CHINA LAW INSIGHT

The CBRC has launched a new round of regulatory storm: its impact on foreign banks in China

By King & Wood Mallesons on April 14, 2017

Author: **Chen** Yunfeisi , Wang Rong, King & Wood Mallesons ***This article is an updated version of the article published on April 14, please read it carefully.***



Preface

1. The China Banking Regulatory Commission (“ **CBRC** ”) has recently issued a series of new regulations (“ **New Regulations** ”) aimed at:
   - Preventing and controlling various risks in the financial system
   - Filling regulatory gaps
   - Improving the level of banking services to the real economy and transformation and upgrading policies
2. The new regulations apply to both Chinese banks and foreign banks in China. This article will focus on major issues related to foreign banks in China.
3. While clarifying a series of requirements and rules, the new regulations also reiterate many existing clear provisions.
4. The new regulations are the latest policy attempts and control measures by China's financial regulatory authorities to prevent financial risks and systemic risks.
5. The new regulations are the first move by the new CBRC Chairman Guo Shuqing since he took office.

Industry issues

The CBRC believes that the following industry issues have led to widespread non-compliance in the banking and financial industries:



Current industry chaos

The CBRC recognizes that the following situations are the main non-compliance problems in the banking and financial industries:



New regulatory system

The new regulations reflect the CBRC's determination and means to address the above-mentioned industry problems and chaos. The new regulations specifically include the following regulatory documents:



Main objectives and expected results

The new rules are designed to achieve the following key regulatory objectives of the CBRC:



Based on the above regulatory objectives, the banking industry is expected to achieve the following expected goals:



How can banks better prevent and control risks?

To achieve better risk prevention and control and compliance, the new regulations require banks to:



How can banks better serve the real economy?

To encourage banks to better serve the real economy, the new regulations require banks to:



Specific actions banks must take



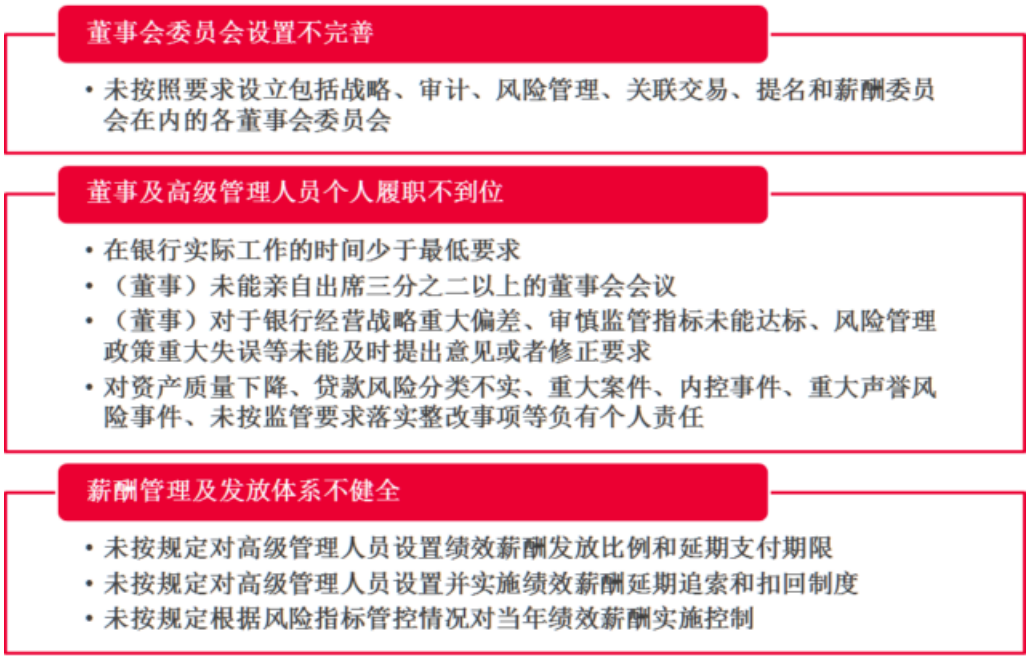
▪Control **informatization** : rigidly control various risks through information systems▪Clear responsibilities : require the source of funds to bear the responsibility for cross-financial products▪Strengthen **inter -bank control** : establish the board of directors' development plan and risk control for inter-bank wealth management business▪Establish **firewalls** : establish firewalls between the banking system and the capital market, bond market, insurance market, and foreign exchange market▪Pre
- **review** : internal management systems and procedures should be established for financial innovation, and the review and approval of the risk management department and the legal and compliance department should be obtained before actual activities are carried out, and the approval of the board of directors (or the corresponding board committee) should be obtained▪Stress **testing** : special stress testing should be conducted on rapidly developing new products and new businesses, as well as business areas with potential major risks

