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致：中国证券监督管理委员会(“中国证监会”)[1]法律部
To the Legal Affairs Department of the China Securities Regulatory Commission[2] ("CSRC")

《衍生品交易监督管理办法(征求意见稿)》
Consultation Draft of the Measures for the Supervision and Administration of Derivatives Trading

亚洲证券业与金融市场协会(“**ASIFMA**”)[3]谨代表其全体会员，就贵会网站上发布的《衍生品交易监督管理办法(征求意见稿)》[4](以下简称“**《征求意见稿》**”，其正式版本则称为“**《办法》**”)向贵会法律部提出意见和建议。

On behalf of its members, the Asia Securities Industry & Financial Markets Association ("**ASIFMA**")[5] is pleased to submit to the CSRC Legal Affairs Department our comments and suggestions on the

[1] 仅为本函件之目的，“中国”一词不包括香港特别行政区、澳门特别行政区和台湾地区。
[2] The "PRC" or "China", for the sole purpose of this letter, excluding Hong Kong, Macau and Taiwan.
[3] ASIFMA 是一个独立的区域性行业协会，会员基础广泛，由银行、资产管理公司、律师事务所和市场基建服务供应商等 165 多家来自买方和卖方市场的领先机构组成。我们与各家会员携手发掘金融行业的共同利益，提升亚洲各大资本市场的深度、广度和流动性。我们致力于促进亚洲资本市场的稳定、创新和竞争力，为区域经济增长提供必要支持。我们针对关键问题群策群力、统一立场，以努力形成共识、寻求解决方案并促成变革。我们的工作包括与监管部门和交易所开展磋商、制定统一的行业标准、发表政策性文件呼吁深化市场发展，并降低在亚太地区经营的成本。ASIFMA 通过全球金融市场协会(GFMA)与美国的证券业与金融市场协会(SIFMA)及欧洲的金融市场协会(AFME)形成联盟，共同提供全球最佳行业实践及标准，为区域发展作贡献。
[4] 可于以下网址查阅：http://www.csrc.gov.cn/csrc/c101981/c7326196/content.shtml。
[5] ASIFMA is an independent, regional trade association with over 165 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

Consultation Draft of the Measures for the Supervision and Administration of Derivatives Trading ("**Draft**", and after the formal promulgation, "**Measures**") published on CSRC's website[6].

多年来，场外衍生品作为海外投资股票现货市场的准入补充路径已形成市场惯例。我们注意到《关于实施<合格境外机构投资者和人民币合格境外机构投资者境内证券期货投资管理办法>有关问题的规定》第十条已经明确，中国证监会可以根据监管需要，要求合格境外投资者报告其在境外开展的与境内证券期货投资相关的对冲交易头寸等信息。
The provision of market access through OTC derivatives as a complement to investment via the cash segment has been the practice for many years. We note Article 10 of QFI Implementing Rules which provides that the CSRC may, based on its regulatory needs, require QFIs to report their offshore hedging positions relevant to their domestic securities and futures investments.

对于中国市场，例如场外衍生品这样的市场准入产品赋予了全球机构投资者获得 A 股经济收益的顺畅渠道。此外，场外衍生品亦是重要的投资及风险管理工具，亦是稳健资本市场的重要部分。
In the case of China, OTC derivatives or other market access products allow global institutional investors seeking a low friction gateway to gain A-share exposure. In addition, OTC derivatives constitute an important investing and risk management tool for investors and remains a key part of the robust and healthy capital markets.

统一境内衍生品市场监管是落实近期颁布的《期货和衍生品法》的重要步骤，我们的会员对中国证监会在这方面所做的努力表示欢迎。就境外衍生品市场而言，境外市场参与者充分理解提高衍生品市场透明度的重要意义。但是，我们也注意到《征求意见稿》中的某些规定可能会在无意中对会员的境外业务活动产生负面影响，且可能不利于促进境外机构投资者参与中国资本市场。
Our members welcome CSRC's efforts to unify the regulation of PRC derivatives markets as an important step to effectively implement the recently promulgated *Futures and Derivatives Law* (FDL). As for offshore derivatives markets, we also recognize the importance for improving the transparency of the derivatives market. We nevertheless find some technical issues in the Draft, which may have an unintended negative impact on the offshore business activities and which may be not advantageous to increasing participation of global investors into China's capital markets.

