an established "commercial presence" in another member country's territory are allowed to provide cross-border financial service but they are still required to complete a registration with or obtain an authorization from the competent authorities of that member country.

We believe that the basic stance of Chinese regulators on the compliance issues related to cross-border financial services can be inferred from Mr. Sun's official remarks. That is, under the current Chinese legal system, foreign-provided financial services are permissible only insofar as they are explicitly granted by laws and after obtaining approval or registration. The proverb that "anything is allowed that is not prohibited by the law" does not apply in the financial regulatory context. As China is likely to seek a more liberal policy for its financial market comparable to more mature markets, we can reasonably expect China's regulators to inevitably impose an approval or registration requirement on foreign providers of financial services if their relevant activities extend to the territory of mainland China.

It is within this context that Mr. Sun explicitly pointed out in the 2021 Speech that foreign institutions providing financial services from abroad via the Internet constitute an unapproved cross-border supply and these are illegal financial activities. This also echoes the 2020 Article, in which he discusses the categories of illegal foreign-provided financial services:

- (1) Foreign exchange margin trading: This type of transaction is currently prohibited in China. Foreign institutions are not allowed to provide Chinese domestic residents with cross-border foreign exchange margin trading services via overseas "foreign exchange trading platforms".

- (2) Cross-border trading services for stocks, futures offered to Chinese domestic residents: Some securities companies, with only foreign securities brokerage licenses or investment adviser licenses, offer Chinese domestic residents financial services to invest in US or Hong Kong listed stocks via the Internet or APPs, such as order placement and execution services.
- (3) Cross-border payment services offered to Chinese trade enterprises: Foreign institutions or overseas subsidiaries of domestic institutions offer Chinese trade enterprises services such as opening offshore accounts and cross-border payment.
- (4) Initial coin offering (ICO) and trading: Foreign or domestic institutions offer Chinese domestic residents Bitcoin trading services or ICO services from abroad via the Internet.
- (5) Cross-border financial services for Chinese domestic residents buying real estate abroad: For example, some Chinese wealth management groups set up offshore entities in different jurisdictions and obtain their financial licenses to form cross-border financial service groups, or cooperate with existing foreign financial institutions, to provide cross-border financial services to Chinese domestic residents in a concealed manner.
- (6) Cross-border match trading or cross-border order-matching: On the surface, it seems no money flows in or out but in substance it is an illegal foreign exchange transaction, which is a type of prohibited underground money exchange.

According to Mr. Sun, the above-mentioned illegal cross-border financial services can be further divided into three categories. The first category is that the transaction itself is not yet open to foreign

investors and is explicitly prohibited in China, but it is lawful overseas. In that case, engaging in such transactions with only foreign licenses within the territory of China shall be determined to be in violation of Chinese prohibitive laws. For example, foreign exchange margin trading, ICO.

The second category is that the transaction itself is not yet opened to foreign investors but *is not* explicitly prohibited in China. In that case, provision of services from abroad without first obtaining licenses required domestically shall be determined to be conducting financial services without proper license, so called “driving without a license”. For example, though current Chinese laws do not explicitly prohibit such cross-border services as providing offshore securities investment services to Chinese domestic residents or the sale of investment-type insurance products to mainland China investors, the legality of such businesses shall be in question because foreign institutions offer such services without domestic licenses. Moreover, some domestic companies cooperate with their overseas subsidiaries, claiming that they simply provide an introduction of overseas financial products to domestic investors rather than conducting financial businesses, which in essence also falls into this same category – that is, so called “driving without license”, according to Mr. Sun in the 2020 Article.

The third category is that the transaction itself is opened to foreign investors, however, it is explicitly required to establish a domestic “commercial presence” for providing such financial services, while the relevant party has no such commercial presence but still provides such services. For example, foreign payment institutions need to establish a foreign-funded enterprise in China if they provide payment services to Chinese trading enterprises in a cross-border manner.

## 2. Focus of the Regulators in Cross-Border Supply

## 2.1 Focus of the Regulators

According to Mr. Sun, the Chinese financial market is very attractive to foreign institutions due to its size and increasing liberalization, whilst the unlicensed cross-border supply of financial services via the Internet may impact Chinese financial order. In this regard, China must emphasize the regulatory principle of “licensed operation of financial businesses.” Based on our observations, it may only be a matter of time before China follows the example of other jurisdictions with mature financial markets requiring cross-border financial service providers or financial instruments supplied in a cross-border manner to be registered or obtain authorization.

