



[中文版本]

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致： 全国人民代表大会常务委员会法制工作委员会
中国北京市西城区前门西大街1号
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敬启者：

《中华人民共和国期货和衍生品法（草案）（二次审议稿）》

The Futures Industry Association（期货业协会，“协会”）¹ 谨代表全体成员就全国人民代表大会（“全国人大”）常务委员会正在审议的《中华人民共和国期货和衍生品法（草案）（二次审议稿）》（“《期货和衍生品法》”），向第十三届全国人民代表大会常务委员会法制工作委员会（“法工委”）提交本意见函。

协会首先希望就《期货和衍生品法（草案）（二次审议稿）》的公布向全国人大表示衷心祝贺，二次审议稿在一次审议稿的基础上取得了重要进展，为中国期货和衍生品市场建立了更为完善的法律框架。协会会员非常欣喜地看到对一次审议稿的主要意见已经在二次审议稿当中得到体现，包括：

- 确认期货交易的结算终局性，确保期货交易的结算将具有终局性，不因任何破产程序而被推翻；
- 将结算终局性保护延伸至期货结算机构破产的情形；及
- 将对期货结算的部分保护性规定纳入衍生品交易集中结算的相关规定，例如结算终局性和担保品强制执行等。

协会深信，纳入了这些重要改动的《期货和衍生品法》将为中国的期货和衍生品交易提供全面保护，并为中国金融市场的持续发展奠定坚实基础。

协会衷心拥护《期货和衍生品法》的积极发展。我们在本函中提出一些有关《期货和衍生品法（草案）（二次审议稿）》的进一步意见，供法工委参考。

1 期货交易和衍生品交易的终局性

终局性概念是稳健的结算制度的基石，二次审议稿明确规定了期货交易的交易终局性和结算终局性，令人倍感鼓舞。二次审议稿规定，除发生影响期货正常交易的例外情况，依照期货交易所的业务规则进行的交易，不得改变其交易结果（第二十六条）。此外，依法进行的结

¹ 期货业协会是国际领先的期货、期权和中央结算衍生工具市场贸易组织，分别在布鲁塞尔、伦敦、新加坡和华盛顿设有办事处。协会会员基础广泛，包括遍布约 50 个国家的结算公司、交易所、结算所、交易公司、商品专业人士，以及服务业界的技术供应商、律师事务所和其他专业机构。协会致力创造公开、透明和具竞争力的市场，保护并健全金融体系，促进高标准的专业操守。协会的结算公司成员包括全球衍生工具结算所的主要成员，在减少全球金融市场系统风险方面发挥着重要作用。更多资料请查阅：www.fia.org。

算和交割，不因参与结算的任何一方进入破产程序而中止、无效或者撤销（第四十三条）。鉴于终局性概念对期货市场的重要意义，协会提请法工委进一步考虑如下建议：

- **期货交易结算与交割的一切方面均应获得明确的终局性条款保护。** 正如协会在上一封意见函中所指出的，终局性概念旨在保护以期货结算机构为中央结算对手方的一切结算和违约管理过程，该等行为将具有终局性，不因任何一方破产而受影响。由此，虽然第四十三条第三款明确肯定结算和交割具有终局性、不受破产程序的影响，但涉及结算和交割过程中其他操作的条款（例如第四十一条和第四十二条）中尚未就此做出确定。为避免疑义起见并保持条款的前后一致性，也鉴于终局性概念的特殊重要性，协会强烈建议将第四十三条第三款的明确肯定作为独立条款置于第三章结尾，以使终局性保护明确涵盖期货结算和交割的所有重要方面（包括不受破产法律的影响）。
- **终局性保护应明确涵盖违约管理措施。** 除保证金强制执行和强行平仓外，违约管理措施也包括违约基金分担、拍卖、损失分摊、保证金估值折扣等。考虑到违约管理措施会不断发展变化，协会谨此建议，法工委明确将终局性规定的范围扩大至期货结算机构业务规则中规定的其他违约管理措施，从而为期货结算机构提供更大的灵活性和确定性。

就衍生品的集中结算而言，协会注意到二次审议稿第三十七条明确规定：衍生品的集中结算具有终局性，不因破产程序而受影响，且结算财产应当优先用于结算和交割，不得被查封、冻结、扣押或者强制执行。协会强烈支持二次审议稿为衍生品结算提供的更为完善的保护和更为健全的法律框架。正如协会在上一封意见函中所指出的，衍生品交易的集中结算过程与期货交易的结算过程大体相同。相应地，适用于集中结算衍生品交易的结算过程和违约管理措施也需要与期货结算受到类似程度的健全法律保护。协会谨此建议，法律对期货结算的全面保护应类似地适用于衍生品的集中结算，例如对平仓终局性和有效性的保护和确认、保证金担保品的强制执行、以及其他违约管理措施。

我们对第三十七条和第四十三条修订建议载于附录。

2 期货交易和衍生品交易的客户结算

二次审议稿第四十三条保护期货交易的结算终局性免受“参与结算的任何一方”的任何破产程序的影响，其中明确涵盖期货结算机构或结算参与人的破产。但不够明确的是第四十三条对结算终局性的保护是否也涵盖了结算参与人的客户破产的情形。

