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

《衍生品交易监督管理办法（二次征求意见稿）》
Second 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(二次征求意见稿)》[4]（以下简称“**《二次征求意见稿》**”，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

[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 150 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/c7443986/content.shtml
[5] ASIFMA is an independent, regional trade association with over 150 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

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

我们的会员对中国证监会就场外衍生品市场制定统一法律和监管框架表示欢迎。我们感谢中国证监会采纳了我们对《衍生品交易监督管理办法（一次征求意见稿）》的部分反馈意见，这对市场参与者来说非常有帮助。尽管如此，我们仍希望进一步指出《二次征求意见稿》中一些可能妨碍外资机构投资中国资本市场的问题，并请求中国证监会对此予以澄清以消除他们的顾虑。

Our members welcome CSRC's continued focus to create a unified legal and regulatory framework for the OTC derivatives market. We note in appreciation that CSRC has accepted some of our consultation responses to the first draft of these Measures, which is very helpful to industry participants. We nevertheless would like to further highlight some issues in the Second Draft which may impede foreign investment into China's capital markets and seek CSRC's clarification to help address these concerns.

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.

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.

[6] Available at: http://www.csrc.gov.cn/csrc/c101981/c7443986/content.shtml

	主要建议和需澄清之处 Suggestions / Clarifications from ASIFMA Members	条款（及相应修改建议） Articles (Recommended Edits)
整体意见 **General Comments**	• 请贵会澄清并确认我们的如下理解正确：就第 48 条域外适用效力并适用第 11 条、第 13 条至第 22 条而言，“类似于境内证券/期货公司所受监管，获得所在国/地区金融监管机构批准或许可或颁发的衍生品业务资格以向客户提供产品和服务的境外经纪机构（如向境外客户提供衍生品的 QFI）”属于第 11 条、第 13 条至第 22 条项下所指“衍生品经营机构”，同时，也被理解为第 48 条项下所指“境外经营机构”。同时，我们希望贵会澄清“交易者”仅指从事自营交易（而不是代表客户进行交易）的投资者。 With respect to the extraterritorial effect under Art. 48 in the context of application of Art.11 & Arts.13-22, members would like to seek CSRC’s explicit confirmation that offshore brokers approved or licensed by the financial regulator of their home country or otherwise qualified to engage in derivatives businesses to offer products and services to clients, similarly regulated as onshore securities or futures companies, such as QFIs in the context of offering derivatives to offshore clients, are considered as “derivatives operating institutions”, which are understood to be the same as “overseas operating institutions” as provided by Art. 48 of the Second Draft. We would also appreciate it if CSRC could also clarify that references to “trading institutions” are only for companies trading on their own behalf (i.e., on a proprietary basis and not on behalf of clients). • 《办法》相当多的条款为原则性规定或高度概括的监管要求而无实施细则。我们理解这些条款的实施需留待证券或期货交易所制定细则（比如第 11、13、14 条）。我们强烈建议贵会授权证券或期货交易所制定相关细则，并建议证券或期货交易所在发布正式细则前向社会公开征求意见，并在正式细则	

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	实施前给予过渡期，以便境外经营机构为履行相关义务做好准备。 We note that quite a lot of provisions of the Measures were drafted as regulatory principles or high-level regulatory requirements without providing details on implementation; the implementation of such provisions would rely on the detailed rules of securities or futures exchanges, e.g., Articles 11, 13 and 14. We strongly recommend the CSRC to commission the securities or futures exchanges to formulate detailed rules, and the exchanges to solicit public comments before releasing any formal rules in this regard and to allow a grace period to ensure offshore operating institutions' readiness for performing the relevant obligations. • 我们建议中国证监会或行业协会（ 如中国证券业协会或中国期货业协会 ）向境外经营机构提供其需要向衍生品交易对手方获取的标准陈述和保证条款，以便其就产生域外适用效力的某些甚至全部条款而言可以依赖这些条款尽职免责。 We suggest the CSRC or the industry association such as the SAC or CFA to provide market standard representations and undertakings for the derivatives counterparties to give to overseas operating institutions to address some, or all, of the Articles that apply extraterritorially so as to discharge the liabilities of the overseas operating institutions.	
第十一条 **Article 11**	• 我们的会员注意到，贵会在现行 QFI 管理办法下对 QFI 的报告义务作出了与第 11 条类似的规定。我们希望贵会能够澄清第 11 条规定的衍生品交易报告义务是否仅适用于向境外客户提供衍生品的 QFI。 Members noted that there is a similar provision for information disclosure provided by CSRC under the current QFI Regulations. It would be helpful if CSRC	**第十一条** 衍生品经营机构在证券期货交易场所进行对冲交易的，应当遵守证券期货交易场所的规定。 证券期货交易场所可以为衍生品经营机构的