The PBOC, as the so-called “Super Financial Regulator,” has underlined on many occasions that operating any financial business within the territory of China requires relevant licenses, regardless of whether they are conducted by domestic or foreign institutions. Secondly, the PBOC may coordinate different departments to launch crackdowns of “unlicensed drivers” targeting cross-border supplied financial service providers. Mr. Sun has also highlighted in the 2020 Article that at the current stage, the focus of law enforcement should be the financial businesses that are more likely to incur high risks to domestic market participants, while financial regulatory authorities shall reserve their discretion in insisting on licenses for operators of other financial businesses casting a low risk to domestic market participants. The 2020 Article lists the following three typical types of high-risk financial businesses that the regulators are focused on in the context of cross-border supply:

- (1) Domestic institutions set up companies abroad and have these companies apply for foreign financial licenses, by which providing round-trip financial services that are prohibited or require licenses in China to domestic residents via digital platforms.

- (2) Foreign companies sell financial products to Chinese domestic residents via digital platforms, while establishing consulting firms or training firms onshore to engage in relevant marketing or promotional activities in a concealed manner.
- (3) Under the guise of foreign exchange margin trading or other investment activities, domestic entities do not actually engage in genuine investment and trading activities, but instead illegally fundraise or commit fraud.

We believe that the above-mentioned activities are typical illegal cross-border supply businesses targeted by the regulators, but this list is not exhaustive.

## 2.2 Advertising of Foreign Financial Services under a Cross-Border Supply Mode

“In the cross-border supply context, it is also illegal for foreign financial service providers to place advertisements within the territory of China by various of means,” Mr. Sun stated in the 2020 Article. The *Advertising Law of the People’s Republic of China* explicitly stipulates that “if the matter concerned with the advertising content is subject to a regulatory approval, the advertisement shall comply with such approval.” Hence, if a foreign institution publishes an advertisement of financial services within the territory of China, it needs to obtain prior approval relevant to that financial service from the competent financial regulatory authority. In other words, foreign institutions shall not place financial advertisements within the territory of China if they have no relevant license.

## Our Observations

Though both Mr. Sun’s speech and article were concerned with the context of digital or financial technology, we believe that the regulatory

principles of the law contained therein shall apply to all types of cross-border supply of financial services or products, irrespective of the “digital” or “financial technology” context. There is a trend of regulators beginning to regulate the cross-border supply of financial services, meaning that without approval or registration, foreign financial service or product providers shall not offer financial services or products to Chinese domestic entities or individuals. It reminds foreign financial practitioners of the regulatory principle that financial business must be carried out with appropriate licenses and warns foreign financial practitioners to rectify their improper business activities established when the regulations were

unclear and have continued. In practice, we have noted that some foreign institutions have been operating in the gray area, such as soliciting Chinese domestic residents or marketing foreign financial services or products within the territory of mainland China. We would recommend that foreign institutions cautiously assess and manage the compliance risks associated with cross-border activities according to the latest regulatory principles, formulate internal compliance guidelines to address its staff, and keep abreast of the progress of legislation and enforcement of cross-border financial services.

Natasha XIE	Partner	Tel: 86 21 2208 6238	Email: xieq@junhe.com
Tianyu Qin	Associate	Tel: 86 21 2208 6140	Email: qinty@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”.





## 金融法律热点问题

### 跨境金融服务监管 – 下一步将如何行动？

不同于某些成熟金融市场拥有较为完善的跨境金融服务注册机制，我国一直以来未建立有关境外金融服务和产品提供者需经许可或注册方可向中国境内单位或个人提供金融服务或产品的法律体系。今年4月29日和10月23日，经全国人大常委会审议的《期货法》一审稿和更名后的《期货和衍生品法》二审稿第一次以金融法律的形式明确规定，境外期货交易所向境内单位或者个人提供直接接入系统进行交易服务以及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，需向国务院期货监督管理机构申请注册。这是高层级金融立法第一次提及跨境金融服务注册要求，相比之下，于2019年12月28日修订的《证券法》并未将跨境证券服务注册纳入其中。考虑到跨境金融服务内容的复杂性，通过从点到面的金融立法逐步明确不同类型跨境金融服务的注册要求，而不是在短时间内建立一套包含所有跨境金融服务类型的注册机制，符合中国立法工作一以贯之的务实风格和节奏，但也使得业界普遍预期我国建立全面的跨境金融服务注册体系尚需较长时日。