Key control behaviors





Key corporate governance deficiencies



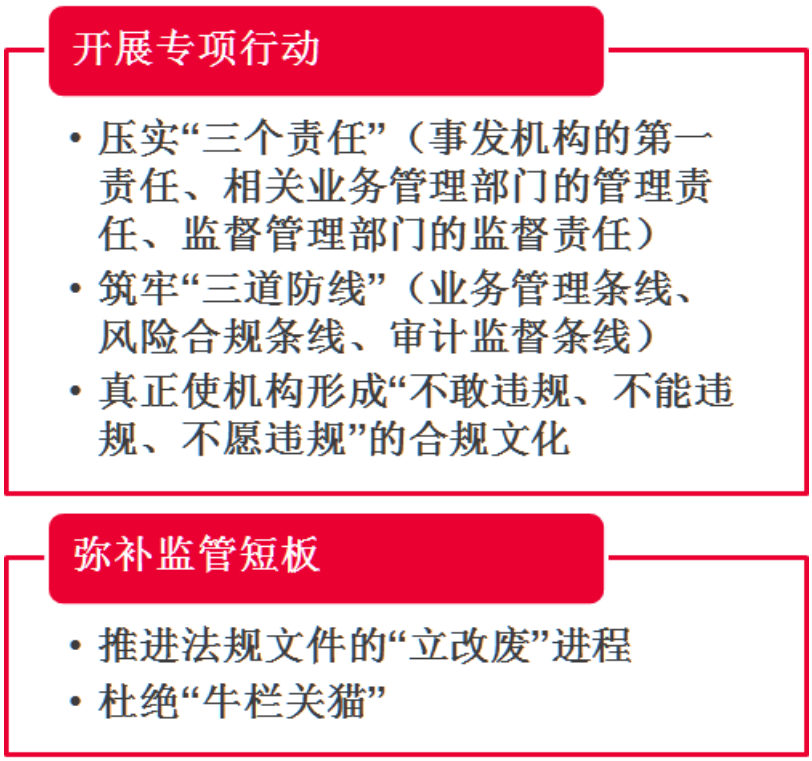
Control principles

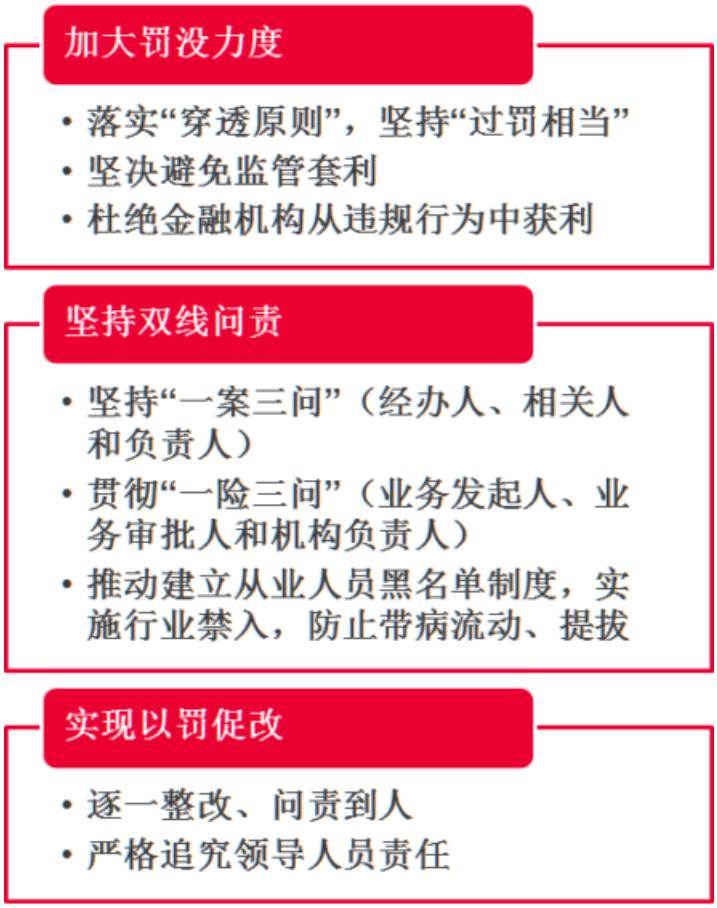
Violation of the new regulations will result in serious consequences of regulatory penalties by the CBRC. The CBRC will apply the following control principles:



CBRC's control plan

Based on the above-mentioned "three irons and three views" control principles, the CBRC will implement key control in the following ways and methods:





Serious consequences of violations

The CBRC will punish the responsible institutions and individuals with the following measures:
▪ Combine institutional self-examination with regulatory inspections, focus on the inspection of legal entities, and deal with problems that are not exhausted by self-examination in a severe and strict manner
▪ Depending on the circumstances, prudent regulatory measures such as ordering suspension of business, stopping approval of new business, stopping approval of additional branches, and ordering adjustments to directors and senior management may
be adopted ▪ Strict punishment will be imposed on institutions that have repeatedly violated regulations, failed to make adequate rectifications, and failed to cooperate with regulatory inspections ▪
Strict and severe punishment will be imposed on illegal related-party transactions, innovative arbitrage behaviors, and interest transfers ▪ Confiscate
illegal gains and impose fines ▪
"Double punishment" will be imposed on violating institutions and relevant responsible personnel
▪ Link the punishment results with market access, performance evaluation, regulatory ratings, etc.

CBRC in action

▪The CBRC has made some administrative penalty decisions in the first quarter of 2017. We expect the CBRC to further increase the intensity of penalties.



How banks should respond

1. **Actively conduct self-examination and proactively correct non-compliant behaviors.** For example:
   comprehensively review the timeliness and compliance of internal systems
   Verify the compliance of loan issuance and the flow of loan funds
   Clean up non-compliant structures and arrangements in wealth management products Investigate non-compliant charging items and charging terms (especially financial advisory fees, consulting fees, and requiring customers to bear mortgage registration fees)
   Evaluate the impact of the new regulations on business transactions between foreign banks and their business offices in China
2. **Cooperate with the regulatory authorities in inspections and conscientiously complete rectification work.** For example:
   ▪ Strengthen communication with regulatory authorities
   ▪ Provide explanations and instructions from the legal and compliance perspectives

The new regulations are a major financial regulatory policy this year. If you need to understand and assess the impact of the new regulations on your business, please contact your contact at King & Wood Mallesons.