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	could clarify if the reporting requirements under this Article 11 are **only** applicable to QFIs offering derivatives to offshore clients. • 我们建议证券或期货交易所就衍生品交易报告模板和内容进一步征求意见，以明确境外经营机构应如何履行衍生品交易记录和报告义务。 We would like to request securities or futures exchanges' further consultation for the template to be used for derivatives reporting under this Article 11 so that overseas operating institutions could have clear guidance on how to perform their derivatives trading recording and reporting obligations. • 由于此前达成的相关交易可能没有包含本《办法》项下可能要求记录的相关信息，我们希望贵会明确第 11 条的报告要求仅适用《办法》生效日之后达成的衍生品交易。 We wish to explicitly propose that the reporting requirement would apply for derivatives trades entered into after the effective date of the Measures because the parties entering into earlier dated trades may not contain / have the information required for reporting purposes.	对冲交易行为提供持仓限额豁免等必要的便利，并对对冲交易行为进行重点监控。 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、交易明细等信息。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信息。 **Article 11** Derivatives operating institutions conducting hedging transactions on securities and futures trading venues shall comply with the provisions of the securities and futures trading venues. Securities and futures trading venues may provide necessary facilities such as position limit exemption for hedging transactions of derivatives operating institutions and shall strengthen the monitoring of hedging transactions. Derivatives operating institutions shall record the information of the counterparties, contracts, 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

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		derivatives operating institutions to provide the foregoing information.
第十三条 **Article 13**	• 我们希望提请贵会注意，“同一或者相似资产”的含义不明确且范围太广。对于本条规定的场内场外持仓合并计算，其计算方法必须十分明确才可能有效实施。我们希望指出目前不清晰的表述可能导致对本条规则解释不一，使得市场参与者难以监控其头寸以满足合规要求。因此，会员强烈建议贵会授权期货交易所制定细则，而不是让合并计算规则随着《办法》出台而直接实施。What constitutes “same or similar assets” is unclear and far-reaching. Very clear parameters would be required for this aggregation of cash and derivatives positions to work. We would highlight that unclear rules would lead to inconsistent interpretations, making it hard to follow and monitor. Hence, rather than having this aggregating requirement become effective as part of the implementation of these Measures, members strongly suggest CSRC to commission the futures exchange to formulate detailed rules. • 关于如何理解“同一或者相似资产”的含义，结合贵会在《起草说明》中阐述的第 13 条目的是防范通过衍生品交易规避期货持仓限额和大户报告制度的行为，我们的理解是，第 13 条应当仅适用于投资者通过“挂钩同一或实质相同的境内上市期货合约”的衍生品合约获得某一具体境内上市期货合约相应的经济利益(exposure)的情形。因此，我们强烈建议贵会删除“或者相似资产”的表述，或者将“同一或者相似资产”的表述修改为“同一或实质相同的境内上市期货合约”，从而明确本条场内场外持仓合并要求的适用范围限于与境内期货交易所上市的、同一或实质相同的期货合约挂钩的衍生品合约，且我们理解以下衍生品合约已经明确排除适用：(1) 其挂钩的期货合约	**第十三条（及修改建议）** 在对期货交易实施持仓限额制度和大户持仓报告制度时，应当按照期货交易场所的规定，~~*将衍生品经营机构、交易者*~~的期货合约持仓和其通过挂钩在期货交易场所交易的同一或者实质相同的期货合约的衍生品交易而间接获得的对同一期货合约的~~直接和间接~~~~*持有的挂钩同一或者相似资产的衍生品合约与期货交易*~~~~的~~持仓合并计算。 期货交易场所应当根据本条制定持仓合并计算相关细则。 **Article 13** For the implementation of the position limit and large position reporting regimes for futures trading, ~~if relevant derivatives trading and futures trading link to the same or similar assets, such derivatives position and futures position directly or indirectly held by a derivatives operating institution or a trading institution shall be aggregated~~ the position of

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	交易品种相同但合约条款（如交割日期）不同；（2）其挂钩任何指数或 ETF，而未挂钩某一期货合约；以及（3）其挂钩在境外交易所上市的期货合约。 The Drafting Statement mentioned the purpose of Article 13 is to prevent evasion of onshore futures exchange rules on position limit or large position reporting via derivatives, therefore we understand that Article 13 only applies to the scenarios where an investor obtains the relevant exposure to certain onshore listed futures contract through a derivatives transaction linked to the same or substantially the same onshore listed futures contract. Therefore, we would suggest removing the reference to "or similar assets" or replacing "same or similar assets" with "linked to same or substantially the same futures contract", so that the scope of the aggregation requirement for position limit and large position reporting purposes should be limited to those derivatives contracts linked to the same or substantially the same futures contracts traded on onshore futures exchanges, which, in our understanding, shall have already explicitly excluded: (i) futures contracts on same products but with different contract specifics (e.g. delivery dates); (ii) derivatives referencing any indexes or ETFs that are not themselves futures contracts; and (iii) futures listed on overseas exchanges. • 如果贵会采纳上述"实质相同"标准，我们建议贵会指导各期货交易所，确保"实质相同"标准应当被统一解释为"一个境内上市期货合约与另一个（衍生品合约所挂钩的）境内上市期货合约的合约条款实质相同"，以避免两个合约条款不同的境内上市期货合约被认定为"同一或实质相同"的期货合约，例如，黄大豆 1 号期货合约和黄大豆 2 号期货合约是两个不同的大豆期货合约，各自适用不同的持仓限额。	the futures contract held by a trading institution and the relevant exposure to the same futures contract indirectly held by it through a derivatives transaction linked to the same or substantially the same futures contract traded on futures trading venues shall be aggregated in accordance with the provisions of the futures trading venues. Futures trading venues shall formulate implementation rules for the aggregation of futures positions in accordance with this Article.