协会理解，《期货和衍生品法》认可期货交易的结算包括（1）期货结算机构与其结算参与人之间的结算；及（2）结算参与人与其客户之间的结算（二次审议稿第三十九条）。这一“分级结算”的原则在国务院行政法规和中国证监会规章中长期得到认可。协会认为，如果对结算终局性的保护扩大至涵盖整个期货结算体系，这将提升中国境内期货市场的稳定性，并使所有市场参与者受益。因此协会谨此建议，第四十三条明确规定结算参与人与其客户之间的结算也受到结算终局性的保护，不因结算参与人的任何客户破产而受影响。

此外，鉴于衍生品交易和期货交易的集中结算过程具有相似性，协会谨此建议，第三十七条结算终局性的保护应明确涵盖结算参与人的客户破产的情形。

3 结算参与人与其客户间的终止净额结算

二次审议稿第九十三条明确保护了期货结算机构终止净额结算安排的可执行性。终止净额结算无疑是降低与金融衍生品和期货有关的信用风险的最重要机制之一。除了期货结算机构与其结算参与人之间的终止净额结算安排外，协会认为，结算参与人与其客户就客户在一个或多个期货交易场所进行的不同期货交易品种的终止净额结算安排同样至关重要。因此，协会建议将第九十三条对终止净额结算安排的认可，延伸至涵盖结算参与人与其客户之间的终止净额结算，包括使其免受破产法律影响。

我们对第九十三条的修订建议载于附录。

4 监管协同或替代合规

全球期货和衍生品市场使企业能够高效、经济地筹集资金和管理风险，而其正常运作，需要各国监管机构之间的信任、合作和认可。协会坚信，《期货和衍生品法》将为国际金融机构和投资者参与中国金融市场奠定坚实的基础。为了进一步保障国际社会的积极参与，我们希望有关部门在当前政策制定阶段关注监管规定的潜在跨境影响。

协会建议有关部门采纳“替代合规”机制，在该机制下，如果其他司法管辖区内的规则是基于国际约定标准来制定的，则可以倚赖该等司法管辖区内的相应监管机构来监管某些跨境活动。“替代合规”原则在实践中证明是行之有效的，在确保全球结算市场的开放准入，提高市场效率，以及避免全球监管机构之间规则冲突、重复监管和执法效能相抵等方面起着核心理论指导作用。协会谨此建议有关部门在制定与第十一章所规定的跨境活动相关的实施条例时，考虑采纳“替代合规”原则，建立一套国际衍生品监管制度的相当性评估体系，以使替代合规决定能够以可预测的、一贯的方式及时做出。

5 其他有待进一步考虑的问题

- a. **跨境交易。**协会注意到，二次审议稿包含了一系列保护措施（如结算终局性、保证金的执行、违约管理、终止净额结算安排等，本函第 1 至 3 节也提出了相关建议），以确保期货和衍生品结算生态系统的安全、完善和稳健运行。鉴于这些保护措施的根本重要性，协会谨此提出，这些保护措施不应局限于境内结算机构参与的交易，而应通过《期货及衍生品法》延伸至涵盖境内结算参与人、境内客户参与的涉及境外结算机构的跨境交易。这将确保境内结算参与人、境内客户参与的交易具有可执行性和终局性，从而有助于在全球范围内建立一个健全和安全的期货和衍生品结算生态系统，并促进境内机构参与全球期货和衍生品市场。法工委也可考虑授权中国期货和衍生品市场的主管部门在相关实施细则中为跨境交易提供此类保护（如果这种方式更为合适）。
- b. **实施细则。**另外，《期货和衍生品法》旨在为境内期货和衍生品市场建立法律的上层制度框架，而由国务院后续制定颁布更为详细的实施条例。协会谨此建议法工委与国务院有关部门在制定该等实施条例时，考虑协会会员提出的下列意见，予以指导和回应。
 - **对境外服务供应商的豁免。**协会注意到，二次审议稿第一百二十条允许国务院期货监督管理机构对境内期货经营机构转委托的某些境外期货经营机构的注册要求做出豁免规定。协会建议，针对机构投资者（即非零售投资者）寻求境外服务的情形，



实施条例可将其作为经常性豁免事项。此外，针对第一百二十二条针对境外机构在境内从事期货营销活动的审批规定，协会建议如果境外机构面向非零售投资者进行营销和交易，且在中国境内没有营业场所，则可将其作为经常性豁免事项。

- **关于境外期货投资的许可。**二次审议稿第一百二十条第二款的注册要求似乎仅适用于境外中介机构提供的交易服务，但不涉及其提供的结算服务。如境内期货经营机构委托境外结算参与人就境内客户的期货交易提供客户结算服务，该等境外结算参与人并不必然与被委托提供交易服务境外期货经营机构是同一机构。因此，协会建议进一步明确该等境外结算参与人是否须遵守任何注册规定。

