

## Financial

### Regulation of Illegal Cross-Border Financial Business – Latest Developments in Legislation and Law Enforcement

On December 30, 2022, the China Securities Regulatory Commission (CSRC) released a statement on its official website about promoting the rectification of illegal cross-border business by two overseas companies<sup>1</sup>. It stated that the two companies' offering of securities services to mainland investors without approval violated the *Securities Law (amended in 2019)* (the "Securities Law") and other relevant laws and regulations, and constituted an illegal operation of securities businesses. The CSRC also said that it has made a public statement on October 15, 2021, highlighting that foreign securities operation institutions that carry out cross-border securities businesses without approval do not comply with the *Securities Law*, the *Regulations on Supervision and Management of Securities Companies* and other laws and regulations and it will act to regulate such activities according to the laws. According to the CSRC, it had a regulatory talk with the two companies' senior management personnel and required them to comply with relevant laws and regulations. Furthermore, the CSRC plans to follow a regulatory approach to "effectively cease opening a new business and orderly dissolve an existing business" and require

the two companies to rectify their illegal activities. Specifically, it plans to ban the two companies from engaging in any new business in mainland China and require them to cease soliciting mainland clients or onboarding any new mainland clients/opening new accounts. The CSRC also plans to require the two companies to properly handle their existing businesses. For the sake of market stability, the CSRC allows existing mainland investors to continue trading through their original overseas brokers, but it clearly points out that overseas brokers are prohibited from allowing any new funds to be transferred to such investors' accounts in violation of China's foreign exchange control. Lastly, the CSRC added that it will dispatch officers to conduct onsite inspections on the two companies and supervise and urge their rectifications, and may take further regulatory measures depending on the rectification.

We have summarized the latest legislative developments and insights from PRC financial regulators regarding cross-border financial business and draw attention to compliance issues for clients that are involved in this area.

<sup>1</sup> See <http://www.csrc.gov.cn/csrc/c100028/c6940083/content.shtml>.

#### **I. Legislative Developments in Cross-Border Financial Business**

In recent years, the legislative bodies and relevant financial regulators of China have successively promulgated new financial laws, regulations and department rules to provide a legal basis for the regulation of cross-border financial business.

The *Futures and Derivatives Law of the People's Republic of China* (promulgated on April 20, 2022 and effective from August 1, 2022) (FDL) specifies that foreign futures exchanges must register with the futures regulatory authority of the State Council if they intend to provide Chinese domestic entities or individuals with direct access to trading systems for their trading activities. Foreign futures operation institutions must do the same if they want to conduct relevant futures trading abroad on behalf of a Chinese domestic futures operation institution. This is the first time at a financial statute level that China has explicitly imposed a registration requirement on cross-border financial service providers. The FDL also provides that approval by the futures regulatory authority of the State Council is required for foreign institutions engaged in futures marketing, promotion and solicitation activities within the territory of the PRC, as do domestic institutions conducting futures marketing, promotion or solicitation activities for any foreign institutions within the PRC. The relevant PRC regulators may take regulatory measures against foreign institutions and persons in charge for violations pursuant to the FDL.

The *Securities Law* does not mention cross-border securities businesses specifically, but relevant provisions have been spelled out in the pertinent regulations and departmental rules. Article 95 of the *Regulation on Supervision and Management of Securities Companies* (amended in 2014) stipulates that "foreign securities operation institutions that operate a securities business or set up a representative office in China shall obtain approval from the securities regulatory authority of the State Council". The *Administrative Measures for Securities Brokerage*

*Businesses* issued by the CSRC on January 13, 2023 (effective from February 28, 2023) ("the Measures") clarify the circumstances that constitute "operating a securities business in China by foreign securities operation institutions" as provided by Article 95 of the *Regulation on Supervision and Management of Securities Companies* (amended in 2014). According to Article 46 of the Measures, if a foreign securities operation institution carries out (directly or indirectly through its affiliate or business partner) marketing, account opening or related activities for overseas securities trading services in China in violation of Article 95 of the *Regulation on Supervision and Management of Securities Companies* (amended in 2014), penalties will be imposed according to Article 202 of the *Securities Law*. This provides a statutory basis for CSRC's law enforcement actions on illegal cross-border brokerage businesses carried out by foreign securities operation institutions.