我们在此提出我们的建议供贵会参考：
We would highlight our recommendations below for your kind consideration:

第一部分 主要建议和需澄清之处
Part I Major Recommendations & Clarifications

I. 第 50 条
Article 50

《征求意见稿》第 50 条规定：
Article 50 of the Draft states that:

> *"境外经营机构在境内从事衍生品交易业务，应当经中国证监会批准，并遵守本办法的规定。*
> *"To engage in derivatives trading business in China, an overseas operating institution shall obtain the approval of the CSRC and abide by the provisions of these Measures.*

[6] Available at: http://www.csrc.gov.cn/csrc/c101981/c7326196/content.shtml.

境外经营机构与境外交易者在境外开展衍生品交易，其对冲交易发生在境内的，应当符合本办法第十二条、第十四条至第二十二条等有关规定。”
Overseas business institutions and overseas traders who carry out derivatives transactions overseas, and their hedging transactions occur in China, shall comply with the relevant provisions of Articles 12, 14 to 22 of these Measures.”

第 50 条第 1 款
Article 50.1
建议和澄清：
Recommendations and Clarifications:

我们理解，第 50 条第 1 款旨在禁止境外经营机构未经批准在中国境内非法经营金融业务(此处特指场外衍生品交易业务)。本条并非旨在广泛适用于 QFI 等境外投资者就境内上市股票或其他金融工具相关的对冲交易，也并非规范跨境衍生品交易。换言之，我们理解第 50 条第 1 款并不改变现有牌照制度。在此基础上，我们希望贵会明确本条的立法意图并在下一次征求意见时对实际立法意图予以澄清。
We understand that this provision aims to prohibit foreign institutions' illegal operation of financial businesses (in this context, the OTC derivatives trading businesses) in China without regulatory approval. Such approval is not intended to be broadly applicable to QFIs or other foreign investors' hedging trading of Chinese listed stocks or other instruments, nor is it intended to regulate entry of cross-border derivatives transactions. In other words, we understand there is no change to the current licensing framework by virtue of the introduction of Article 50.1. On that basis, we appreciate CSRC's confirmation of the intention of this provision and provide clarity to the next Draft.

第 50 条第 2 款
Article 50.2
建议和澄清：
Recommendations and Clarifications:

就第 50 条第 2 款所述“境内对冲交易”而言，在底层资产是股指或一揽子股票的情况下，我们的会员建议当且仅当境内上市股票的权重占股指或一揽子股票 30%以上[7]且相关境外衍生品交易存在《期货和衍生品法》规定的“扰乱境内市场秩序”的情况下，第 50 条第 2 款方才适用。
With respect to the materiality threshold of onshore hedging activities, in the case of an index or a basket of stocks, our members suggest that the scope of Article 50.2 should apply if (and only if) the weighting of Mainland listed stocks in the index or basket exceeds 30%[8] in the event the offshore derivatives transaction disrupts market order onshore as provided by the FDL.

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[7] 美国商品期货交易委员会(CFTC)对“宽基指数”的定义如下——具备以下全部特征的证券指数为宽基指数：(1)包含十种以上的成分证券；(2) 没有任何一种成分证券占指数权重的 30%以上；(3) 五个加权最高的成分证券合计不超过指数权重的 60%；以及 (3)合计占指数权重 25%的加权最低的成分证券的平均每日交易量(ADTV)合计 5000 万美元或以上(或对于包含 15 种或以上成分证券的指数，为 3000 万美元或以上)。
[8] The CFTC defines broad-based index as follows: Under Path A, which derives from Section 1a(25)(A) of the CEA, 7 USC 1a(25)(A), a security index is classified as broad-based if it has all of the following characteristics: (i) the index has ten or more component securities; (ii) no single component security comprises more than 30 percent of the index's weighting; (iii) the five highest weighted component securities together comprise no more than 60 percent of the index's weighting; and (iv) the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume

此外，我们理解第 50 条第 2 款仅适用于《办法》生效后达成的衍生品交易，且《办法》会设置六个月过渡期，允许境外经营机构和境外交易者在过渡期内完成相关准备工作以符合《办法》的规定。
Furthermore, our understanding is that Article 50.2 will only apply to trades entered into after the Measures take effect and that the new measures would provide a six-month grace period to allow foreign operating institutions and foreign traders to prepare for compliance of such Measures.