6 附录

除上述对《期货和衍生品法（草案）（二次审议稿）》的主要意见外，我们还随函提交了一份附录，提出了对二次审议稿文本的详细修订建议，以及有待在《期货和衍生品法》或其实施条例中，或以另行发布的问答形式做出澄清的问题。

下一步行动

我们非常荣幸能有机会就《期货和衍生品法（草案）（二次审议稿）》提出意见，也非常乐意与法工委进一步探讨上述问题，或者以法工委认为合适的任何方式提供协助。《期货和衍生品法》的颁布将是国内期货立法史上的一个重要里程碑，也是中国朝着建立健全、完善的期货和衍生品市场法律框架的目标迈出的关键一步。

我们很乐意与法工委进一步探讨我们的意见，并进一步提供业界意见。如法工委有任何问题，请随时通过 bherder@fia.org 或 +65 6549 7333 与协会亚太区主管 Bill Herder 联系，或者通过 tmyeo@fia.org 或 +65 9111 0717 与协会亚太法律政策事务总监 Tze Min Yeo 联系。

同时，为方便沟通，本函将抄送中国证券监督管理委员会副主席方星海博士。

此致！

A handwritten signature in black ink that reads 'Walt L. Lukken'.

Walt Lukken

期货业协会主席兼首席执行官

（本函以英文和中文同时书就）



附件

修改建议和待澄清问题

条款	意见 / 待澄清问题	修改建议
第一章 总则		
第二条	<p><u>意见:</u></p> <p>协会谨此建议明确规定跨境衍生品交易及相关活动同样受本法关于结算终局性和净额结算等规定的保护。</p>	<p>协会建议增加以下段落作为第二条第三款:</p> <p><u>“境内单位或者个人依照法律、行政法规、国务院期货监督管理机构或者国务院授权的部门的有关规定从事境外期货交易和境外衍生品交易的，交易结果和结算交割受本法保护。”</u></p>
第三条	<p><u>意见:</u></p> <p>合约是否采用“标准化”形式，并不是衍生品交易和期货交易的主要区别。现实中存在标准化形式的衍生品交易（缔约双方在两两协商的基础上针对一套标准化的交易参数，包括名义金额、计算期间等，对商业条款达成协议），但其并非期货交易。因此，协会建议本法按交易缔结方式区分期货交易和衍生品交易，以避免混淆。</p> <p><u>待澄清问题:</u></p> <p>协会建议明确“期权合约”定义，使其既包括现金交割的期权（未实际购买或出售标的资产），也包括实物交割的期权。</p>	<p>协会建议将第三条第一款修订如下:</p> <p><u>“本法所称期货交易，是指以期货合约或者标准化期权合约作为交易标的、以第十条第一款规定的集中竞价或其他方式为交易缔结方式的交易活动。”</u></p> <p>协会建议将第三条第二款修订如下:</p> <p><u>“本法所称衍生品交易，是指期货交易以外的，以非标准化期权合约、互换合约和远期合约及其组合为交易标的、以第十条第三款规定的协议谈判或其他方式为交易缔结方式的交易活动。”</u></p>

条款	意见 / 待澄清问题	修改建议
第二章 期货交易和衍生品交易 —— 第二节 期货交易		
第二十二条	<p>意见：</p> <p>协会理解本条对标准化期权合约权利金的金额和支付时间不作要求，意味着权利金的金额可以为零，支付时间可以是合约到期行权时。</p>	<p>协会建议将第二十二条最后一款修订如下：</p> <p>“前款所称权利金是买方支付的用于购买和行使标准化期权合约的资金。”</p>
第二章 期货交易和衍生品交易 —— 第三节 衍生品交易		
第三十七条	<p>意见：</p> <p>协会谨此建议：（1）本法对期货结算的全面保护应类似地适用于衍生品的集中结算；以及（2）本条规定的结算终局性的保护应覆盖结算参与人的客户破产的情形。</p> <p>此外，协会谨此提议，终局性的保护不应局限于境内结算机构参与的交易，还应涵盖境内结算参与人、境内客户参与的涉及到境外结算结构的跨境交易。</p>	<p>协会建议将第三十七条修订如下：</p> <p>“衍生品交易，由国务院期货监督管理机构或者国务院授权的部门批准的结算机构作为中央对手方进行集中结算的，<u>中央对手方可以通过结算参与人与交易者以分级结算方式进行集中结算。集中结算包括中央对手方与结算参与人、结算参与人与交易者之间的结算和交割。</u></p> <p><u>中央对手方向结算参与人、结算参与人向交易者收取的保证金形式包括现金、债券等流动性强的有价证券以及国务院期货监督管理机构或者国务院授权的部门规定的其他财产。以有价证券作为保证金的，可以依法通过质押等具有履约保障功能的方式进行。</u></p> <p><u>参与结算的任何一方收取的保证金等，应当与其自有资金分开，专户存放，分别管理，禁止违规挪用。</u></p>