The People's Bank of China (PBOC), for the first time, provides for the cross-border delivery of services by overseas financial infrastructures in the *Measures for the Supervision and Administration of Financial Infrastructures (Draft for Comment)* released on December 14, 2022, which specifies the market entry requirements, conditions, and reporting obligations in cross-border delivery. This indicates that cross-border financial businesses may be more regulated in broader financial legislations and may soon be a focus of regulatory enforcement.<sup>2</sup>

## **II. Positions Taken by Financial Regulators**

In January 2020, Sun Tianqi, head of the Financial Stability Department of the PBOC, published an article entitled *The Opening-up and*

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<sup>2</sup> For more details, please refer to JunHe Client Briefing "People's Bank of China Solicits Comments on the Measures for the Supervision and Administration of Financial Infrastructures" published on January 28, 2023.

*Supervision of Cross-Border Supplied Financial Services in the Financial Technology Context* (the “2020 Article”), in which he discussed the different categories of illegal foreign-provided financial services and underlined the focus of regulators in cross-border supply. Following this, Mr. Sun delivered a speech in October 2021 called *The 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 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<sup>3</sup>. Echoing the 2020 Article and the 2021 Speech, Mr. Sun published another article on the same issues in February 2022 entitled *Reflections on the Effectiveness of Financial Regulation in the Digital Economy* in China Finance (the “2022 Article”)<sup>4</sup>, in which he reiterated the principle of “the licensed operation of financial businesses”. He highlighted that it is illegal for foreign institutions to engage in prohibited businesses, engage in businesses that are not yet open to foreign investors or engage in businesses with only foreign licenses within the territory of China, all of which shall be determined as illegal financial activities. As a senior officer at PBOC, Mr. Sun’s views regarding the legitimacy and limits of cross-border financial services, in our view, should not only be read in the context of digital or financial technology, but the regulatory principles contained therein shall apply to all types of cross-border supply of financial services or products, irrespective of the “digital” or “financial technology” context.

On a related note, in July 2016, the CSRC released a risk warning of illegal securities and

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<sup>3</sup> For more details, please refer to JunHe Client Briefing “*Regulation of Cross-Border Supply of Foreign Financial Services – What’s Next?*”, published on November 16, 2021.

<sup>4</sup> Please refer to Sun Tianqi, *Reflections on the Effectiveness of Financial Regulation in the Digital Economy*, China Finance, No.03, 2022, pp. 15-17.

futures businesses on its website<sup>5</sup>. This risk warning targeted the scenario whereby foreign securities operation institutions provided trading access or services to domestic investors to invest in foreign securities markets through the platform protocols or mobile terminals of domestic internet companies and by cooperating with such domestic internet companies. The CSRC pointed out that, according to the *Securities Law (amended in 2014)*, no entity or individual is permitted to engage in securities business without the approval of the securities regulatory authority of the State Council; and according to the *Regulations on Supervision and Management of Securities Companies*, foreign securities operation institutions that operate a securities business shall obtain approval from the securities regulatory authority of the State Council; therefore, the legality of the foreign securities operation institutions’ activities is questionable. The CSRC’s recent regulatory actions toward illegal cross-border financial businesses highlight this position i.e., that cross-border financial businesses are subject to approval, and it may indicate a trend of enhanced law enforcement along with the recent rectification campaign.