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	If such “substantially the same” standard applies, we recommend the CSRC to provide unified guidance to each futures exchange that "substantially the same” should be consistently interpreted as “one futures contracts with its contractual specifics substantially the same as another futures contract”, so that two futures contracts will not be determined same or substantially the same with each other, such as No 1 soybean and No 2 soybean contracts, which are clearly different soybean futures contracts and there are already separate position limits for each soybean futures contract. • 关于衍生品经营机构是否适用持仓合并要求，我们理解第 13 条仅适用于交易者，而不适用于向客户提供互换等市场准入产品的衍生品经营机构（请见第一部分 “整体意见”中对“衍生品经营机构”的澄清）。因为，实际上是接受互换产品的交易者，而不是提供互换产品的衍生品经营机构，希望通过衍生品合约间接获得相关期货合约的经济利益(exposure)。我们希望贵会明确确认，如果衍生品经营机构向客户提供互换等市场准入产品，贵会无意根据第 13 条对其持有的该衍生品合约和期货持仓实施合并计算。 As to whether to aggregate a derivatives operating institution’s cash and derivatives positions, we understand that Art. 13 shall apply to trading institutions only, not derivatives operating institutions that offer market access products like swaps to clients, because it is the trading institutions that accept swaps, not the derivatives operating institutions that write swaps, who intend to obtain the exposure to the relevant futures contract indirectly through derivatives. Please confirm it is not the intention of the CSRC to aggregate the derivatives positions of a derivatives operating institution if it just offers market access products like	

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	swaps to clients for the purpose of Art. 13. • 此外，在实施持仓限额制度和大户持仓报告制度的类似情形下，会员注意到香港证监会认为："为进行大户持仓报告的目的，同一集团内受共同控制的公司之间持有的头寸应当合并计算；然而，那些仅因为集团架构而受集团共同控制的公司无需合并计算头寸，只要日常交易中该公司未给予其关联公司或子公司任何交易指示。"[7] 会员了解境内期货交易所规则下存在合并持仓限额和大户持仓报告的"实际控制账户"概念，但我们仍建议贵会考虑国际金融机构集团的多个关联公司或交易单位(trading units)可能在不同的全球交易所独立开展交易，即其相互之间有独立的交易策略和交易决策。考虑到持仓合并计算方法的复杂性，我们强烈建议贵会授权期货交易所制定细则。 In addition, under a similar situation of implementing the position limits and large open position reporting ("LOP"), members note that the HKEX acknowledges that the positions held by different companies within the same group under the same control should be aggregated for LOP reporting purpose; however, the aggregation requirement does not apply to a group company who controls positions merely by virtue of its corporate relationship, provided that such company does not give its affiliates or subsidiaries any day-to-day direction with respect to trading[8]. We appreciate the concept of "*de facto* controlled accounts" under the relevant futures exchange rules that are subject to position limit and large position report on an aggregation basis but would like to suggest CSRC to consider that in the context of global financial institutions, multiple affiliates or	

[7] 具体可参见香港证监会发布的 HK LOPR FAQ (Q8).
[8] See Q8 of HK LOPR FAQ.

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	trading units would be trading on various global exchanges independently, i.e., they have separate trading strategies and independent decision-making. Given the complexity that may be involved in the aggregation methodology, we strongly suggest CSRC to commission the futures exchange to formulate detailed rules.	
第 14 条 **Article 14**	• 如同我们对第 13 条的意见，我们理解，对于本条规定的股票与衍生品持仓合并计算，其计算方法必须十分明确才可能有效实施。我们希望指出目前不清晰的表述可能导致对本条规则解释不一，使得市场参与者难以监控其头寸以满足合规要求。因此，会员强烈建议贵会授权证券交易所制定细则，而不是让合并计算规则随着《办法》出台而直接实施。 Similar comment to that on Art. 13 concerning the aggregation methodology: Very clear parameters would be required for this aggregation of cash and derivatives positions to work. We would highlight that unclear rules would lead to inconsistent interpretations, making it hard to follow and monitor. Hence, rather than having this aggregating requirement become effective as part of the implementation of these Measures, members strongly suggest CSRC to commission the securities exchange to formulate detailed rules. • 同样，如同我们对第 13 条的意见，我们理解第 14 条仅适用于交易者，而不适用于向客户提供互换等市场准入产品的衍生品经营机构（请见第一部分“整体意见”中对“衍生品经营机构”的澄清）。因为，实际上是接受互换产品的交易者，而不是提供互换产品的衍生品经营机构，希望通过衍生品合约间接获得相关个股的经济利益(exposure)。我们希望贵会明确确认，如果某一衍生品经营机构向客户提供互换等市场准入产品，贵会无意根据第 14 条对该衍生品经营机构的衍生品合约持仓与股票持仓实施合并计算。当然，我们	**第十四条（及修改建议）** 在履行信息披露义务或者收购等活动中，应当按照证券交易场所的规定，将~~衍生品经营机构、~~交易者通过其~~持有~~与衍生品经营机构达成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有表决权股票（以下简称标的股票）为标的物的衍生品合约而间接持有的标的股票与其直接和间接持有的标的股票合并计算。 证券交易场所应当根据本条制定持仓合并计算相关细则。 **Article 14** For the performance of information disclosure obligations or in the acquisition activities or other activities, the ~~derivatives contracts~~ stocks indirectly held by a ~~derivatives operating institution or by a~~ trading institution through entering into a derivatives transaction with the

