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尊敬的先生/女士:
Dear Sir/Madam,

关于中国人民银行和国家外汇管理局《境外机构投资者境内证券投资资金管理 规定》的征求意见稿

RE: PBOC and SAFE's Consultation Draft of the *Administrative Provisions on the Management of Domestic Securities Investment Capital of Foreign Institutional Investors*

亚洲证券业与金融市场协会 (“ASIFMA”) ¹谨代表我会会员向中国人民银行 (“**人民银行**”) 和国家外汇管理局 (“**外管局**”) 提交我们对人民银行和外管局于 2019 年 12 月 13 日发布的《境外机构投资者境内证券投资资金管理规定》(“**管理规定**”) (征求意见稿) (“**征求意见稿**”) 的一些意见。

On behalf of its members, Asia Securities Industry & Financial Markets Association (“**ASIFMA**”) ¹ is pleased to submit our comments on the Consultation Draft (the “**Consultation Draft**”) of the *Administrative Provisions on the Management of Domestic Securities Investment Capital of Foreign Institutional Investors* issued by the People's Bank of China (“**PBOC**”) and State Administration of Foreign Exchange (“**SAFE**”) on 13 December 2019 (the “**Administrative Provisions**”).

¹ 亚洲证券业与金融市场协会 (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、律师事务所及市场基础设施服务供应商等 120 多家领先机构组成。协会的使命是发掘金融行业的共同利益来推动亚洲资本市场的深度和广度发展, 为区内的经济发展及增长提供基本条件。ASIFMA 致力于通过清晰而有力的行业共同声音来推动业界就关键议题达成共识、提出解决方案和促进变革。我们所牵头的众多举措包括回应监管机构和交易所的咨询、树立统一的行业标准、通过政策论文倡导更优质的市场, 以及为降低亚太区内的业务成本探索可行方案。通过全球金融市场协会 (GFMA), ASIFMA 与位于美国的证券业与金融市场协会 (SIFMA) 以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。详情请参阅 www.asifma.org。

ASIFMA is an independent, regional trade association with over 120 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.

DEVELOPING ASIAN CAPITAL MARKETS

2019年9月，合格境外机构投资者（“QFII”）和人民币合格境外机构投资者（“RQFII”）的境内证券投资额度限制被正式取消。对及时发布与此配套的征求意见稿，我们表示十分欢迎。该征求意见稿拟废除与QFII/RQFII额度相关的现行法律规定，并统一QFII和RQFII的登记、资金管理、资金收付及汇兑等流程，由此有效地建立一套QFII/RQFII境内证券投资资金管理和风险防范相关的新监管制度。

The removal of quota restriction on domestic securities investments by Qualified Foreign Institutional Investors (“QFIIs”) and Renminbi Qualified Foreign Institutional Investors (“RQFIIs”) was announced in September 2019. We welcome the timely publication of the Consultation Draft, which proposes to abolish the provisions of existing laws relating to such quotas, and to harmonise the procedures for registration, capital management, funds conversion and remittance for QFIIs and RQFIIs, thus effectively creating a new regulatory regime on the capital management and risk prevention in QFII/RQFIIs’ domestic securities investments.

我们相信，征求意见稿对资金汇兑手续的简化可以大幅提高QFII和RQFII累计投资资金汇出的速度，从而减轻了外国投资者在资本汇出方面的压力，此举是维持QFII/RQFII计划的吸引力的一项必要举措。与此同时，我们还希望看到进一步的监管变化，使QFII/RQFII与沪港通、深港通和沪伦通等不同市场准入渠道间具有更大的相互转换性，并可在不同渠道下的账户间实现非交易过户，以解决某些QFII/RQFII参与机构在外汇基准存在的问题。

We believe that the resultant simplification of fund remittance proposed by the Consultation Draft can substantially speed up the process of remitting investment proceeds by QFIIs and RQFIIs, thereby allaying the unease of foreign investors on capital outward remittance - an essential step to maintain the attractiveness of the QFII/RQFII scheme. At the same time, we look forward to seeing further regulatory change to allow for greater fungibility between QFIIs/ RQFIIs and the different market access channels such as Shanghai-Hong Kong Connect, Shenzhen-Hong Kong Connect and Shanghai-London Connect, as well as non-trade transfers of funds between the accounts under the different channels to accommodate the FX basis concerns of some QFIIs/ RQFIIs.