II. 第 19 条和第 21 条 Articles 19 & 21

《征求意见稿》第 19 条规定：
Article 19 of the Draft states that:

> *“禁止通过衍生品交易规避股份减持、限售规则。”*
> *“It is prohibited to circumvent the shareholding reduction rules and restricted shares rules through derivative trading.”*

《征求意见稿》第 21 条规定：
Article 21 of the Draft states that:

> *“禁止衍生品经营机构与上市公司持有百分之五以上股份的股东、实际控制人、董事、监事、高级管理人员，以及所持股份有限售或者减持限制的股东开展以该上市公司股票为标的资产的衍生品交易。*
> *“It is prohibited for derivatives operating institutions to engage in derivatives trading with shareholders of a listed company who holds 5% or more shares of such listed company, de facto controllers, directors, supervisors, and senior management personnel of such listed company, or with the shareholders whose shares are subject to sales restrictions or shareholding reduction restrictions, if the underlying assets of the derivatives trading are stocks of the listed company.*
>
> *适用前款规定时，上市公司的股东与其一致行动人所持有的股份应当合并计算。When the provisions of the preceding paragraph apply, the shares held by a shareholder of the listed company and its persons acting in concert shall be calculated in aggregate.*
>
> *衍生品经营机构应当对交易者真实身份和交易目的进行穿透核查，不得与前两款所述主体及其控制、设立的相关产品、法人、合伙企业等进行第一款所述交易。”*
> *A derivatives operating institution shall conduct look-through verification of the real identity of a trading institution and the trading purpose and shall not conduct the transactions as provided in the first paragraph with any persons specified in the preceding two paragraphs or with the relevant products, legal persons and partnership enterprises controlled or established by them.”*

<u>建议</u>：
<u>Recommendations</u>:

1. 我们注意到，中国证券业协会现行有效的自律规则规定，证券公司不得违规与持有上市公司特定股份的特定类型的“敏感客户”开展以本公司股票为标的收益互换交易或场外期权。其中，“敏感客户”包括上市公司及其关联方、一致行动人。《征求意见稿》进一步扩大了前述禁止交易对象范围，将所持股份有限售或者减持限制的股东(以下分别简称“**限售股**

(ADTV) of $50 million or more (or in the case of an index with 15 or more component securities, $30 million or more).

股东”和“**限售股**”)纳入其中，并全面禁止衍生品经营机构与限售股股东开展衍生品交易。
We note that under the current Securities Association of China (SAC) self-disciplinary rules, securities companies are prohibited from, in violation of relevant laws, regulations and rules, to conduct swap or OTC options transactions with so called certain types of “sensitive clients” that hold certain shares of a listed company if the underlying assets of the swap transaction are the shares of such listed company. “Sensitive clients” include the listed company itself, its related parties and persons acting in concert. The Draft further expands the above prohibited target clients to include any shareholders whose shares are subject to sales restrictions or shareholding reduction restrictions (the “**Restrictive Shareholder**” and the “**Restrictive Shares**”) and widely prohibits derivatives operating institutions from trading derivatives with them.

在海外市场中，境外机构向有意获得中国 A 股经济收益的对冲基金等国际投资者提供收益互换产品。这些国际投资者中的绝大多数无意获得 A 股股份的所有权，也无意行使该等股份的表决权，他们只希望获得与 A 股表现相关的经济收益，从而提高融资效率。如前所述，海外收益互换市场有助于提高资本市场效率、扩大资本流入、提高投资者信心和促进中国资本市场的全面发展，我们相信这符合中国监管机构的期望。
In the offshore markets, foreign institutions are offering swap products to international investors such as hedge funds who have a strong appetite to gain economic exposure on China A shares. Most international investors do not wish to obtain title to the shares, nor do they want to exercise any voting rights; they are only keen to gain economic exposure to the performance of the A shares, with enhanced financing efficiency. Benefits of the offshore swap markets per earlier mention include increased capital market efficiency, capital inflow, investor confidence, and the broader development of China’s capital markets, which is consistent with the China’s regulator’s expectations.