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	相信上述理解与衍生品经营机构在现行规则下的信息披露义务并不矛盾，即当衍生品经营机构的股票现货持仓头寸达到 5%时其应履行相应的信息披露义务。 Similar comment to that on Art. 13 concerning whether to aggregate a derivatives operating institution's cash and derivatives positions: We understand that Art. 14 shall apply to trading institutions only, but not to derivatives operating institutions that offer market access products like swaps to clients. This is because it is the trading institutions that accept swaps, not the derivatives operating institutions that offer swaps, who intend to obtain the exposure to a single stock indirectly through derivatives. Please confirm it is not CSRC's intention to aggregate the derivatives positions of a derivatives operating institution if it just offers market access products like swaps to clients for the purpose of Art. 14. We are confident that the above understanding will not conflict with the existing DOI obligations of a derivatives operating institution, i.e., such a derivatives operating institution shall still be subject to the DOI obligation if its cash holding position reaches 5%. • 退一步而言，若第 14 条不得不适用于衍生品经营机构，我们希望贵会明确，为履行信息披露的目的需合并计算衍生品经营机构持有的挂钩同一个股的衍生品多空头寸，应按轧差后的衍生品净头寸与其现货头寸合并计算，否则，可能会对市场流动性产生负面影响（ 如果不轧差计算，衍生品经营机构的头寸很容易达到 5%），过度表述持仓比例，甚至可能误导市场。 Taking a step back, if CSRC insists on applying the aggregation requirement under this Art. 14 to derivatives operating institutions, it would be helpful if CSRC could explicitly confirm that long/short derivatives positions referencing the same	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") that have voting rights 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. Securities trading venues shall formulate implementation rules for the aggregation of futures positions in accordance with this Article.

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	underlier held by a derivatives operating institution can be netted down for shareholding disclosure purposes as otherwise it could 1) negatively impact market liquidity (as derivatives operating institutions could more easily exceed the 5% position without netting) and 2) overstate the economic interest, potentially misleading the market. • 第 14 条规定“在履行信息披露义务或者收购等活动中”应当将股票与衍生品持仓合并计算，我们理解该持仓合并计算要求应当仅适用于信息披露或上市公司收购活动，而不适用于现行特定股东减持或短线交易等规定中关于“持有 5%以上股份的股东”的计算，因为我们理解如何计算“5%股东”（合并还是无需合并）应该由该等现行规则加以具体规定，而《办法》并未试图推翻或修改有关特定股东减持或短线交易的现行具体规定。特别是，我们注意到，沪深交易所于 2023 年 10 月 14 日发布的关于限制限售股融券卖出的规定（即《关于优化融券交易和转融通证券出借交易相关安排的通知》），以及中国证监会此前于 2023 年 7 月 21 日发布的《关于完善特定短线交易监管的若干规定（征求意见稿）》，均未规定在认定“持有 5%以上股份的股东”时需纳入衍生品头寸。此外，我们也注意到，《二次征求意见稿》第 21 条（关于禁止“持有 5%以上股份的股东”开展以该上市公司股票为合约标的物的衍生品交易）也仅提及“股份”，未要求计算衍生品头寸。如果贵会能在下一次征求意见稿或正式出台的《办法》或有关起草说明中明确确认上述理解，将对市场大有裨益，否则推翻或修改刚生效不久的交易所规则，将会给市场参与者造成困惑，不利于稳定市场预期。 Art. 14 provides that the aggregation requirements involving derivatives positions as well as physical stocks are for the purpose of DOI or listed company acquisition	

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	activities, and we understand that it is ONLY for the purposes of DOI and listed company acquisition activities, but not for other rules/contexts mentioning "5% shareholder" such as specific shareholder reduction rules and short-swing profit rules; we further understand the Measures do not seek to override or modify the existing aggregation or disaggregation methodologies for the specific shareholder reduction rules or short-swing profit rules. Particularly, we note that neither the Exchanges' recent rules on short selling of restrictive shares on October 14, 2023 (i.e., The Circular on Optimizing the Relevant Arrangements for Securities Borrowing and Lending and Securities Refinancing) nor CSRC's earlier consultation draft on short swing trading on July 21, 2023 (i.e., The Certain Provisions on Improving the Regulation of Trading Related to Short-Swing Profit Rules (Consultation Paper)) mentioned that derivatives position should be included to determine "5% shareholder". In addition, we also note that Article 21 of this Second Draft (i.e., no derivatives transaction by 5% shareholders) also just refers to 5% "shareholding" without requiring aggregation with derivatives position. It would be helpful for CSRC to confirm the above understanding in the next draft/final version or in the explanatory notes; otherwise, overriding or modifying the recent rules that became effective just a few months ago would cause confusion to market participants and be detrimental to policy stability and market expectations.	
第 15 条 **Article 15**	我们的会员希望将本条项下的"监管规定"和"任何违法或违规行为"限于与内幕交易、市场操纵、欺诈相关的法规。由于"规避监管"表述不够明确，市场参与者可能难以实施有效的合规程序和实践指引，因此我们建议作出相应修改。 Our members would like to seek more clarity or to narrow down the scope of	**第十五条（及修改建议）** 禁止通过衍生品交易实施欺诈、内幕交易、操纵市场~~、利益输送、规避监管等违法违规行为~~。