以下是关于该征求意见稿的一些具体意见和问题，谨供您参考：

Set forth below are some specific clarification comments and questions on the Consultation Draft that we would like to submit for your consideration:

QFII/RQFII 监管体系

General QFII/RQFII regulatory regime

征求意见稿第一条规定，《管理规定》是根据《中华人民共和国中国人民银行法》（中华人民共和国主席令第12号）、《中华人民共和国外汇管理条例》（国务院令第532号）等相关规定制定的。与现行管理规定不同，征求意见稿并未将《合格境外机构投资者及人民币合格境外机构投资者境内证券投资管理办法》列为其制定基础。此处是涉及有关立法意图澄清的一项重要参考，即涉及QFII/RQFII境内证券投资资金流动的所有问题须受该《管理规定》的约束。在这方面，我们注意到中国证券监督管理委员会（“证监会”）于2019年1月颁布了QFII/RQFII证券与期货投资管理办法草案（“QFII/RQFII草案”）。如可以澄清该《管理规定》是否将基于QFII/RQFII草案最终版本制定，将会对本管理规定的理解有所帮助。

Article 1 of the Consultation Draft states that the Administrative Provisions are formulated based on the Law of PBOC (Decree No. 12 of the President), PRC Foreign Exchange Administration Rules (Decree No.532 of the State Council), and relevant provisions. The Consultation Draft, unlike the current administrative regulations in this regard, does not specify the Rules on the Management of QFII and RQFII Securities Investments as its legal basis. This is an important reference to clarify the legislative intent that all issues relating to QFII/RQFII investment funds flows are to be governed by the

Administrative Provisions. In this regard, we note that the CSRC issued the draft QFII/RQFII Securities and Futures Investments Administrative Measures (the “**QFII/RQFII Draft**”) in January 2019 and it would be helpful to clarify whether the Administrative Provisions will be formulated based on the final version of the QFII/RQFII Draft.

托管关系

The custodian relationship

关于中国法律是否要求隔离托管行所持资金以防范托管行破产风险的问题，法律实务界尚未达成一致意见。一种观点认为，由于资金是可替代物，任何存入托管账户的资金均构成托管人对 QFII/RQFII 的负债，在托管人破产时不可与托管人的自有资产相隔离。另一种较为符合逻辑的观点则是，若托管人破产，QFII/RQFII 有充分的理由主张其对相关账户中的现金资产享有直接的专有权利/所有权，且托管账户中的资金性质有别于普通银行存款。按照我们的理解，后一观点同样是中国监管当局就客户资产与托管人自有资产相隔离所倡导的立场。如果《管理规定》能够阐明，QFII/RQFII 对其托管账户中持有的现金资产享有直接的专有权利/所有权，将有所裨益。若有此等阐明内容，与对普通银行存款所享有的权利相比，QFII/RQFII 对监管账户所享有的权利将获得更加强有力的保护。

The PRC law position on ring-fencing of cash held by the custodian bank against the bankruptcy risk of the custodian bank has not been fully aligned amongst the legal practitioners. One school of thought is that as cash is fungible, any cash deposited in the custodian account constitutes a debt owed to the QFII/RQFII by its custodian and may not be segregated from the proprietary assets of the custodian in case the custodian goes into bankruptcy. The more logical view is that in the case of the bankruptcy of the custodian, a QFII/RQFII may have good arguments that it has direct proprietary rights over the cash assets in the relevant accounts and the nature of cash held in a custodian account would be different from usual bank deposits. We understand the latter is also the position pushed by the PRC regulators with regard to segregation of client assets from a custodian’s proprietary assets. It would be helpful if the Administrative Provisions could clarify that QFIIs/RQFIIs have direct proprietary rights over the cash assets held in their custodian accounts, thus giving the QFII/RQFII enhanced rights in a custodian account as compared to usual bank deposits.