条款	意见 / 待澄清问题	修改建议
		<p>保证金、清算基金、风险基金和其他结算财产应当优先用于结算和交割，不得被查封、冻结、扣押或者强制执行；在结算和交割完成前，任何人不得动用。</p> <p>集中结算的衍生品交易，不得改变其交易结果。依法根据中央对手方的规则和相关协议安排进行的集中结算以及违约处置程序，不因参与结算的任何一方（包括中央对手方、结算参与人和交易者）依法进入破产程序而中止、无效或者撤销。”</p>
<p>第三章 期货结算与交割</p>		
<p>第四十三条</p>	<p>意见：</p> <p>协会谨此建议本法明确规定终局性保护涵盖期货结算、交割及违约处置流程的方方面面，且不因结算参与人的客户的任何破产程序而中止、无效或撤销。</p> <p>此外，协会谨此提议，终局性的保护不应局限于境内结算机构参与的交易，还应涵盖境内结算参与人、境内客户参与的涉及到境外结算机构的跨境交易。</p>	<p>协会建议第四十三条第三款经如下修订后作为独立条款插入第三章末尾：</p> <p>“依法根据期货结算机构的规则和相关协议安排进行的结算和交割以及违约处置程序，不因参与结算的任何一方（包括期货结算机构、结算参与人和交易者）依法进入破产程序而中止、无效或者撤销。”</p>
<p>第七章 期货结算机构</p>		
<p>第九十三条</p>	<p>意见：</p> <p>协会建议本法对中央对手方的定义与《金融市场基础设施原则》保持一致，即“中央对手方介入一个或多个金融市场交易</p>	<p>协会建议将第九十三条修订如下：</p>

条款	意见 / 待澄清问题	修改建议
	<p>的合约的对手方之间，成为所有卖方的买方和所有买方的卖方，从而确保未平仓合约的履行。”</p> <p>此外，协会谨此提议，终止净额结算的保护不应局限于境内结算机构参与的交易，还应涵盖境内结算参与人、境内客户参与的涉及到境外结算机构的跨境交易。</p>	<p>“期货结算机构作为中央对手方，是<u>结算参与人共同对手方，介入期货交易双方，成为所有买方的卖方和所有卖方的买方。期货结算机构进行终止净额结算，为期货交易提供集中履约保障。</u></p> <p><u>期货结算机构、结算参与人或其客户依照相关期货结算机构的业务规则或者结算参与人与其客户之间的相关合约作出终止净额结算行为，不因参与结算的任何一方（包括期货结算机构、结算参与人以及交易者）依法进入破产程序而中止、无效或者撤销。”</u></p>
第八章 期货服务机构		
<p>第一百零一条</p>	<p>意见：</p> <p>由于期货市场涉及的软硬件产品范围较广且更新迭代频率较高，如要求所有的信息技术服务机构都履行备案手续，需要大量监管资源，也不利于市场的良性发展。因此，协会建议本条与证券市场的相关做法保持一致。《证券服务机构从事证券服务业务备案管理规定》第九条规定，仅“重要信息系统”需要向监管机构备案。</p>	<p>协会建议将第一百零一条修订如下：</p> <p>“为期货经营机构、期货交易所、期货结算机构和非期货经营机构结算参与人等提供软硬件产品、信息技术系统或者技术服务的<u>信息技术服务机构，应当符合国家及期货行业信息安全相关的技术管理规定和标准，涉及重要信息系统的，还应当并向国务院期货监督管理机构备案。</u>”</p>
第十一章 跨境交易与监管协作		
<p>第一百二十四条</p>	<p>待澄清问题：</p> <p>正如协会在上一封意见函中所指出的，在期货市场境内外参与者的正常运作过程中，频繁的跨境信息共享是十分必要的。</p>	



条款	意见 / 待澄清问题	修改建议
	<p>鉴于就跨境信息共享取得有关部门同意的要求已被移至第二十四条第一款的最后一句，该要求似乎只适用于境内机构和个人在调查取证期间向境外监管机构提供文件和资料的情况。</p> <p>因此，协会谨此建议本法明确规定上述取得同意的要求仅限于跨境调查中的信息提供，或就出于特定目的的文件和信息共享做出豁免规定。</p>	



18 November 2021

To: Standing Committee of the National People's Congress of the People's Republic of China
Legislative Affairs Commission
No.1 Qianmen West Street, Xicheng District
Beijing, China
100805

Dear Sirs,

The Futures and Derivatives Law of the People's Republic of China (Second Reading Draft)

On behalf of its members, the Futures Industry Association (**FIA**)¹ respectfully presents to the Legislative Affairs Commission (the "**Commission**") of the Standing Committee of the 13th National People's Congress this letter of submission in relation to the second reading draft of "*Futures and Derivatives Law of the People's Republic of China*" (the "**Futures and Derivatives Law**"), which is currently being reviewed by the Standing Committee of the National People's Congress (**NPC**).

FIA would first like to congratulate the NPC on the publication of the second reading draft of the Futures and Derivatives Law which is a key step in establishing a robust legal framework for China's futures and derivatives markets. FIA members are extremely encouraged to see that many of their key observations on the first reading draft have been reflected in the second reading draft, which include:

- confirming settlement finality for futures transactions, ensuring that a cleared futures transaction will be final and conclusive and not liable to be set aside in any bankruptcy proceeding;
- extending settlement finality protection to the bankruptcy of futures clearing institutions; and
- extending protections for futures clearing, such as for settlement finality and collateral enforcement, to central clearing of derivatives transactions.