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	"regulations" and "any illegal acts or violations" thereof to regulations related only to insider trading, market manipulation and fraud. Given the lack of clarity on the wording "circumvention of regulations", market participants may find it difficult to have sufficient compliance procedures and practice guidelines.	**Article 15** It shall be prohibited to commit, through derivatives trading, any illegal acts or violations such as fraud, insider trading, [and] market manipulation~~, interest funneling and circumvention of regulation~~.
第 16 条 **Article 16**	• 如第 14 条建议，我们理解衍生品持仓的合并仅适用于为履行信息披露义务或者收购之目的。请注意，其他司法管辖区（如香港）虽已实施为信息披露目的将股票和衍生品持仓合并计算但并不适用短线交易。 As mentioned in the comments on Art. 14, we understand that derivatives' inclusion in position aggregation is only for DOI and listed company acquisition purposes. For other markets (e.g. Hong Kong) that include all derivatives for DOI purposes, there is no additional short swing profit rule implication. • 我们建议贵会澄清第 16 条的意图并非一般性地禁止而是防止"持有 5%以上股份的股东"利用衍生品交易违反《证券法》短线交易规则交易股票。 We suggest CSRC clarify that the intention of Art. 16 is not to put a blanket prohibition here but to prevent the > 5% shareholders from using OTC derivatives as a mask to trade stocks in violation of the short-swing profit rules under the PRC Securities Law.	**第十六条** 禁止通过衍生品交易实施《证券法》第四十四条规定的短线交易行为。 **Article 16** It shall be prohibited to conduct the "short-swing" trading as provided by Article 44 of the Securities Law through derivatives trading.
第 19 条 **Article 19**	• 由于"规避监管"的含义不够清晰，市场参与者可能难以实施有效的合规程序和实践指引。 Given the lack of clarity on what constitutes circumvention of regulations, market participants may find it difficult to have sufficient compliance procedures and	**第十九条** 禁止通过衍生品交易规避减持规定和限售股规定。

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	practice guidelines. • 我们理解，如果某一衍生品经营机构参与 IPO 或非公开发行配售并获得限售股票的目的是随后与客户签订互换合约使客户获得该等限售股票的买入经济利益(long exposure)，则该衍生品经营机构不应被视为通过衍生品交易“规避”减持规定和限售股规定。我们希望贵会澄清该问题以排除第 19 条对外资参与 IPO、非公开发行配售和融资活动的影响或阻碍。 Where a derivatives operating institution subscribes to an IPO / private placement and hence holds lock-up shares in its inventory, but the intention is to then write a swap with their client(s) to give the long exposure to the client(s), the derivatives operating institution should not be considered as using derivatives to circumvent selling restrictions/lock-up. We would appreciate CSRC providing such clarification such that foreign participation in IPOs, placements, and capital raising activities would not be impacted or discouraged. • 我们希望贵会关注第 19 条对平台式资产管理人的潜在不利影响。在实践中，平台式资产管理人的多个基金经理可能独立管理基金(或法律实体)，彼此之间相互不知道持仓状况。因此，应将每个基金经理的持仓视为相互独立的(而不是将平台式基金视为一个法律实体而整体受到限售限制)，即：尽管交易簿记在同一个法律实体，一个独立的基金经理开展衍生品交易不应被视为规避另一个独立的基金经理所受的限售约束。如果两个独立的基金经理间运营完全独立的策略，而其中一个基金经理使用衍生品可能导致其被视为规避适用于另一个基金经理的持仓限售限制，那么拥有多个独立运营的基金经理/交易策略的平台式基金将不得不回避从事此类可能受到限售限制的股票投资，	**Article 19** It shall be prohibited to circumvent the shareholding reduction rules and restricted shares rules through derivatives trading.