实践中，境外机构通过衍生品交易为其境外客户获得 A 股非公开发行相关经济收益提供便利，持有限售股的境外机构也可能直接和/或通过衍生品交易同一 A 股上市公司的非限售股以获得非限售股的头寸。我们认为此类交易并未滥用场外衍生品交易以规避境内监管规定，也不违反境内监管规定。
In practice, offshore operating institutions may provide financing channels to offshore clients by entering into derivatives transactions with them to gain economic exposure in private placement deals of A shares. In addition, offshore institutions holding Restrictive Shares may trade non-Restrictive Shares of the same A-share listed company directly and/or through derivatives to obtain exposure over the non-Restrictive Shares. This is not an abuse of OTC derivatives to circumvent the domestic rules, and does not contravene the rules.

《征求意见稿》禁止限售股股东进行任何衍生品交易可能限制限售股股东的上述正当交易行为，并且可能阻碍众多境外机构参与 A 股非公开发行。
The possibility of widely prohibiting Restrictive Shareholders from conducting any and all derivatives activity may have unintended consequences in restricting legitimate trading activities by Restricted Shareholders; and may impair the ability for international investors to participate in private placement deals of A shares.

因此，我们希望与贵会确认，《征求意见稿》的立法意图并非限制境外经营机构通过衍生品交易为其境外客户获得 A 股非公开发行相关经济收益提供便利(当然相关境外机构，如 QFI，仍需要相应遵守相关非公开发行股票锁定期的规定)，也不是限制持有限售股的境外机构通过衍生品交易从市场上买入或卖出非限售股。考虑到《征求意见稿》第 19 条和第 21 条的适用范围从文义上解读过于宽泛从而可能造成意想不到的影响(如上文所述)，并且第 15 条和第 17 条等条款已经对规范不当行为作出规定，我们的会员建议删除第 19 条和第 21 条，在其他法规(如股票市场相关法规)中落实对相关限售股股东的限制性规定。

In light of the above, we would like to confirm with CSRC that the Draft is not intended to prohibit offshore operating institutions entering derivatives with offshore clients to enable them to gain economic exposure in A-share private placement deals (provided that the relevant offshore operating institutions like QFI does indeed comply with the lock-up requirements in relation to A-share private placement deals), nor is it intended to restrict offshore institutions that hold Restrictive Shares to buy or sell non-Restrictive Shares in the market. Given the wide reading and unintended consequences of the current draft of Articles 19 and 21 (as stipulated above), and the fact that there are already other measures such as Articles 15 and 17 that curb improper conduct, our members would recommend the removal of Articles 19 and 21 and that such articles may be better placed in other regulations (e.g. those regulating the equity capital markets) that impose restrictions on the Restrictive Shareholder.

2. 第 21 条第 3 款规定，衍生品经营机构应当穿透核查交易者真实身份和交易目的。需要指出的是，衍生品经营机构很难履行该等穿透核查义务，因为境外经营机构如 QFI，无法看穿其衍生品交易对手方采取的行动。我们建议规定交易者而非 QFI 等衍生品经营机构有义务根据《征求意见稿》第 14 条规定披露其自身合并持股等相关信息。
Article 21.3 reads that derivatives operating institutions should bear the obligations of looking through the "true identity" and "trade intention" of clients/counterparties. We would like to highlight that it is very difficult for derivatives operating institutions to perform this obligation because the QFI, for example, would not have visibility as to further actions of the trading counterparty with whom they had entered into the derivative. We suggest that it should be the trading counterparty/clients, rather than QFI brokers, that should have the obligation to disclose information such as their aggregate holdings, as specified in Article 14.

我们非常愿意与贵会进一步交流相关问题。如果能够与贵会建立充分的沟通渠道，以便衍生品经营机构能够进一步澄清如何满足上述监管要求，我们将不胜感激。
We would very much welcome continued dialogue with the CSRC in this regard. It would be appreciated if there are sufficient communication channels with CSRC so that the derivatives operating institutions can further clarify its regulatory obligations in satisfying these requirements.

