

外商投资法律热点问题

证监会就《外商投资期货公司管理办法》征求意见

继《外商投资证券公司管理办法》于2018年4月28日正式批准生效，作为金融行业对外开放的又一项举措，中国证券监督管理委员会（以下简称“**中国证监会**”）于2018年5月4日发布《外商投资期货公司管理办法（征求意见稿）》（以下简称“**《征求意见稿》**”）。下面我们总结了外国投资者可能关心的主要内容。

一、 适用范围

《征求意见稿》首先明确境外股东累计持有期货公司的股权比例应当符合国家对于期货业对外开放的安排，即根据目前对外开放的承诺，外国投资者直接或间接投资期货公司的投资比例限制为51%，三年后，投资比例不受限制。考虑到外商投资期货公司的经营特点可能与国内期货公司不同，中国证监会为此专门制定规范外商投资期货公司的管理办法。《征求意见稿》将外商投资期货公司界定为“单一或有关联关系的多个境外股东持有（包括直接持有或间接控制）公司5%以上股权的期货公司”。而外资股比低于5%的期货公司，仍适用《期货公司监督管理办法》（以下简称“**《期货公司办法》**”）。

二、 境外股东的资质条件。

目前规范期货公司设立的主要规定是《期货交易管理条例》和《期货公司办法》。其中，《期货交易管理条例》要求期货公司主要股东以及实际控制

人“具有持续盈利能力，信誉良好，最近3年无重大违法违规记录”等；而《期货公司办法》规定外资股东应当是“合法存续的金融机构”，“近3年各项财务指标及监管指标符合相关要求”等。

《征求意见稿》进一步细化了外资股东的资质条件。规定直接持有期货公司5%以上股权的境外股东，除应符合《期货公司办法》第七条和第九条的规定以外，对于“合法存续的金融机构”，《征求意见稿》明确为“持续经营5年以上的金融机构，且近3年未受到重大处罚”。《征求意见稿》对于“持续盈利能力”细化为“具有良好的国际声誉和经营业绩，近3年业务规模、收入、利润居于国际前列”，而对于“信誉良好”明确为“近3年长期信用均保持在高水平”。《征求意见稿》中对境外股东的资质条件要求与已实施的《外商投资证券公司管理办法》中对外商投资证券公司的境外股东要求基本一致。

对境外投资者间接持股期货公司的，《征求意见稿》明确规定“境外投资者通过投资关系、协议或其他安排，实际控制期货公司5%以上股权的，应转为直接持股”。考虑到目前不少期货公司为证券公司全资持股或控股，以及境外投资者可以通过QFII/RQFII，“互联互通”等渠道持股境内上市的期货公司，《征求意见稿》对“通过境内证券公司间接持有期货公司股权及证监会规定的其他情形”予以豁免。此外，如果境外投资者通过证券交易所

的证券交易或通过其他安排与他人共同持有境内上市的期货公司股份达到5%以上的，根据《征求意见稿》，该境外投资者也应当符合上述境外股东的资质条件。

三、 高管履职

随着外资股比的提升，考虑到外方股东会希望任命更多的外籍高级管理人员，《征求意见稿》要求外商投资期货公司所有高级管理人员须在境内实地履职，且具有中华人民共和国国籍的高级管理人员数量不得低于高级管理人员总数的三分之一。

四、 信息系统部署的要求

《征求意见稿》规定，“外商投资期货公司交易、结算、风险控制等信息系统的核心服务器以及记录、存储客户信息的数据设备，应当设置在中华人民共和国（港澳台地区除外）境内”。

五、 经营范围

《征求意见稿》未就外商投资期货公司的经营范围做出任何限制性的规定。与内资期货公司一样，外商投资期货公司可根据《期货交易管理条例》和其他相关规定申请经营境内期货经纪业务、境外期货经纪、期货投资咨询以及中国证监会规定的其他期货业务，但不得从事或者变相从事期货自营业务。实践中，期货公司可以根据中国期货业协会发布的《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》的相关规定，设立期货公司风险管理子公司从事做市等相关自营业务。我们理解，与内资期货公司一样，外商投资期货公司亦可以按照上述规定申请设立风险管理子公司以从事相关自营业务。

征求意见截止时间为2018年6月4日，我们预计正式稿在征求意见截止期后会很快发布。

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Foreign-Invested

CSRC Solicits Comments on Administrative Measures for Foreign-Invested Futures Companies

On May 4, 2018, following the promulgation of the Administrative Measures for Foreign-invested Securities Companies, the China Securities Regulatory Commission (“**CSRC**”) released a consultation paper on the Administrative Measures for Foreign-Invested Futures Companies (“**Consultation Paper**”) addressing additional measures to open up the financial industry. Below we have summarized the main points of relevance for foreign investors.