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	则市场对限售股股票发行市场的兴趣将会因此降低。综上所述，我们强烈建议贵会澄清上述运营模式不会被认为构成第 19 条项下的规避限售。 Besides, we would like to draw CSRC's attention to the potential adverse impact on trading institutions such as platform-based asset managers where in practice, there could be multiple portfolio managers (PMs) managing a fund/legal entity independently, but without visibility over each other's positions. Therefore, each PM's position should be treated independently from one another's (so as not to have the entire legal entity subject to the selling restrictions) and the use of derivatives by another PM should not be seen as circumventing selling restrictions, even though the legal booking entity may be the same. If the use of derivatives by a PM could be deemed as circumventing selling restrictions applying to the positions held by another PM operating an entirely separate strategy, then the trading institutions which operate with multiple managers/multiple strategies would stay away from investing in shares subject to any restrictions, thereby reducing the total interest in the market for offering of shares which are subject to restrictions. Based on the above, we would suggest the CSRC to clarify that such operating models should not be deemed to be a circumvention of the selling restrictions. • 我们的会员希望贵会明确确认，如果投资者（无论是衍生品经营机构还是交易者）同时持有限售股份和同一上市公司的非限售股份，第 19 条的禁止性规定不会影响该投资者开展挂钩该等非限售股的衍生品交易。 Members would like to seek CSRC's explicit confirmation that if a person (be it a derivatives operating institution or a trading institution) holds both (i) shares that	

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	are subject to shareholding restrictions and selling restrictions and (ii) shares of the same company that are NOT subject to shareholding restrictions and selling restrictions ("Unrestricted Shares"); the prohibition under article 19 should not impact the ability for that person to enter into derivatives transactions which are hedged by the Unrestricted Shares.	
第 21 条 **Article 21**	我们理解，上市公司董事或“持有 5%以上股份的股东”应当被允许开展某些与上市公司相关的衍生品交易，比如董事或“持有 5%以上股份的股东”通过这些衍生品交易持有本公司股票的多头头寸并且将按照第 14 条规定进行信息披露，例如，上市公司的买入期权。因此，我们建议将本条规定的禁止行为限定为违反相关法规的行为。 We understand that a director or a shareholder with over 5% shareholding should be allowed to invest in, e.g., a call option over its own company, where the director/shareholder is taking a positive position in its company and such position will be disclosed pursuant to Art. 14; hence, we suggest the prohibited activities be limited to only those that are in breach of certain rules and regulations.	**第二十一条（及修改建议）** 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违规开展以该上市公司股票为合约标的物的衍生品交易。 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。 衍生品经营机构应当对交易者真实身份和交易目的进行核查，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。 **Article 21** A derivatives operating institution shall be prohibited from engaging in derivatives trading with shareholders of a listed company who holds 5% or more shares of such listed company, the de facto controller, directors, supervisors, and

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		senior management personnel of such listed company, or with the shareholders who hold restrictive shares or hold shares subject to reduction restrictions if the underlying assets of the derivatives trading are stocks of such listed company, in breach of the relevant regulations and rules. 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. A derivatives operating institution shall verify 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.
第 21.3 条&第 22 条 **Article 21.3 & Article 22**	关于第 21 条第 3 款 Re Article 21.3 • 我们希望指出的是，衍生品经营机构可能无法完全防止与第 21 条“持有 5%以上股份的股东”进行衍生品交易情形的发生。这是因为衍生品经营机构无	**第二十二条（及修改建议）** 禁止衍生品经营机构、交易者~~在~~明知~~或者应当知道~~或经合理核查后知道其交易对手方通过衍生品交易实施本办法第十五条至第二十一条规定的行为，仍与其达成衍生品交易。

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	法获得客户股票总体持仓情况，也不知道客户是否持有限售股票（例如，核查客户是否持有通过大宗交易获得的限售股份是很困难的，因为这些信息并不公开）。我们建议核实“5%持股”的义务应由客户承担，衍生品经营机构获得客户提供的相关书面陈述应被视为履行了核查义务。 We would like to highlight that a derivatives operating institution may not be able to entirely prevent transactions with the major shareholders as set out in Article 21 because they sometimes do not have full access to holdings of investors and do not know whether the relevant shares of investors are subject to lock-up or selling restriction (e.g., it is difficult to verify whether a client holds lock-up shares in block trades as such information may not be public). The obligation to evaluate overall ownership and adhere to the 5% restriction should reside with the client, and a client's statement be deemed to fulfill the verification requirement. • 第 21 条第 3 款中“真实身份”和“交易目的”的含义不清楚，若不加以澄清，衍生品经营机构很难评估应该采取何种措施方可有效核查交易对手的“真实身份”和“交易目的”。 The terms “real identity” and “trading purpose” in Article 21.3 are vague and if no clarity is given, derivatives operating institutions will have difficulty in evaluating what measures would be effective in verifying “the real identity of a trading institution and the trading purpose” of their counterparties. • 我们希望贵会明确贵会期待的衍生品经营机构对客户的核查程度以及对客户“交易目的”的核查细节。 It would be helpful to clarify the level of due diligence and what level of checks is	衍生品经营机构和交易者可以依赖交易对手方作出的相关书面陈述履行本条核查义务。 **Article 22** A derivatives operating institution or trading institution shall be prohibited from concluding derivatives trading with a counterparty when they know ~~or~~ ~~ought to know~~ or after making reasonable enquiries, know that the counterparty conducts any of the prohibited activities as provided in Article 15 to Article 21 hereof through derivatives trading. A derivatives operating institution and trading institution may rely on the written representations of a counterparty to satisfy any due diligence required under this Article.