FIA strongly believes that by taking on board these critical changes, the Futures and Derivatives Law will provide comprehensive protections for futures and derivatives transactions in China and will lay a solid foundation for the ever-growing Chinese financial markets.

¹ FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets. Further information is available at www.fia.org.



FIA wholeheartedly welcomes the positive developments of the Futures and Derivatives Law. We set out in this letter a few further observations on the draft Futures and Derivatives Law for the kind consideration of the Commission.

1 **Finality for futures transactions and derivatives transactions**

With the finality concept being a cornerstone for a robust clearing system, it is heartening to see that both trading and settlement finality in respect of futures transactions have been clarified in the second reading draft. The draft law now provides that, subject to exceptional conditions affecting the normal trading of futures, the trading outcome conducted in accordance with the rules of a futures exchange shall not be altered (Article 26). Furthermore, clearing and settlement of futures conducted in accordance with the law will not be suspended, invalidated or revoked as a result of the commencement of bankruptcy proceedings in respect of any party participating in the clearing and settlement process (Article 43). In view of how crucial the finality concept is to the futures market, FIA respectfully submits that the Committee further consider the following suggestions:

- ***All aspects of futures clearing and settlement should benefit from express finality protection*** – As noted in our previous submission, the finality concept aims to protect any settlement and default management process with the futures clearing institution as central clearing counterparty (CCP). Accordingly, such action will be final and must not be affected by the bankruptcy of any party. To this end, while Article 43 paragraph 3 specifically provides that clearing and settlement will be final notwithstanding bankruptcy proceedings, a similar express statement has not been provided in respect of other operative clearing and settlement provisions (such as Articles 41 and 42). For the avoidance of doubt and for consistency purposes, given the paramount importance of this concept, FIA strongly recommends that such an express statement (such as Article 43 paragraph 3) be inserted at the end of Chapter 3 as an independent article so that all material aspects of futures clearing and settlement are clearly given finality protection (including protection from bankruptcy laws).
- ***Finality protection should extend specifically to default management measures*** – In addition to margin enforcement and liquidation, default management measures now also extend to include default fund contributions, portfolio auctions, loss allocation, margin haircutting and other techniques. Given the evolving nature of default management measures, FIA respectfully suggests that the Commission specifically extend the coverage of these finality provisions to all other default management measures set out in the clearing rules of a futures clearing institution to provide the necessary flexibility and certainty to the futures clearing institution.

In terms of central clearing of derivatives, FIA notes that Article 37 of the second reading draft expressly provides that central clearing of derivatives is final and conclusive notwithstanding bankruptcy proceedings and that any property involved in the clearing of derivatives shall be first applied for clearing and settlement, and shall not be impounded, frozen, seized or subject to any compulsory enforcement. FIA strongly supports such



enhanced protections and robust legal framework for derivatives clearing. As FIA has noted in our previous submission, the central clearing process for derivatives transactions is the same as the process for futures transactions. Accordingly, the clearing process and default management measures applicable to centrally cleared derivatives transactions would require a similar level of robust legal protection.

Therefore, FIA respectfully suggests that the all-round protection for futures clearing under the law should similarly apply to central clearing of derivatives, such as the protection and recognition of finality and effectiveness of liquidation of positions, enforcement of margin collateral and other default management measures.

Our proposed amendments to Articles 37 and 43 are set out in the Appendix.

2 Client clearing for futures transactions and derivatives transactions

Article 43 of the second reading draft now expressly protects settlement finality for futures transactions from any bankruptcy proceedings of “any party participating in the clearing process”, which clearly encompasses the bankruptcy of futures clearing institutions or the clearing participants. However, it is less clear whether the settlement finality protection under article 43 would also extend to the bankruptcy of the client of a clearing participant.

FIA understands that the Futures and Derivatives Law recognises that settlement of futures transactions comprises settlement (i) between a futures clearing institution and its clearing participants; and (ii) between a clearing participant with its clients (Article 39 of the second reading draft). This principle of “settlement at different levels” has been recognised in State Council administrative regulations and CSRC rules for a long time. FIA believes it will enhance the stability of the futures market in the People’s Republic of China (the **PRC**) and benefit all market participants if the protection for settlement finality is extended to cover a fuller scope of the futures clearing ecosystem. Therefore, FIA respectfully suggests that Article 43 make it clear that the settlement between a clearing participant and its clients is also protected for settlement finality notwithstanding the bankruptcy of any client of the clearing participant.

In addition, given the similarities in the central clearing process of derivatives transactions and futures transactions, FIA respectfully suggests that the protection for settlement finality under Article 37 expressly cover scenarios where clients of a clearing participant become insolvent.