III. 第 14 条 Article 14

《征求意见稿》第 14 条规定：
Article 14 of the Draft states that:

> *"在履行信息披露义务或者收购等活动中，交易者持有的以上市公司或者股票在国务院批准的其他全国性证券交易场所交易的公司的股票(以下简称标的股票)为标的资产的衍生品合约，应当按照证券交易场所的规定与其直接和间接持有的标的股票合并计算。"*
> *"For the performance of information disclosure obligations or in the acquisition activities or other activities, a derivative contract held by a trading institution with the stocks of a listed company or a company whose stocks are traded on any other national securities trading venue approved by the State Council (the "underlying stocks") as the underlying assets shall be calculated in aggregate with the underlying stocks directly or indirectly held by the trading institution in accordance with the provisions of the securities trading venue."*

<u>建议与澄清</u>：
<u>Recommendations and Clarifications</u>:

1. 我们的会员提议，在对衍生品交易的标的股票进行合并计算时，排除(1)以现金结算的衍生

品；(2)不具有表决权或投资决策权的衍生品；(3)与上市公司无表决权股票(如优先股)挂钩的衍生品，且任何需合并计算的衍生品交易头寸应均为净头寸，即衍生品交易多头与空头轧差后的净头寸。我们希望特别指出的是，如果将现金结算的衍生品交易头寸纳入合并计算，按照对应股份数量计算的相关权益将轻易超过某一上市公司已发行股份总数的5%，从而触发5%持股变动披露义务以及三日内禁止买卖该上市公司的股票的限制，同时触发短线交易限制从而在六个月或更长期限内禁止交易(详见下文)。我们预期本条与国内短线交易规则(该要求较香港市场更为严格，香港市场无短线交易限制规则)相互作用的结果可能是突然导致 QFI 和股票通交易量双双下跌。

Our members would like to propose excluding (1) cash-settled derivatives; (2) derivatives that do not provide voting rights or investment decision-making power; (3) derivatives that reference non-voting shares (e.g. preference shares) of a listed company from shareholding disclosure calculations; and any derivative position to be calculated should be a net position, i.e. netting long and short derivatives positions. We would particularly highlight that if cash-settled derivatives are included for aggregation, the equity interest (calculated by way of the number of shares equivalent) will easily go beyond 5% of a listed company's outstanding shares which will therefore trigger 5% shareholding disclosure filing and a 3-day cooling off period, as well as short-swing profit rule restrictions which will immediately impact the ability of the investor to trade for 6 months or longer (more detail below). We foresee this rule change coupled with the existing short-swing profit rule (which is stricter than the Hong Kong market that does not have a short swing profit rule) will dramatically reduce trading activities via the QFI and the Stock Connect channels.

2. 第 14 条规定，合并计算头寸应当适用于履行信息披露义务或者上市公司收购及“其他活动”。在认定短线交易以及《征求意见稿》第 21 条第 1 款中的“持股 5%的股东”时是否需要合并计算并不明确。换言之，我们希望澄清在前述两种情况下认定5%持股是否包括衍生品头寸。若5%持股包含衍生品头寸，这将在实践中对衍生品经营机构履行穿透核查义务造成切实困难。如前所述，实践中衍生品经营机构不得不在很大程度上依赖客户/交易对手方的陈述与保证。因此，我们建议删除第 14 条中的“等活动”，并明确认定短线交易限制及第 21 条第 1 款 (若本条在《办法》正式稿中保留) 所述的“持股 5%的股东”不包括衍生品头寸。

   Article 14 stipulates that the “consolidated positions” shall apply to information disclosure, the listed company acquisition activities, and “other activities”. It is unclear whether the “consolidated positions” apply to both short-swing profit restrictions and Article 21.1 of the Draft given that the ‘5% shareholding’ threshold is mentioned in both contexts. In other words, the industry wishes to have clarity over whether the ‘5% shareholding’ threshold mentioned in these contexts include derivatives position as well. It is not practically feasible for derivatives operating institutions to perform the look-through checking if the 5% includes derivatives positions. Derivatives operating institutions would have to largely rely on the representations of the clients/counterparties as a matter of practice per earlier mention. Therefore, we suggest deleting “other activities” in Article 14 and clarifying that the 5% calculation for the purposes of short-swing profit restrictions and application of Article 21.1 (to the extent such article remains) shall not include derivatives position.