### III. Our Observations

Cross-border financial business has developed rapidly in recent years. PRC regulators have long faced the challenges of making legislation and mobilizing limited law enforcement resources to respond in a timely manner to the relevant issues. Article 46 of the *Administrative Measures for Securities Brokerage Businesses* may indicate a trend towards including certain regulatory principles for cross-border financial businesses into financial law-making. Furthermore, the CSRC’s desire to rectify illegal cross-border business by the two companies may indicate that it has formulated initial handling measures for a wider range of illegal cross-border financial

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<sup>5</sup> See <http://www.csrc.gov.cn/csrc/c106299/c1600712/content.shtml>.

businesses and following that, it may take further law enforcement actions for any violations. We advise foreign financial institutions to prudently evaluate and manage the compliance risks involved in their cross-border businesses and to

revisit and update their internal compliance policies to guide their behaviour and their staff. We will continue to monitor the situation and keep our clients apprised of important developments in this respect.

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## 金融法律热点问题

### 非法跨境展业——立法与执法的最新进展

2022年12月30日，中国证券监督管理委员会（“证监会”）在其官网上发布关于推进某两家境外公司非法跨境展业整治工作的相关信息<sup>6</sup>。证监会表明，两家公司未经核准面向境内投资者开展跨境证券业务的行为违反了《证券法》等相关法律法规，构成非法经营证券业务。证监会表示其曾于2021年10月15日通过媒体发声，指出境外证券经营机构未经核准开展跨境证券业务不符合《证券法》、《证券公司监督管理条例》等法律法规规定，并将依法对此类活动予以规范。根据证监会的声明，证监会对两家公司的高管进行了监管约谈要求其依法规范面向境内投资者的跨境证券业务。同时，证监会拟按照“有效遏制增量，有序化解存量”的思路要求两家公司对上述违法违规行为进行整改，取缔增量非法业务活动，禁止招揽境内投资者及发展境内新客户、开立新账户，并妥善处理存量业务。出于维护市场平稳的考虑，证监会允许存量境内投资者继续通过原境外机构开展交易，但证监会特别指出，禁止境外机构接受违反我国外汇管理规定的增量资金转入此类投资者账户。此外，针对两家公司的非法跨境展业行为，证监会还表示将责成相关派出机构对其进行现场核查、督促整改，并视整改情况采取进一步监管措施。

下文我们通过简要梳理近期跨境金融业务相关立法和监管者的态度，对非法跨境展业立法与执法的最新进展进行提示。

#### 一、跨境金融业务相关立法进展

近年来，为规范跨境金融业务，我国立法部门及有关监管机构已陆续出台了若干金融法律法规和部门规章，为加强跨境展业监管提供法律支持。

2022年8月1日生效的《期货和衍生品法》首次以金融法律的形式明确规定，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所交易系统交易服务的，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，均应当向国务院期货监督管理机构申请注册。此外，境外机构在境内从事期货市场营销、推介及招揽活动，以及境内机构为境外机构在境内从事期货市场营销、推介及招揽活动的，也应当经国务院期货监督管理机构批准。违反上述规定的，监管机构可以根据《期货和衍生品法》的规定对相关境外机构及有关负责人员采取相应措施。

与跨境期货业务监管架构不同，《证券法》未对跨境证券业务监管做出具体规定，但相关条例和部门规章层面对跨境证券展业已有明确的规定。

《证券公司监督管理条例(2014年修订)》第九十五条明确境外证券经营机构在境内经营证券业务或

<sup>6</sup> 参见 <http://www.csrc.gov.cn/csrc/c100028/c6940083/content.shtml>。

者设立代表机构的，应当经国务院证券监督管理机构批准。在此基础上，证监会近日发布的《证券经纪业务管理办法》（自 2023 年 2 月 28 日施行）对跨境证券业务监管作出了进一步细化与补充。根据《证券经纪业务管理办法》第四十六条，境外证券经营机构违反《证券公司监督管理条例》第九十五条，直接或者通过其关联机构、合作机构，在境内开展境外证券交易服务的营销、开户等活动的，将按照《证券法》第二百零二条的规定予以处罚。上述规定为证监会打击境外证券经营机构的非法跨境经纪业务提供了执法依据。