优化托管人管理

Optimising the management on custodians

征求意见稿第三条第二段规定，指定一家托管人作为主报告人，负责代 QFII/RQFII 统一办理登记等事项。此项规定几乎抹除了允许 QFII/RQFII 委托一家以上托管人的意义，除非主托管人负责的登记事项仅限于第二十条所列事项，并且不涉及由每家托管人适当负责的其他事项（譬如申报）。如果这一观点成立，我们建议在《管理规定》第三条中对此加以明确。否则，《管理规定》须具体列明主托管人与其他托管人的责任/义务。例如，若需要提交报告，谁将负责提交报告以及提交报告的频率等。

The appointment of one custodian as main custodian for all registration-related matters of a QFII/RQFII , as required by Paragraph 2 of Article 3 of the Consultation Draft, almost defeats the purpose of allowing a QFII/RQFII to appoint more than one custodian, unless the registration matters by the main custodian are limited to those matters set out in Article 20 and do not extend to other matters such as reporting, which are properly the responsibility of individual custodians. If this is the case, then we would suggest that it be clearly specified in Article 3 of the Administrative Provisions. Otherwise, it is important that the Administrative Provisions specify the responsibilities/obligations of the main custodian and other custodians. For example, if there are reports to be filed, who would file them and how often do those reports have to be filed.

此外，如果 QFII/RQFII 指定多于一家托管人，则其中一家托管人的资金是否可以为履行结算义务以及汇出目的而划转给另一家托管人？如果《管理规定》可以明确资金如何能够从一家托管人账户转移至另一家托管人账户，则将会有所帮助。

In addition, if a QFII/RQFII appoints more than one custodian, can funds under one custodian be transferred to another custodian for purposes such as meeting settlement obligations and consolidation for repatriation purposes? It would be helpful if the Administrative Provisions could specify how funds can be moved from one custodian's account to another custodian's account.

我们还建议《管理规定》澄清不禁止关联方担任 QFII/RQFII 的主托管人。例如，如果 QFII/RQFII 为某银行集团旗下的资产管理人，该 QFII/RQFII 可以指定同一银行集团旗下的相关方担任其托管人或主托管人。We also suggest that the Administrative Provisions clarify that there is no prohibition on a connected party being the custodian or main custodian for a QFII/RQFII. For example, if the QFII/RQFII is an asset manager that is part of a bank group, it is allowed to appoint a custodian or main custodian that is also part of the same bank group.

本外币一体化账户管理

Integrated account management

鉴于《管理规定》的核心原则之一是统一 QFII/RQFII 的资金管理，我们建议在《管理规定》中明确，QFII 人民币或外汇账户资金是否可以分别转移到 RQFII 人民币或外汇账户（即 QFII 人民币账户资金转移到 RQFII 人民币账户，QFII 外汇资金转移到 RQFII 外汇账户）。鉴于附件二《合格投资者境内账户管理操作指引》（“《操作指引》”）第四段规定 QFII/RQFII 专用账户资金可以在获得批准之后与其境内其他账户之间划转资金，如果《管理规定》第八条可以澄清是否能够进行上述转移以及如何进行该等转移（譬如，需要获得何种批准），将会有所帮助。

Given that a key principle of the Administrative Provisions is to unify the management of QFII/RQFII capital, it would be helpful to further clarify if funds in a QFII RMB or FX account may be transferred to a RQFII RMB or FX account, respectively (i.e. QFII RMB account to RQFII RMB account, QFII FX account to RQFII FX account). It would be helpful if Article 8 can clarify if, and how, such transfers can be made (e.g. what kind of approval is required), since paragraph 4 of the Domestic Accounts Operational Guidelines in Appendix 2 (the “Operational Guidelines”) states that funds from the QFII/RQFII special accounts can be transferred to other accounts with approval.

客户与开放式基金的资产

Assets of clients and open-ended funds

我们了解到，根据《操作指引》规定，已开立基本存款账户的合格投资者，应随后为其自有资金、客户资金或开放式基金开立相应的专用人民币存款账户（若需要）。在某些司法管辖区，例如香港，特定资产管理人可能受制于不得持有客户资产的牌照条件；此外，适用于持有客户资产的资产管理人的资本充足性要求可能相对较高。

We understand that under the Operational Guidelines, a qualified investor who has opened a basic deposit account shall then open corresponding RMB special deposit account(s) for its own funds, client funds or open-ended funds (as necessary). In jurisdictions such as Hong Kong, certain asset managers may be subject to a licensing condition for not holding client assets; also, capital adequacy requirements for asset managers who hold client assets may be relatively higher.