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CHINA LAW INSIGHT

银监会掀起新一轮监管风暴——对于在华外资银行的影响

By King & Wood Mallesons on April 14, 2017

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此文为4月14日文章的更新版，敬请阅读。

前言

1. 中国银行业监督管理委员会（“**银监会**”）近期颁布了一系列的新规（“**新规**”），旨在：
   ▪防控金融系统的各项风险
   ▪弥补监管短板
   ▪提升银行业服务实体经济和转型升级政策的水平
2. 新规同时适用于中资银行和在华外资银行，本文将重点关注与在华外资银行相关的重大事项
3. 新规在明确了一系列的要求和规则的同时，也重申了许多既有的明确规定
4. 新规是中国金融监管当局预防金融风险和系统性风险的最新政策尝试和管控措施
5. 新规是银监会新主席郭树清先生任职以来的首次亮剑

行业问题

银监会认为，下列行业问题导致银行及金融行业存在普遍的不合规情况：



当前行业乱象

银监会认识到，下列情形是银行及金融行业存在的主要不合规乱象：



新规体系

新规体现了银监会对于治理以上行业问题和乱象的决心和手段，新规具体包括以下规范性文件：



主要目标和预期效果

新规旨在实现银监会的以下主要监管目标：



根据上述监管目标，期待银行业能够实现以下预期目标：



银行该如何更好地防控风险

为实现更好的风险防控和合规效果，新规要求银行：



银行该如何更好地服务实体经济

为促使银行更好地服务实体经济，新规要求银行：



银行必须采取的具体行动



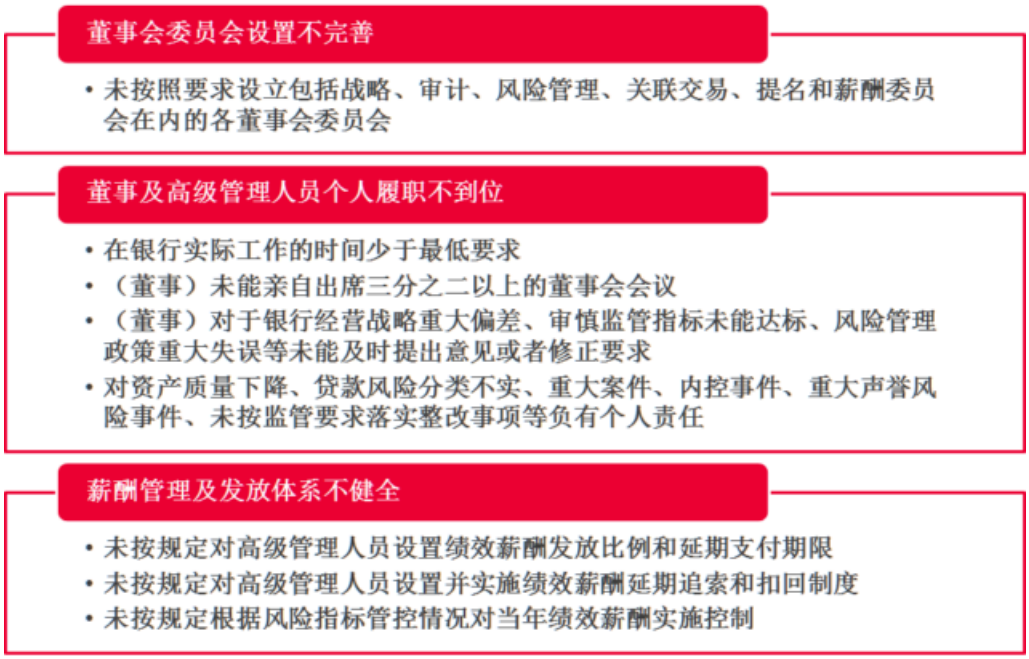
- **控制信息化**：通过信息系统刚性控制各类风险
- **责任明确化**：要求资金来源方承担交叉性金融产品的责任
- **强化同业管控**：树立董事会对同业理财业务的发展规划和风险管控
- **建立防火墙**：建立银行体系与资本市场、债券市场、保险市场、外汇市场之间的防火墙
- **事前审查**：开展金融创新应当建立内部管理制度和程序，并在开展实际活动前获得风险管理部门、法律合规部门的审核同意，并获得董事会（或相应董事会委员会）批准
- **压力测试**：对快速发展的新产品和新业务以及存在潜在重大风险的业务领域进行专项压力测试