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	expected to verify the trading intention of the clients. 关于第 22 条 Re Article 22 • 我们建议删除“应当知道”的表述，因为衍生品经营机构或交易者几乎不可能核查其交易对手方是否利用衍生品交易从事《办法》规定的禁止的交易行为（请注意，衍生品持仓可能不是公开信息）。市场参与者按照公平原则交易，难以制定并落实有效的合规程序和实践指引来核查其交易对手方的“目的”和“行为”以符合第 22 条的规定。 We would suggest the deletion of the reference to “ought to know” as it is practically impossible for derivatives operating institutions or trading institutions to successfully conduct due diligence on whether their counterparties are using derivatives transactions to engage in the specified prohibited trading activities (please note that securities and derivatives holdings may not be public information). Market participants will find it difficult to develop effective compliance procedures and practice guidelines to investigate its arm’s length counterparties’ intentions/practices to satisfy this standard. • 如果需要保留“应当知道”的表述，我们建议贵会（在《办法》或相关起草说明中）明确市场参与者如何可以满足“应当知道”的标准。特别是，我们希望确认只要收到交易对手方关于其自身未违反《办法》第 15-21 条的明确陈述便足以被视为已满足“知道或应当知道”的标准，确保市场参与者不会因疏忽而违反第 22 条规定，并确保整个市场对此理解一致。	

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	If the reference to "ought to know" must be retained, we request that the CSRC includes an explicit statement (either in the rules or explanatory notes) on how market participants could satisfy the "ought to know" standard. In particular, we would seek confirmation that receipt of explicit representations to the effect that a counterparty is not in breach of Articles 15-21 is sufficient to discharge this obligation, in order to ensure that market participants do not inadvertently fall foul of this prohibition and to ensure consistency across the market. 因此，我们建议在第 22 条中增加第二款如下： Hence, we suggest adding a second paragraph to this Article 22 as the below: *"衍生品经营机构和交易者可以依赖交易对手方作出的相关书面陈述履行本条核查义务。"* *"A derivatives operating institution and trading institution may rely on the written representations of a counterparty to satisfy any due diligence required under this Article."* 另一种建议是，贵会可以考虑将"应当知道"标准替换为"经合理核查"标准，即经过合理核查知道交易对手方从事《办法》第 15-22 条禁止行为。 Alternatively, we would suggest CSRC to consider replacing "ought to know" with "after making reasonable enquiries" as a standard to knowing that a counterparty conducts prohibited activities.	
第 48 条 **Article 48**	• 如果《办法》的域外适用效力不考虑相关境外衍生品交易(1)是否在境内开展对冲交易以及(2)是否"扰乱中华人民共和国境内市场秩序，损害境内交易者	**第四十八条（及修改建议）** ~~境外经营机构在境外开展衍生品交易，其对~~

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	合法权益”，《办法》的规定实际上超出了《证券法》和《期货和衍生品法》有关域外管辖权规则的适用范围。我们希望指出的是，对于不在境内进行对冲的境外衍生品交易，不存在“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”的可能性。我们建议将第 48 条域外适用效力的范围恢复为“对冲交易发生在境内”的情形，并将第 11、13–22 条均适用于“对冲交易发生在境内”的境外衍生品交易，这样做更符合《期货的衍生品法》第 2 条的原意。 It goes beyond the extra-territorial jurisdiction rules contemplated by the Securities Law and the Futures and Derivatives Law (FDL) if these Measures have extraterritorial effect regardless of whether or not the offshore derivatives transactions would (i) be hedged onshore and/or (ii) actually disturb market order or otherwise adversely impact the interests of onshore trading participants. For offshore derivatives trading with no hedging transaction onshore, there is no basis that such derivatives trading would disrupt domestic market order and damage the lawful rights and interests of domestic traders. We suggest that Art.48 should be linked back to hedging activities taking place within Mainland China and Articles 11, 13 – 21 should only apply to hedging activities taking place within Mainland China, as this will be more consistent with the spirit of Article 2 of the FDL. • 我们希望贵会明确本条所指的“对冲交易”不包括通过“北向通”开展的对冲交易，这是因为：(1) 2017 年 3 月，中国证监会公布了对两名个人在“北向通”交易中操纵市场的处罚决定，这体现了香港证监会和中国证监会基于监管合作谅解备忘录建立了有效的跨境信息共享和监管合作框架；(2）“北向	~~冲交易发生在境内的，应当遵守本办法第十一条规定。~~ ~~在境外开展与境内标的物相关的衍生品交易的，应当遵守本办法第十三条至第二十二条等有关规定。~~ 境外经营机构和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，应当符合本办法第十一条、第十三条至第二十二条等有关规定。 **Article 48** ~~Where an overseas operating institution conducts derivatives trading outside China while the relevant hedging transactions take place within China, it shall comply with Article 11 of these Measures.~~ ~~Conducting derivatives trading outside China that links to underlying assets in China shall be subject to Articles 13 to 22 of these Measures.~~ Where an overseas operating institution and an overseas trading institution conduct derivatives trading outside China while the relevant hedging transactions take place within mainland China,