3 Close-out netting between clearing participants and clients

Article 93 of the second reading draft of the Futures and Derivatives Law expressly protects the enforceability of close-out netting arrangements of a futures clearing institution. Close-out netting arrangements are without doubt one of the key risk reduction methods for credit risks associated with financial derivatives and futures. In addition to the close-out netting arrangements of a futures clearing institution and its clearing participants, FIA also notes the critical importance of the close-out netting arrangements between a clearing participant and its client in relation to futures transactions conducted on one or multiple futures trading



venues. Therefore, FIA respectfully suggests that the recognition for close-out netting arrangements in Article 93, including protection from any bankruptcy law, be extended to cover close-out netting between a clearing participant and its clients.

Our proposed amendments to Article 93 are set out in the Appendix.

4 Regulatory deference or substituted compliance

Global futures and derivatives markets enable firms to raise financing and manage their risks efficiently and cost-effectively. For this to work properly, trust, cooperation, and recognition are needed amongst regulators globally. FIA strongly believes that the Futures and Derivatives Law will provide a solid foundation for international financial institutions and investors to participate in the Chinese financial markets. To further ensure robust international participation, we encourage that attention be paid in the current legislative phase of policymaking to the potential cross-border implications of the regulations.

FIA believes policymakers should implement a substituted compliance model, i.e., relying on counterpart-regulators in other jurisdictions to supervise certain cross-border activities if the national rules in such jurisdictions are benchmarked to internationally agreed standards. The principle of “substituted compliance” has been proven to be effective and remains a key plank in ensuring open access to global cleared markets, increasing market efficiency, and avoiding contradictory requirements, duplicative supervision and counter-reactions by global regulatory authorities. FIA therefore respectfully suggests that policymakers in the PRC consider applying this “substituted compliance” principle when regulating cross-border activities as contemplated in Chapter 11 of the Futures and Derivatives Law. To this end, a comparability assessment framework should be established so that substituted compliance determinations can be made in a predictable, consistent, and timely manner.

5 Further issues for consideration

- a. Cross-border transactions** – FIA notes that the second reading draft of the Futures and Derivatives Law contains a number of protections (finality for settlement, margin enforcement, default management and close-out netting arrangements as supplemented by our comments in paragraphs 1-3 of this letter) for a safe, sound and robust functioning of a futures and derivatives clearing ecosystem. Given the fundamental importance of these protections, FIA respectfully submits that these protections should not be limited to transactions involving onshore clearing institutions in the PRC and should be extended by the Futures and Derivatives Law to cover cross-border transactions of clearing participants and clients from the PRC involving clearing institutions outside the PRC. This will ensure the enforceability and finality of the transactions with clearing participants and clients from the PRC, which will help promote a sound and safe futures and derivatives clearing ecosystem globally and facilitate the participation by Chinese institutions in the global futures and derivatives markets. If considered more appropriate, the Commission may empower the competent authority of the futures and derivatives markets in the PRC to extend such protections for cross-border transactions in relevant implementing regulations.



- b. Implementing regulations** – In addition, FIA notes that the Futures and Derivatives Law will set up an overarching legal framework for the futures and derivatives markets in the PRC and contemplates that more specific implementing regulations will be promulgated by the State Council. FIA respectfully suggests that the Commission and the competent authority of the futures and derivatives markets consider addressing the following comments from FIA members when formulating such implementing regulations.
- **Exemptions for offshore service providers.** FIA noted that Article 120 allows the futures regulatory body of the State Council to provide an exemption from registration for certain offshore futures brokerage institutions entrusted by an onshore futures brokerage institution. FIA suggests that the implementing regulations provide for a standing exemption where institutional investors (i.e. non-retail investors) seek offshore services. In addition, with respect to the approval requirement under Article 122, it is recommended that standing exemptions be provided for an offshore institution marketing and dealing with non-retail investors where such offshore institution does not have a place of business in the PRC.
 - **Licensing in relation to outbound futures investments.** Article 120 paragraph 2 seems to contemplate that the registration requirement will only be applicable to the provision of trading services by offshore intermediaries but not to the provision of clearing services. Where an offshore clearing participant is appointed by an onshore broker to provide client clearing services in respect of the futures trades of onshore clients, such offshore clearing participant may not always be the same person as the one who is being appointed as offshore broker. Hence FIA suggests further clarification to be made as to whether such offshore clearing participant be subject to any registration requirement.

6 Appendix

In addition to setting out our key observations on the second reading draft of the Futures and Derivatives Law, we have also included into this submission an Appendix which sets out in more detail our suggested amendments to the text of the second reading draft as well as the issues to be clarified in the Futures and Derivatives Law itself, implementing regulations or in the form of Questions and Answers (Q&As).

Next steps

FIA is extremely grateful for the opportunity to comment on the second reading draft of the Futures and Derivatives Law and would be pleased to discuss the issues addressed above further or otherwise to assist in any way that the Commission deems appropriate. Publication of the Futures and Derivatives Law will be a key milestone in the history of futures legislation in China and a fundamental step towards the establishment of a sound and comprehensive legal framework for China's futures and derivatives markets.

We would be delighted to engage in further discussions with the Commission in relation to our comments and provide further industry input. If you have any questions, please do not hesitate to



contact Bill Herder, Head of Asia Pacific, at bherder@fia.org or +65 6549 7333 or Tze Min Yeo, Head of Legal & Policy, Asia Pacific, at tmyeo@fia.org or +65 9111 0717.