因此，我们建议在《管理规定》中明确规定，专用存款账户可以客户或开放式基金的名义开立，以便将客户和开放式基金的资金与 QFII/RQFII 的自有资金加以区分。

Accordingly, it would be helpful for the Administrative Provisions to clarify that the special deposit accounts may be opened in the name of clients or open-ended funds, in order to distinguish these from the QFII/RQFIIs' own capital.

除账户名称予以明确之外，我们还建议，在《管理规定》中明确规定，托管人、合格投资者和任何最终客户可以约定账户管理安排。

In addition to specifying the names of the accounts, it would also be helpful for the Administrative Provisions to expressly contemplate the possibility of account management arrangements that may be agreed among the custodian, the qualified investor and any end client.

资金汇出程序简化

Simplification of outward remittance process

《管理规定》第十二条规定，开放式基金可委托其托管人根据申购或赎回的轧差净额按日办理相关资金的汇入和汇出。我们建议扩大本条范围，将封闭式基金纳入其中，从而使范围更广泛的投资结构受益于上述每日汇入汇出授权。

Article 12 of the Administrative Provisions provides that an open-ended fund may entrust its custodian with the inward or outward remittance of capital on a daily basis according to the net amount of subscription or redemption. We would suggest expanding the scope of this Article to include closed-ended funds, to enable the benefit of this daily remittance authorisation to be available for a broader range of investment structures.

第十三条看起来是规定 QFII/RQFII 在汇出收益之前仅需要签署完税承诺函，并且仅当 QFII/RQFII 清盘或其产品清盘时才需出具审计报告与税务备案表。由于出具审计报告与税务备案表需要很长的时间，如果此规定为最终安排，这将会受到境外机构投资者的大力欢迎。我们建议澄清该条以明确列载上述内容。

Article 13 seems to suggest that a QFII/RQFII only needs to sign a tax undertaking before it can repatriate profits, and that an audit report and tax clearance filing is required only when a QFII/RQFII is being liquidated or when its product is being liquidated. This is most welcomed by foreign institutional investors if such were to be the case, as the latter can take a lot of time. We would suggest clarifying this Article to clearly state the foregoing.

此外，我们假设第十三条适用于开放式基金。如可以澄清对于（（半）封闭式基金）的收益汇出及其清盘收益而言，是否仍需要出具审计报告与税务备案表，那将会有所帮助。

Further, we assume article 13 applies to open-ended funds. It would be helpful to clarify if audit reports and tax clearance will still be required for the repatriation of profits (for (semi) close-end funds) and their liquidation proceeds.

风险管理及衍生品交易

Risk management and derivative trading

《管理规定》第十四条要求合格投资者境内证券投资汇出与汇入的资金币种应保持一致。我们建议取消此项限制，从而给予境外机构投资者最大限度的灵活性以便于其管理外汇头寸。

Article 14 of the Administrative Provisions requires that the currency of a qualified investor's inward remittances and outward remittances under the Administrative Provisions be identical. We suggest

that this limitation be removed, to allow foreign institutional investors maximum flexibility to manage their foreign exchange positions.

第十五条规定 QFII/RQFII 在中国境内开展的衍生品交易，仅限于以套期保值为目的的外汇风险对冲和股指期货交易。此项规定似乎限制性过强，因为根据 QFII/RQFII 草案中证监会拟议扩大的 QFII/RQFII 投资范围，允许投资商品期货，且无须局限于以套期保值为目的。此外，在 QFII/RQFII 草案中还有其他类型的许可产品，譬如在中国金融期货交易所上市的金融期货（以套期保值为目的）、在国务院或证监会批准的期货交易所上市及交易的期货等。因此，如果可以在第十五条中载明可投资的衍生品范围与 QFII/RQFII 草案项下许可投资范围相统一，将会对处理与 QFII/RQFII 草案项下许可投资范围的关系和理解有所帮助。

Article 15 requires that all derivative transactions conducted by QFII/RQFII within the PRC be limited to foreign exchange risk hedging and stock index futures transactions for hedging purposes, which seems too restrictive as under CSRC's proposed expanded investment scope of QFII/RQFII in the QFII/RQFII Draft, investment in commodity futures is allowed without it being tied to hedging purposes. In addition, there are also other types of permissible products in the QFII/RQFII Draft, such as financial futures listed on the China Financial Futures Exchange (for hedging purposes), options listed and traded on futures exchanges approved by the State Council or the CSRC, etc. Therefore, it would be helpful to include wording in Article 15 to include the permissible investment scope under the QFII/RQFII Draft.