重点管控行为


未经批准或备案从事经批准或备案方能从事的业务活动
未制定制度即开展创新业务
员工违规查询、泄露、倒卖客户信息
以贷转存、存贷挂钩、浮利分费、借贷搭售、转嫁成本等
将抵押登记费转嫁给客户承担
多收费、少服务、超出价格目录范围收费
未公示收费目录、未提前3个月公示新设或调高的市场调节价收费项目
提供服务时，未能事前告知收费项目、服务价格等信息，并获得客户确认
违规发放房地产贷款
违规发放贷款致使贷款资金流入股市和期市
违规与小额贷款公司等机构合作办理业务
违规出售、处置、核销不良贷款
违规转让非不良贷款
非真实转让信贷资产
通过嵌套方式实现不良资产违规出表
以重组贷款、平移贷款等方式掩盖不良资产情况
办理无真实贸易背景银行承兑汇票业务
将票据资产转入资管计划以投资替代贴现
会计核算、风险计量和计提资本未遵循穿透性原则和实质重于形式原则
为非法交易场所提供金融服务
使用自有资金购买本行或他行理财产品
以理财产品嵌套理财产品
利用委外资金放大杠杆、加长久期
为同业投资和理财业务违规接受或提供担保或兜底安排
将同业资金对接理财产品和资管计划、加大杠杆、赚取利差
通过同业业务虚增资产负债规模
采取欺骗、行贿、利益输送等方式获取存款
投资关联基金、合伙企业，违规转移信贷资产
利用关联机构变相进行股权投资
利用关联机构变相进行非自用不动产投资
通过购买QDII等产品投资国内房地产企业在境外发行的债券
未按规定披露年报信息、变更等信息
员工私自销售飞单产品
员工误导客户购买理财产品
未进行投资者适当性测试而销售产品
未做明确说明而代销其他机构产品，使客户误认为是本行产品
强制搭售理财产品
开展理财资金池业务
理财产品之间相互交易
委托非金融机构对理财资金进行投资管理
理财产品投资于非金融机构发行的产品
理财产品直接投资于信贷资产或其收益权
理财产品投资于不良资产或不良资产支持证券或不良资产收益权、受益权
保本型理财产品未按照存款管理，未缴纳存款准备金