实践中，以互联网方式跨境提供金融服务近年来飞速发展，越来越多的境外互联网金融服务机构以“跨境交付”(Cross-Border Supply)的方式向境内单位或个人提供金融服务，且业务规模庞大、增长迅速。监管机关已经意识到此类活动将对现有金融监管体系形成挑战，甚至在一定程度上可能影响金融稳定。基于监管的迫切性，金融监管者亟需在立法尚处于模糊地带之时从法律原则和精神出发厘

清合法与非法的边界，以向市场传递清晰的信号，并调动有限的执法资源积极应对由此而来的监管挑战。

2021年10月24日，中国人民银行金融稳定局局长孙天琦在第三届外滩金融峰会上发表了题为“数字环境下金融牌照的地域边界和客群边界的实现”的演讲(以下简称“**2021年演讲**”)。此前，孙局长也曾在2020年1月发表“金融科技背景下‘跨境交付’类金融服务的开放与监管”的署名文章(以下简称“**2020年文章**”)。在跨境金融服务缺乏完善立法的情况下，通过下文对这两篇文章和演讲要点的梳理，我们或可一窥有“超级监管者”之称的央行，其负责金融稳定的高级官员对跨境金融服务活动合法合规性边界的阐述。

#### 一、禁止类的跨境交付金融服务

2021年演讲中，孙局长首先援引《服务贸易总协定》(General Agreement on Trade in Service, 以下简称“GATS”)项下《服务贸易具体承诺减让表》中我国承诺可允许通过“跨境交付”方式提供的十分有限的几项特定金融服务，也提及2021年7月26日商务部发布的《海南自由贸易港跨境服务贸易特别管理措施(负面清单)(2021年版)》在GATS减让表基础上略微有所扩大的允许以跨境交付方式提供的某些证券服务，继而明确指出，除中国法律法规、监管政策明确规定的某些特定金融服务外，我国未承诺其他金融服务可通过跨境交付方式提供；就国际最新实践而言，即便在服务贸易开放水

平相对较高的《全面与进步跨太平洋伙伴关系协定》(Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 以下简称“CPTPP”)协议框架内,虽允许服务提供者在他国没有商业存在的情况下提供跨境金融服务,但仍要求在对方国家完成跨境金融服务提供商注册或取得该国有权部门的授权。

由此可见中国金融监管者对跨境金融服务相关合规问题的基本立场,即在现行中国法律体系下,从事金融领域的跨境交付活动必须有明确的法律依据,获得相应的许可或者注册方可进行,并不是“法无明文禁止即可为”;随着中国进一步开放金融市场,逐步达到成熟市场的开放程度,要求境外金融服务提供者经许可或注册方可向中国境内服务接收方提供金融服务则实属必然。

在此背景下,2021年演讲明确将境外机构以互联网方式跨境提供金融服务的活动归类为未经批准的跨境交付,属于非法金融活动,呼应了孙局长在一年多以前的文章,在该文章中孙局长区分不同类型违法跨境交付类金融服务进行分析:

- (1) 外汇保证金交易:外汇保证金交易目前在中国是禁止的。境外机构不得通过境外“外汇交易平台”跨境向中国境内居民提供外汇保证金交易。
- (2) 为中国境内居民提供跨境炒股期货服务:典型例子为持有境外券商牌照和注册投顾牌照的证券公司,通过网站、APP等向中国境内居民提供投资美股、港股等服务,包括股票交易下单与执行等。
- (3) 境外支付机构跨境向中国外贸企业提供支付服务:即境外机构或境内机构通过其在境外设立的机构以“跨境交付”模式为中国境内外贸企业提供离岸账户开立和跨境收款服务。
- (4) 比特币、首次币等发行(ICO)交易:境外机构或境内机构在境外通过网站,向中国境内居民提供比特币、ICO等交易服务。
- (5) 中国境内居民跨境购房相关的跨境金融

服务:例如,中国一些财富管理集团在境外设立实体机构,从多个国家获得各类金融牌照,形成跨境金融服务集团,或者与境外金融机构合作,变相为中国境内居民境外购房提供跨境金融服务。