此外，第十五条亦规定，衍生品敞口与作为交易基础的境内证券投资项下投资风险敞口应具有合理的相关度。鉴于 QFII/RQFII 草案拟大幅度扩大 QFII/RQFII 可开展的衍生品投资范围，我们建议，将合理的相关度要求的适用范围同样限制在以套期保值为目的的外汇风险对冲和股指期货交易。如果可以在第十六条中澄清合格投资者持有的外汇衍生品头寸所“对应的人民币资产规模”是否有可接受比率或门槛等标准，亦将会有所帮助。

Further, article 15 also states that derivative exposures and investment risk exposures of the underlying domestic securities investments shall have a reasonable correlation. Given that the QFII/RQFII Draft proposes to significantly expand the permitted scope of derivatives investments by QFII/RQFIIs, we suggest that the requirement of reasonable correlation also be limited in application to foreign exchange risk hedging and stock index futures transactions for hedging purposes. It would also be helpful to clarify if there is an acceptable ratio or threshold for foreign exchange derivative position held by a QFII/RQFII that is within the “corresponding RMB asset scale” under Article 16.

宏观审慎管理

Macro prudential management

本《管理规定》第二十八条与 QFII/RQFII 草案第二十六条相似，该第二十六条规定 QFII/RQFII 的资金汇入与汇出须根据中国经济金融形势、外汇市场供求关系和国际收支状况等由人民银行与外管局实施宏观审慎管理；二者间唯一的区别是《管理规定》第二十八条没有提及 QFII/RQFII 汇入及汇出资金。如果《管理规定》第二十八条可以澄清宏观审慎管理的含义，包括阐明该等宏观审慎管理将不会影响 QFII/RQFII 汇入及汇出资金（鉴于《中华人民共和国外商投资法实施条例》第二十二条已经明确承诺将不会对外国投资者汇入及汇出中国大陆的资金的币种、数额及频次进行限制），将会有所帮助。

Article 28 is similar to Article 26 of the QFII/RQFII Draft, which refers to remittance and repatriation of funds by QFIIs/RQFIIs being subject to macro prudential management by PBOC and SAFE according to China's economic and financial conditions, supply and demand on the foreign exchange market, and balance of international payments, the only difference being that this Article does not mention remittance and repatriation of funds by QFII/RQFII. It would be helpful if Article 28 could

clarify what macro prudential management means, including specifying that remittances and repatriations by QFII/RQFII will not be affected by such macro prudential management, given the clear commitment in Article 22 of the Foreign Investment Law Implementing Rules not to impose restrictions on the currency, size and frequency of remittances by foreign investors into and out of mainland China.

本协会非常感谢有机会对征求意见稿提出意见，并期待在最终发布的《管理规定》中采纳本函的意见。如果您对以上内容有任何疑问，请联系本会的资产管理部主管沈玉琪女士（电邮 eshen@asifma.org 电话 +852 2531 6570）。

ASIFMA is grateful for the opportunity to comment on the Consultation Draft and look forward to the issuance of the Administrative Provisions that takes into consideration our comments made in this letter. If you have any questions regarding any of the foregoing, please contact Eugenie Shen, Head of Asset Management Group of ASIFMA, at eshen@asifma.org or Tel: 2531 6570.

本函由本协会会员年利达律师事务所（就中国法律方面，由与年利达有限责任合伙律师事务所（Linklaters LLP）联营的上海昭胜律师事务所提供意见）在广泛征求本协会会员意见后撰写。

This submission was prepared by law firm Linklaters, ASIFMA member, with input from Shanghai Zhao Sheng Law Firm, which entered into joint operation with Linklaters LLP, as to the PRC law aspects of the submission, based on feedback from the wider ASIFMA membership.

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Yours sincerely,



Mark Austen

首席执行官 Chief Executive Officer

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