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	通”交易与 QFI 等其他交易渠道有以下不同：(i) 区别于 QFI 在境内交易不受香港法律监管，“北向通”交易受香港证监会及香港《证券及期货条例》监管；(ii) “北向通”交易除遵守内地证券市场规则外，还需遵守香港《证券及期货条例》等相关香港制度框架下关于市场操纵的若干规定；以及(3) 香港联交所的规则已明确规定交易所参与者和投资者应遵守中国内地证券法规和交易所规则的额外义务。因此， 对于通过“北向通”开展的对冲交易，我们建议充分利用现有的跨境监管合作框架，并充分讨论如何落实“北向通”下的相关法律制度。 It would be helpful if CSRC could clarify that hedging positions should exclude hedging with China Connect shares, because (1) in March 2017, the CSRC published a decision sanctioning two individuals for the manipulative trading of securities under Stock Connect Northbound trading, which demonstrated the effective cross-boundary information sharing and regulatory cooperation framework between the SFC and the CSRC under such MoU; and (2) Stock Connect Northbound trading is different from other channels of onshore securities trading such as QFI: (i) Stock Connect Northbound trading is subject to SFO regulation and SFC's oversight, which is different from QFI whose onshore trading with no nexus to Hong Kong is not subject to Hong Kong regulatory supervision; (ii) Stock Connect Northbound trading shall comply with home market rules (i.e., onshore securities laws and regulations) and is also subject to a number of Hong Kong securities law market manipulation provisions under the SFO; and (iii) HKEX's rules have expressly stipulated additional obligations of exchange participants and investors to comply with Mainland Chinese securities regulations and exchange rules. Hence, if hedging takes place within Stock Connect, it is recommended to	they shall comply with the relevant provisions of Article 11, and Articles 13 to Article 22 of these Measures. **[如保留《二次征求意见稿》第四十八条的表述，则会员对现第二款的修改建议如下]** ~~在境外开展与境内标的物相关的衍生品交易的，应当遵守本办法第十三条至第二十二条等有关规定。~~ 不得通过开展以境内上市的证券期货为标的的境外衍生品交易规避本办法第十三条至第二十一条等有关规定。 **[Alternative edits to Art.48.2 if the current draft is retained]** ~~Conducting derivatives trading outside China that links to underlying assets in China shall be subject to Articles 13 to 22 of these Measures.~~ No derivatives trading conducted outside the PRC with a PRC listed securities and futures underlier shall be used to circumvent Articles 13

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	leverage the existing cross-border regulatory cooperation framework and as the next step, discuss how to implement the relevant legal mechanisms under Stock Connect. • 退一步而言，如不得不保留《二次征求意见稿》第 48 条原文，我们建议第 48 条第 2 款“与境内标的物相关”的表述应明确为“在中国证监会监管的境内证券期货交易所上市的证券或期货”。 Taking a step back, if the current draft is retained, we suggest further clarification is required on the reference to “linked to assets in China”, i.e., it should be re-drafted to expressly refer to securities or futures listed on a CSRC regulated trading venue. 即：我们理解，<u>除非中国证监会另有明确规定</u>，以下标的物并不落入第 48 条第 2 款的范围： For example, we understand the following are not in scope, <u>unless the CSRC rules and regulations explicitly stipulate otherwise</u>: 1) 境外上市的股票（如 H 股）、债券、存托凭证（如美国存托凭证、全球存托凭证（例如，《关于优化融券交易和转融通证券出借交易相关安排的通知》中关于存托凭证的表述较为模糊引发市场各方解读不一））； overseas listed stocks (e.g., H shares), bonds, depository certificates, such as ADRs, GDRs (e.g., the vague language pertaining GDRs in the *Circular on Optimizing the Relevant Arrangements for Securities Borrowing and Lending and Securities Refinancing* have led to inconsistent interpretations among	to 21 of these Measures.

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	market participants). 2) 境外指数，如 MSCI World Index、MSCI EM Index。 Overseas index such as MSCI World Index or MSCI EM Index. • 如我们在“整体意见”中所述，我们希望贵会明确第 48 条下的“境外经营机构”，是指“类似于境内证券/期货公司所受监管，获得所在国/地区金融监管机构批准或许可或颁发的衍生品业务资格以向客户提供产品和服务的境外经纪机构（如向境外客户提供衍生品的 QFI）”，这些机构被视为第 11 条、第 13 条至第 22 条提及的“衍生品经营机构”。 As mentioned in General Comments, we understand “overseas operating institutions” under Art.48 refers to “offshore brokers approved or licensed by the financial regulator of their home country or otherwise qualified to engage derivatives businesses to offer products and services to clients, similarly regulated as onshore securities or futures companies, such as QFI offering derivatives to offshore clients”. • 此外，我们认为第 48 条只会触发第 13-21 条，即应删除第 22 条，因为第 22 条与第 48 条本身重复。 Besides, we think Art. 48 will only trigger Arts. 13-21, i.e., taking out Art.22, as it is redundant with Art 48 itself.	

我们希望在本次公开征求意见期限结束后有机会尽快拜访中国证监会以讨论我们提出的意见并藉此机会进一步阐述行业的观点。如有任何问题，敬请随时与我们联系。
We would appreciate a meeting with CSRC in relation to our comments shortly after this consultation concludes where we can provide further industry inputs. If you have any questions, please do not hesitate to contact me.

此致：
Yours faithfully,

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