- (6) 跨境撮合、跨境两端对敲:表面看是没有资金跨境的非法外汇交易,属于地下钱庄模式。

孙局长认为,上述非法跨境金融服务可以分为三类:一是,交易本身为中国尚未开放且明确禁止,但境外属合法。在境外拿到牌照后,跨境向境内开展此类交易的,属于违反中国禁止性规定。比如,外汇保证金交易、ICO交易。二是,交易本身为中国尚未开放,也并未明确禁止,但是没有中国金融牌照就跨境向境内提供服务的,属于“无照驾驶”类非法金融活动。比如,境内居民跨境炒股等证券投资交易、跨境销售投资类保险产品,虽然目前中国并无法律法规禁止,但提供此类服务的境外机构未获得中国牌照,在境内提供相关服务的合法性存疑。此外,2020年文章还特别强调了境内公司法人与境外子公司建立业务合作,宣称只做境外金融产品的介绍而非金融业务,其本质也属于上述第二类,即境外机构在境内“无照驾驶”。三是,交易本身已经开放,但明确规定需以“商业存在”模式提供金融服务,而相关主体未在中国境内设立商业存在而提供金融服务。例如,境外支付机构如需跨境向中国外贸企业提供支付服务,应当在境内设立外商投资企业。

## 二、“跨境交付”相关的监管重点

### 1、 监管关注的重点

孙局长2020年文章提到,由于中国金融市场规模大,开放程度不断提高,对境外市场主体具备很大吸引力,而基于互联网等平台跨境“无照驾驶”会冲击中国金融秩序,在此情况下,中国必须强调持牌经营。我们观察,从长远看,中国效仿成熟市场司法管辖区要求跨境金融服务提供者或跨境提供的金融工具进行注册或获得授权,可能只是时间早晚的问题。

央行作为超级监管者，强调无论境内机构还是境外机构，在中国开展金融活动都必须持牌经营。下一步，央行可能会组织协调多部门，调动必要的执法资源，针对某些跨境“无照驾驶”进行严厉惩治。孙局长的文章也指出，在现阶段，监管执法的重点还是在于有可能给境内市场主体带来风险的业务，对于风险较低的极少数业务，具体的金融监管部门应当随时针对情况进行细分，保留要求市场机构持牌经营的权力。文章特别强调以下三类业务为目前跨境交付模式下金融服务的监管重点：

- (1) 持有境外牌照的中资机构在境外设立公司并申请金融牌照，通过数字平台，“返程”向境内提供境内禁止或需要持牌方可经营的金融服务。
- (2) 境外公司通过数字平台跨境向境内主体销售金融产品，同时在境内设立咨询公司、培训公司等变相进行实质的营销活动。
- (3) 境内违法犯罪主体打着外汇保证金交易等投资的幌子，实际并未真正从事任何投资交易，而是实施非法集资或诈骗犯罪。

我们理解，上述行为仅代表监管目前所重点关注的非法业务典型，并未穷尽应被禁止的跨境交付活动。

## 2、“跨境交付”模式下的跨境金融广告

2020 文章也提及跨境交付模式下的境外金融服务提供商在境内以各种方式投放的广告均为非法。《广告法》规定：“广告内容涉及的事项需要取得行政许可的，应当与许可的内容相符合”。根据前述规定，境外机构在境内发布金融服务广告，须首先就相关金融服务取得中国金融监管部门的行政许可，也即，如境外机构并未在中国取得提供相关金融产品或服务的牌照，其不得在中国境内发布相关广告。

### 我们的观察

孙局长的两篇文章和演讲均是在数字或金融科技的语境下，但如不考虑数字或金融科技这一语境，其对监管原则和精神的阐释应概括适用于金融服务或产品提供者的所有跨境活动。中国对跨境交付类金融服务展开监管行动，并明确要求境外金融服务或产品提供者未经许可或注册不得向中国境内单位或个人提供金融服务或产品，代表了金融监管者向市场释放的强烈信号，提醒境外金融从业者谨记金融业务必须持牌经营，未经许可或注册不得从事金融业务的监管原则，及时纠正在过去若干年由于监管环境宽松形成的欠缺谨慎的做法。实践中，我们注意到有部分境外机构可能会行走于灰色地带，涉嫌招揽客户或宣传推介境外相关金融产品和服务。建议境外机构根据最近的监管原则和精神审慎评估和管理与跨境活动有关的合规风险，制定内部合规指引指导机构和员工的行为，并随时关注有关跨境金融服务监管立法和执法行动的进展。

谢 青 合伙人 电话：86 21 2208 6238  
秦天宇 律师 电话：86 21 2208 6140

邮箱地址：xieq@junhe.com  
邮箱地址：qinty@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”。