In the meantime, to facilitate dialogue, we will also share a copy of our submission with Dr. FANG Xinghai, Vice President of the China Securities Regulatory Commission.

Yours faithfully,

A handwritten signature in black ink that reads 'Walt L. Lukken'. The signature is written in a cursive, flowing style.

Walt Lukken

President and Chief Executive Officer, Futures Industry Association (FIA)

(This submission is made in English and Chinese)

Appendix

Suggested Amendments and Issues to Be Clarified

Clause	Comments / Issues to Be Clarified	Suggested Amendments
Chapter 1 General Principles		
Article 2	<p><u>Comments:</u></p> <p>FIA respectfully suggest that the law makes it clear that protections such as settlement finality and netting apply to cross-border derivatives transactions and activities as well.</p>	<p><i>FIA suggests that the following paragraph be inserted as the third paragraph under Article 2:</i></p> <p><u>“Where domestic entities or individuals participate in offshore futures transactions and offshore derivatives transactions in accordance with the relevant laws, administrative regulations and rules formulated by the futures regulatory authority under the State Council or the departments authorised by the State Council, the trading outcome and the clearing and settlement shall be protected by this Law.”</u></p>
Article 3	<p><u>Comments:</u></p> <p>Whether or not the contract is in a “standardised” form is not the key distinction separating derivatives transactions from futures transactions. There are derivatives transactions in standardised form (where contracting parties enter into a transaction based on bilateral negotiation and agree on a standardised set of parameters of the transaction, such as the notional amount, the length of calculation period, etc.) which are not futures transactions. Therefore, FIA suggests that the law distinguish futures transactions and derivatives transactions by contracting methods to avoid confusion.</p>	<p><i>FIA suggests that the first paragraph under Article 3 be amended as follows:</i></p> <p>“Under this Law, “futures transactions” refer to transactions with futures contracts or standardised option contracts as trading objects and <u>entered into by way of centralised bidding or other transaction methods as prescribed in Article 10 paragraph 1.</u>”</p> <p><i>FIA suggests that the second paragraph under Article 3 be amended as follows:</i></p> <p>“Under this Law, “derivatives transactions” refer to transactions other than futures transactions, with non-standardised option contracts, swap contracts and forward contracts, as well as any combination of such contracts as trading objects <u>and entered into by way of</u></p>

Clause	Comments / Issues to Be Clarified	Suggested Amendments
	<p><u>Issues to Be Clarified:</u></p> <p>FIA suggests further clarification that the definition of “options contract” includes both cash-settled options (with no actual buying or selling of the underlying assets) and physical settled options.</p>	<p><u>contractual negotiation or other transaction methods as prescribed in Article 10 paragraph 3.</u>”</p>
Chapter 2 Futures and Derivatives Transactions – Section 2 Futures Transactions		
Article 22	<p><u>Comments:</u></p> <p>FIA understands that there is no requirement on the amount and payment time relating to the premium, which means the premium could be zero and could be paid at the expiry of the option.</p>	<p><i>FIA suggests that the last paragraph under Article 22 be amended as follows:</i></p> <p>“The option premium referred to in the preceding paragraph means the funds paid by the buyer for the purchase <u>or the exercise</u> of the standardized option contract.”</p>
Chapter 2 Futures and Derivatives Transactions – Section 3 Derivatives Transactions		
Article 37	<p><u>Comments:</u></p> <p>FIA respectfully suggests that (i) the all-round protection for futures clearing under the law similarly apply to the central clearing of derivatives and (ii) settlement finality protections under Article 37 expressly cover the scenario of bankruptcy of the clients of a clearing participant.</p> <p>In addition, FIA would respectfully submit that finality protection should not be limited to transactions involving onshore clearing institutions and should also be extended to cover cross-border transactions of clearing participants and clients from the PRC involving offshore clearing institutions.</p>	<p><i>FIA suggests that Article 37 be amended as follows:</i></p> <p>“Where derivatives transactions are centrally cleared by the clearing institutions approved by the futures regulatory authority or the department authorised under the State Council which act as the central counterparty, <u>the central counterparty may carry out its central clearing activities with clients via clearing members by way of hierarchical settlement. Central clearing activities include the settlement and delivery between central counterparty and its clearing members, and the settlement and delivery between clearing members and their clients.</u></p>

Clause	Comments / Issues to Be Clarified	Suggested Amendments
		<p><u>The margin collected by the central counterparty from clearing members, and collected by clearing members from their clients includes cash, bonds, and other negotiable securities with high liquidity, as well as other properties as prescribed by the futures regulatory authority or the department authorised under the State Council. Where margin is in the form of negotiable securities, it may be collected by means of pledge or other methods with performance assurance features in accordance with the law.</u></p> <p><u>Amounts such as margin received by any party participating in the clearing shall be held separately from the proprietary funds of the relevant clearing institutions and clearing participants. Such amounts shall be placed and administered in a segregated account. Uses in violation of the regulations shall be prohibited.</u></p> <p><u>The margin, guarantee funds, risk reserve funds and other the property involved in the clearing of such derivatives transactions shall be first applied for clearing and settlement, and shall not be impounded, frozen, seized or subject to any compulsory enforcement; no one shall use such property before the completion of clearing and settlement.</u></p> <p><u>The outcome of centrally cleared derivatives shall not be altered. Central clearing conducted or any default management measures taken in accordance with the law the rules of a central counterparty and related contractual arrangements shall not be stayed, invalidated or revoked due to the commencement of any bankruptcy proceeding with respect to any party (including central counterparties, clearing</u></p>