I. Scope of Application.

The Consultation Paper starts by specifying that aggregate foreign ownership in a futures company shall comply with the State’s current commitment to open up of the futures industry, i.e. the percentage of equity in a futures company held by foreign investors, whether directly or indirectly, will be limited to 51% for the first three years, after which the cap will be lifted. In recognition of the differing operational characteristics of foreign-invested and domestic-invested futures companies, the CSRC has formulated separate and specific administrative measures to regulate those futures companies invested by foreign investors. The Consultation Paper defines a foreign-invested futures company as “any futures company in which 5% or more equity is directly owned or

indirectly controlled by a single foreign shareholder or multiple affiliated foreign shareholders.” Those futures companies whose foreign ownership is less than 5% will continue to be governed by the Measures for Supervision and Administration of Futures Companies (“**Measures for Futures Companies**”).

II. Qualification Requirements for Foreign Shareholders.

Currently, the establishment of a futures company is primarily governed by the Administrative Regulation for Futures Trading (“**Regulation for Futures Trading**”) and the Measures for Futures Companies. The Regulation for Futures Trading requires that the major shareholders and *de facto* controller of a futures company should “have sustained profitability and good credit and no record of material violations of laws or regulations over the past three years”, while the Measures for Futures Companies provide that a foreign shareholder shall be a “validly existing financial institution” and that “all financial and regulatory indexes of the company for the past three years shall comply with the relevant requirements.”

The Consultation Paper further specifies the qualification requirements for foreign shareholders. As well as complying with Articles 7

and 9 of the Measures for Futures Companies, any foreign shareholder directly holding 5% or more equity in a futures company, shall also be a “validly existing financial institution”, and moreover “be a financial institution having operated continuously for at least five years and have not been subject to any material punishment for violations of law or regulations for the past three years.” In addition, the Consultation Paper requires “sustained profitability”, defined as “having good international reputation and operation performance, and the business scale, incomes, profits of the company shall be ranked in the forefront of the world” and also “good credit”, meaning the company shall “have maintained its long-term credit at a high level for the past three years.” We note that the qualification requirements for foreign shareholders proposed by the Consultation Paper are basically in line with those for foreign-invested securities companies provided in the Administrative Measures for Foreign-invested Securities Companies.

As for a foreign shareholder indirectly holding equity in a futures company, the Consultation Paper requires that “for any foreign investor having actual control over 5% or more equity in a futures company through an investment relationship, agreement or another arrangement, the equity shall be directly transferred to such investor.” Given the current situation, in which some futures companies are wholly owned or controlled by securities companies, and that foreign investors may currently buy shares in onshore listed futures companies through QFII/QDFII channels and the stock connect mechanism, the Consultation Paper grants exemptions from the direct shareholding requirement for “any equity indirectly held by domestic securities companies or other circumstances provided by the CSRC.” Moreover, if the shares in a listed futures company

purchased by a foreign investor, whether through a stock exchange trade, through joint ownership by a foreign investor and others, or through some other arrangements, reach 5% or more, such foreign investor shall meet the qualification requirements for foreign shareholders pursuant to the Consultation Paper as set forth above.

III. Appointment of Management.

Along with the increase of the foreign ownership limit in futures companies, given foreign shareholders’ desire to appoint more foreign senior management personnel, the Consultation Paper requires that all such senior management personnel of the foreign-invested futures company shall be present in China to perform their duties, and that the number of senior management having Chinese nationality shall be not less than one third of the total number of senior management personnel.

IV. Deployment of IT System.

The Consultation Paper provides that, “the main server of a foreign-invested futures company, used as the information system for trading, settlement and risk control and as the data device for recording and storing customer information shall be hosted inside China (excluding Hong Kong, Macao and Taiwan).”

V. Business Scope.

The Consultation Paper does not provide any additional restrictions on the business scope of foreign-invested futures companies. As is the case for domestic futures companies, foreign-invested futures companies can apply for domestic futures brokerage, overseas futures brokerage, futures investment consulting and other futures business as stipulated by the CSRC in accordance with the Regulation for Futures Trading and other relevant regulations, but are prohibited from engaging in any futures

proprietary trading business, whether directly or in a disguised form. In practice, a foreign-invested futures company may establish a risk management subsidiary to conduct futures proprietary trading business such as market making business in accordance with the *Working Guidelines for the Pilot Business of Futures Companies' Establishment of Subsidiaries for Operating Businesses Focusing on Risk Management Services* as stipulated by the China Futures Association. We understand that as is the

case for domestic futures companies, foreign-invested futures companies may apply to set up a risk management subsidiary to conduct futures proprietary trading activities in accordance with the above provisions.

The deadline for soliciting public comments on the Consultation Paper is June 4, 2018 and we expect that the final version will be issued soon thereafter.

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