重点管控的公司治理缺陷



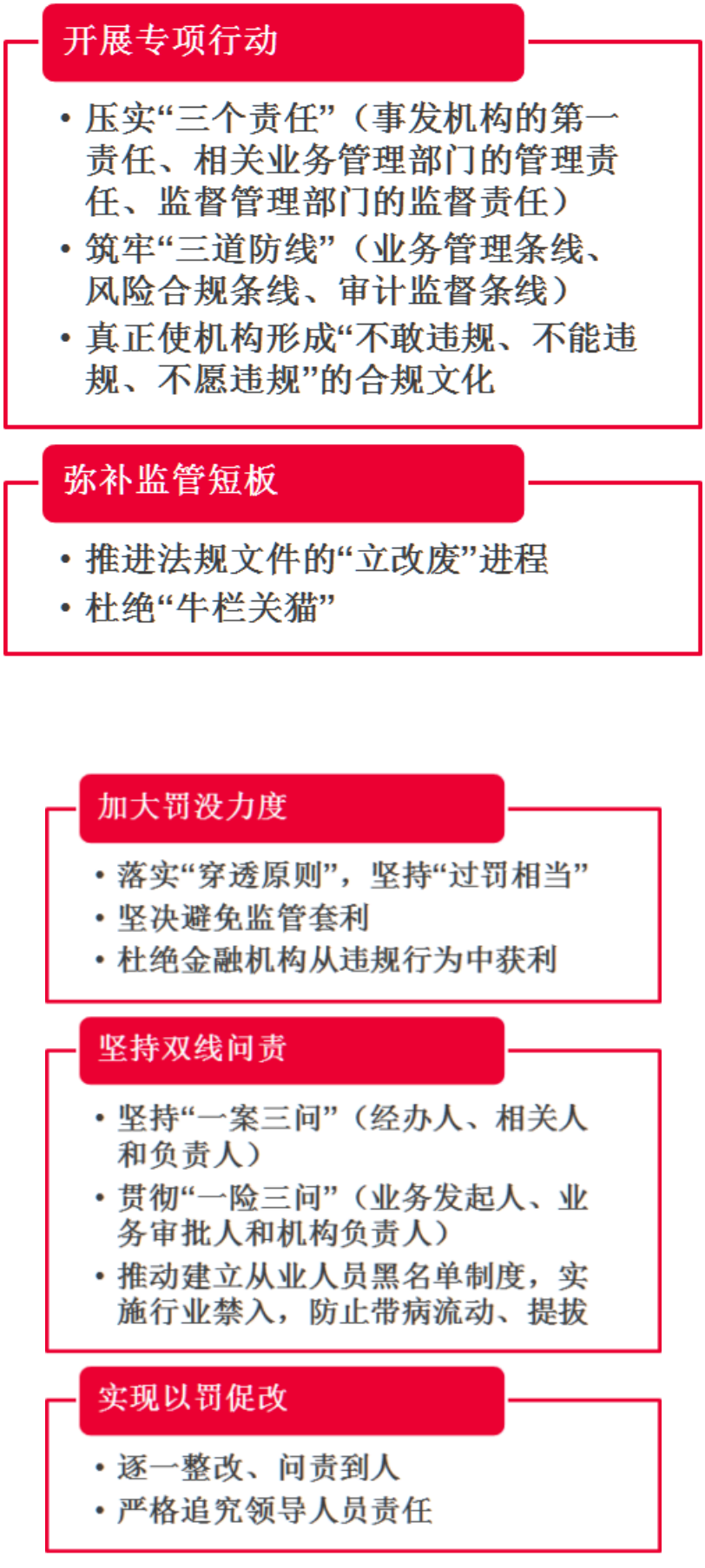
管控原则

违反新规将产生严重的银监会监管处罚后果
银监会将适用以下管控原则：



银监会的管控方案

基于上述的“三铁三见”管控原则，银监会将按照以下路径和方式实施重点管控：



违规的严重后果

银监会将以以下举措处罚责任机构和个人：

▪机构自查与监管检查相结合，注重对法人机构检查，从重从严处理自查未穷尽的问题

▪视情况可采取责令暂停业务、停止批准开办新业务、停止批准增设分支机构、责令调整董事及高管等审慎监管措施

▪对于多次违规、整改不到位、不配合监管检查的机构从严处罚

▪对于违规开展关联交易、花样翻新的套利行为和利益输送从严从重处罚

▪没收违法所得的同时还要处以罚款

▪对违规机构和相关责任人员实施"双罚"

▪将处罚结果与市场准入、履职评价、监管评级等挂钩

银监会在行动

▪银监会在2017年一季度已经做出了一些行政处罚决定，我们预期银监会会进一步加大处罚力度



银行应如何应对

1. **积极开展自我检查，主动纠正不合规行为。**例如：
   全面梳理内部制度的时效性和合规性

核实贷款发放的合规性和贷款资金流向
清理理财产品中的不合规结构、安排
排查不合规的收费事项、收费条款（尤其是财务顾问费、咨询费，以及要求客户承担抵押登记费用的情况）
评估新规对于外国银行及其在中国的营业机构之间业务往来的影响

2. **配合监管部门检查，认真完成整改工作。**例如：
▪加强与监管部门的沟通
▪从法律和合规角度做好解释与说明

新规是今年较为重大的金融监管政策，如您需要了解、评估新规对您的业务的影响，请联系您在金杜的联系人。

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