Clause	Comments / Issues to Be Clarified	Suggested Amendments
		<p><u>participants and transaction parties</u>) participating in the clearing in accordance with the law.”</p>
<p>Chapter 3 The Clearing and Settlement of Futures</p>		
<p>Article 43</p>	<p>Comments:</p> <p>FIA respectfully suggests an express provision to clarify that finality protection should cover all aspects of futures clearing and settlement and default management process, and shall not be set aside by any bankruptcy proceeding of the clients of a clearing participant.</p> <p>In addition, FIA would respectfully submit that finality protection should not be limited to transactions involving onshore clearing institutions and should also be extended to cover cross-border transactions of clearing participants and clients from the PRC involving offshore clearing institutions.</p>	<p>FIA suggests that the third paragraph of Article 43 be inserted at the end of Chapter 3 as an independent article and amended as follows:</p> <p>“Clearing and settlement conducted <u>or any default management measures taken in accordance with the law</u> <u>rules of a futures clearing institution and related contractual arrangements</u> shall not be stayed, invalidated or revoked due to the commencement of any bankruptcy proceeding with respect to any party <u>(including futures clearing institutions, clearing participants and transaction parties)</u> participating in the clearing in accordance with the law.”</p>
<p>Chapter 7 Futures Clearing Institutions</p>		
<p>Article 93</p>	<p>Comments:</p> <p>FIA suggests the definition of CCP be consistent with PMFI: “A central counterparty interposes itself between counterparties to contracts traded in one or more financial markets, becoming the buyer to every seller and the seller to every buyer and thereby ensuring the performance of open contracts.”</p> <p>In addition, FIA would respectfully submit that close-out netting protection should not be limited to transactions</p>	<p><i>FIA suggests that Article 93 be amended as below:</i></p> <p>“Futures clearing institutions, as the central counterparty, shall be the common counterparty of the clearing participants, <u>interposes itself between the futures counterparties, becoming the buyer to every seller and the seller to every buyer.</u> It carries to carry out close-out net settlement and provide centralised performance assurance for futures transactions.</p> <p><u>Close-out net settlement conducted by a futures clearing institution, a futures clearing participant or its client in accordance with the business</u></p>



Clause	Comments / Issues to Be Clarified	Suggested Amendments
	<p>involving onshore clearing institutions and should also be extended to cover cross-border transactions of clearing participants and clients from the PRC involving offshore clearing institutions.</p>	<p><u>rules of the relevant futures clearing institution or the relevant contracts between a futures clearing participant and its client, shall not be stayed, invalidated or revoked due to the commencement of any bankruptcy proceeding with respect to any party (including the futures clearing institution, clearing participant and transaction party) participating in the futures clearing in accordance with the law.</u></p>
Chapter 8 Futures Service Institutions		
<p>Article 101</p>	<p><u>Comments:</u></p> <p>Given the wide scope of software and hardware product updates involved in the futures market and the need for frequent updates, requiring all the information technology service agencies to perform filing procedures would take up a lot of regulatory resources and impede the healthy development of the market. Therefore, FIA recommends aligning with the relevant practices in the securities market. Article 9 of the <i>Regulations on the Administration of Recordation of Securities Service Institutions Engaged in Securities Service Business</i> stipulates that all the important information systems need to be filed with regulatory agencies.</p>	<p><i>FIA suggests that Article 101 be amended as below:</i></p> <p>“Information technology service institutions that provide software and hardware products, information technology systems or technical services to futures business institutions, futures exchanges, futures clearing institutions and clearing participants of non-futures business institutions shall comply with national and futures industry information safety-related technical management regulations and standards, <u>and if an important information system is involved, file</u> with the futures regulatory authority under the State Council for record.”</p>
Chapter 11 Cross-Border Transactions and Regulatory Coordination		
<p>Article 124</p>	<p><u>Issues to Be Clarified:</u></p> <p>As FIA has noted in our previous submission, frequent cross-border information sharing is necessary in the normal</p>	



Clause	Comments / Issues to Be Clarified	Suggested Amendments
	<p>operations of both onshore and offshore participants in the futures market.</p> <p>Given that the requirement to obtain consent from governmental authority has been moved to the last sentence of Article 124 paragraph 1, it seems that such requirement is now applicable only if domestic institutions and individuals provide documents and materials to overseas regulatory bodies during investigations / evidence collection.</p> <p>FIA therefore respectfully suggests that further clarification be made that such consent requirement is limited to cross-border investigations or that an exemption be provided for the sharing of documents and information in connection with certain permitted purposes.</p>	