IV. 第 12 条第 3 款 Article 12.3

《征求意见稿》第 12 条第 3 款规定：
Article 12.3 of the Draft states that:

“衍生品经营机构应当记录与对冲交易相关的衍生品合约的交易对手方、交易合约、交易策略、交易明细等数据信息。证券期货交易场所根据监测需要，可以要求衍生品经营机构提供上述相关数据信息。”
“Derivatives operating institutions shall record the data and information of the counterparties, contracts, trading strategies and the trading details of the derivatives contracts relating to hedging transactions. Securities and futures trading venues may, based on the needs of monitoring, require derivatives operating institutions to provide the foregoing data and information.”

建议：
Recommendations:

我们建议删除“交易策略”的表述，因为交易策略可能因交易而异并且无法清晰捕捉；同时，衍生品经营机构难以将客户的交易策略与每笔交易逐一对应。
We would suggest removing reference to “trading strategy” as this may vary trade by trade and is not a capturable data. Also, derivatives operating institutions are not aware of the trading strategy of their clients on a trade-by-trade basis.

此外，我们的会员期盼证券期货交易场所就衍生品交易报告模板和内容征求意见以使市场参与者能够完成系统准备工作以支持衍生品报告义务的履行。需要注意的是，对冲交易有可能是在投资组合层面进行的，而非“一对一”对冲。
In addition, our members would request for the exchanges to consider soliciting comments on the reporting template and contents such that industry participants are able to ensure operational readiness to support any changes to derivatives reporting. Please note that hedging for derivatives may be done at a portfolio basis and not one for one.

第二部分 其他条款
Part II Others

第 3 条
Article 3
澄清：
Clarifications:
我们的会员希望贵会对“结构过度复杂的衍生品合约”的构成要件进行详细说明。
Our members would like CSRC to elaborate on what may constitute “overly complex derivatives contracts”.

第 7 条
Article 7
澄清：
Clarifications:
我们的会员希望澄清什么样的新特征或新类型构成“新品种衍生品合约”从而触发报告义务。我们注意到，中国证券业协会以及中国期货业协会的现行自律规则中并没有这样的报告要求或指引。
Our members would like to seek clarity on what would constitute new features or new types of derivatives contracts which would trigger the administrative reporting requirement. We note that there is no such reporting requirements or guidance in current self-disciplinary rules of the SAC or CFA.

我们的会员还希望了解，境内银行业金融机构与证券公司、期货公司或其子公司开展场外或上市衍生品交易时，除根据中国银保监会现行《银行业金融机构衍生产品交易业务管理暂行办法》向中国银保监会备案外，是否需要在交易前就新品种衍生品合约向行业协会报告。
Our members would also like to know whether an onshore banking institution carrying out derivatives business with securities companies, futures companies or their subsidiaries concerning OTC or listed derivatives also need to submit the pre-trade new product reporting to the industry associations on top of the existing filing requirement to CBIRC according to *CBIRC Interim Measures for the Business Management of Derivative Transactions of Banking Financial Institutions*.

第 9 条
Article 9
建议：
Recommendations:

期货和场外衍生品已经分别受到严格监管以降低市场风险，我们不清楚本条对衍生品交易的持仓和期货交易的持仓合并计算的立法意图。我们也不清楚对衍生品交易适用持仓限额制度的立法意图，我们理解场外衍生品交易的持仓限额制度在其他司法管辖区并不常见。
It is unclear what the purpose is behind aggregating position limits for listed futures together with OTC derivatives - both are already separately regulated to mitigate against market risks. It is also unclear as to the purpose of applying position limits to OTC derivatives which is uncommon in other jurisdictions.

第 15 条
Article 15
建议：
Recommendations:

本条中的兜底规定“等”违法违规行为过于宽泛和模糊。境外参与者无法了解全部境内规则和监管要求，因此他们难以确保自身未从事任何可能被视为规避这些规则的活动。我们建议贵会澄清并缩小该兜底条款要求的范围。
The catch-all provision of "other violations of laws and regulations" is too broad and ambiguous, and it is impossible for foreign participants to be aware of all domestic rules and regulatory requirements so that they face difficulties ensuring that they are not engaging in activities that may be deemed as circumventing those rules. We would suggest that CSRC clarify and narrow down the scope of “other violations of laws and regulations”.