此外，中国人民银行（“央行”）于 2022 年 12 月 14 日发布的《金融基础设施监督管理办法（征求意见稿）》中亦首次出现对境外金融基础设施跨境交付的规定，包括跨境交付的准入要求和条件以及报告义务。<sup>7</sup>这似乎预示着跨境展业相关规定将在各领域的金融立法中纷纷体现，并可能在不久的将来成为监管执法的重点之一。

## 二、金融监管者的立场

央行金融稳定局局长孙天琦曾于 2020 年 1 月发表名为“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，孙局长在该文章中区分了不同类型违法跨境交付类金融服务进行分析，并详细阐述了“跨境交付”相关的监管重点。后于 2021 年 10 月 24 日，孙局长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，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。<sup>8</sup>2022 年 2 月，孙局长在《中国金融》发表名为“数字经济下金融监管有效性思考”的署名文章，再度重申“金融作为特许行业必须持牌经营”的原则，强调境外机构在境内从事禁止的、未对外开放的金融业务或仅持境外牌照在境内展业，均属于非法金融活动。

<sup>7</sup> 更多相关评述，请参见我们撰写的文章“君合法评|央行就金融基础设施监督管理办法征求意见”，《君合法律评论》，2023 年 1 月 28 日。

<sup>8</sup> 更多相关评述，请参见我们撰写的文章“君合法评|跨境金融服务监管——下一步将如何行动？”，《君合法律评论》，2021 年 11 月 16 日。

<sup>9</sup>作为央行负责金融稳定的高级官员，我们认为，孙局长对于跨境金融服务业务之合法合规性边界的观点不应仅限在数字及金融科技语境下解读，其对金融监管原则和精神的阐释亦可以概括适用于金融服务或产品提供者的所有跨境活动。

值得注意的是，证监会曾在其官网上发布非法证券期货风险警示<sup>10</sup>，针对境外证券经营机构与境内互联网公司合作，通过境内互联网公司的平台网站或移动客户端为境内投资者投资境外证券市场提供交易渠道和服务的活动，提示投资者该等活动的合法性存疑，并就《证券法》<sup>11</sup>下“未经国务院证券监督管理机构批准，任何单位和个人不得经营证券业务”的规定以及《证券公司监督管理条例》下“境外证券经营机构在境内经营证券业务，应当经国务院证券监督管理机构批准”的规定予以提示。近期证监会此次非法跨境展业整治行动再次表明证监会关于跨境展业必须持牌经营的立场，且不排除证监会在整治的同时加强对非法跨境展业活动的执法。

## 三、我们的观察

近年来跨境金融业务飞速发展，跨境展业相关立法的及时跟进以及监管执法资源的调配，是金融监管机构长期面临的实际问题。《证券经纪业务管理办法》第四十六条的出台预示着未来将跨境展业的原则性规定纳入金融立法这一趋势。而证监会的此次非法跨境展业整治行动可能意味着证监会就非法跨境展业乱象已初步形成应对方案，未来将继续对非法跨境展业展开进一步的监管执法行动。建议境外金融机构根据立法和执法的最新进展审慎评估和管理与跨境活动有关的合规风险，更新内部合规制度以便适当地指引指导机构和员工的行为。我们也将持续关注并及时与我们的客户分享跨境展业有关立法和执法行动的最新进展。

<sup>9</sup> 参见孙天琦：“数字经济下金融监管有效性思考”，《中国金融》，2022 年第 03 期，第 15-17 页。

<sup>10</sup> 参见 <http://www.csrc.gov.cn/csrc/c106299/c1600712/content.shtml>。

<sup>11</sup> 此处指当时有效的《证券法(2014 年修正)》第一百二十二条。

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