第 17 条
Article 17
建议：
Recommendations:

我们理解，第 17 条第 2 款旨在禁止获取内幕信息以外的其他未公开信息的人违规从事与该信息相关的衍生品交易的行为。鉴于《最高人民法院、最高人民检察院关于办理利用未公开信息交易刑事案件适用法律若干问题的解释》(“司法解释”)仅适用于证券、期货交易，贵会如果在《办法》的起草说明说明确《办法》第 17 条第 2 款与司法解释的原则一致，将对行业大有裨益。
We understand that the second paragraph to Article 17 intends to cover other non-public information than inside information related to the execution of the derivatives. Given the *Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning the Application of Laws in Handling Criminal Cases Related to Trading using Non-public Information* (the “Supreme

Court Guidance") only applies to securities and futures, it would be of great benefit to the industry if the intention to apply the principles as set out in the Supreme Court Guidance is clarified in the guidance note provided by CSRC.

另外，类似于第 31 条，我们建议贵会明确认可加以隔离的信息流动(即“中国墙”)可以作为衍生品经营机构已经履行相关责任的抗辩理由。
Separately, we would suggest the CSRC to expressly recognize separate information flows (i.e., Chinese wall) as a defense similar to Article 31.

第 20 条
Article 20
建议：
Recommendations:

由于通过衍生品间接持有证券的持仓信息并非公开信息，根据“应当知道的”信息评估交易对手的适格性不合理地扩大了衍生品经营机构的义务，我们建议删除“应当知道”。同时，我们建议允许衍生品经营机构、交易者依赖对方的陈述与保证以履行其义务，因为双方按照公平原则交易，互相并不知道对手方每笔交易背后的逻辑和动机，也不知道对手方投资组合的持仓情况，这使得任一方都其难以知道对手方是否实施了《征求意见稿》第 15 至 19 条规定的禁止性行为。
Given that the information with regard to indirect securities holding via derivatives is not public, the obligation may be unreasonably expanded for the derivative business operating institutions if they have to evaluate a counterparty's eligibility based on 'ought to know' information. Hence, we suggest deleting "ought to know" and accepting that the derivatives operating institutions and traders can rely on each other's representations to discharge their obligations because counterparties engage each other on an arm's length principle and are not aware of the counterparty's rationale for each and every transaction, nor of the wider positions in a counterparty's portfolio – this makes it challenging to know whether the counterparty of a trade is engaging in prohibited activities per Articles 15 to 19.

第 52 条
Article 52
建议：
Recommendations:

鉴于会员提出的上述意见，我们谨此期盼贵会(1)延长征求意见的时间；(2)就实施拟出台的《办法》设置过渡期；及(3)明确拟出台的《办法》对生效前订立的衍生品交易无溯及力。
In light of the collective input from our members' provided above, our members would like to respectfully request for (a) a longer consultation period in respect of the proposed Measures; (b) a grace period for implementing such proposed Measures; and (c) no retrospective effect of such proposed Measures on the derivatives transactions entered into prior to the effective date of such proposed Measures.

我们的上述反馈意见集中于境外场外衍生品交易相关规定，因为场外衍生品是海外市场重要市场准入工具之一。坦率而言，市场参与者对目前的《征求意见稿》可能造成的影响表达了深切担忧。由于亚太区其他优先事项，我们尚未来得及对这一非常重要的立法动态投入足够的时间和关注。考虑到拟出台的《办法》的重要性，我们非常希望与贵会进一步探讨我们的意见，并在有需要时进一步提供业界意见。如果贵会有任何疑问，请联系 ASIFMA 董事总经理、证券部主管赵荫人(邮箱：lchao@asifma.org；电话：+852 9826 8020)。

This response has focused on overseas OTC derivatives, which is a crucial market access tool for the international investment community. In full candor, the industry has raised significant concerns about unintended consequences based on the current draft, and there has not been sufficient time given multiple priorities across the region to devote sufficient time and attention to this very important development. Given the importance of these measures, we would be grateful for the opportunity to engage in further discussions with CSRC in relation to our comments and to provide further industry input where necessary. If you have any questions, please do not hesitate to contact Lyndon Chao, Managing Director - Head of Equities and Post Trade at ASIFMA, at lchao@asifma.org or +852 9826 8020.

此致：
Yours faithfully,

赵荫人
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亚洲证券业与金融市场协会
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