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中倫律師事務所
ZHONG LUN LAW FIRM

Securitisation

资产证券化法律实务指南

China 中国

中伦律师事务所
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■ 作者简介

Author Profile

中伦律师事务所自 1995 年就在推广和促进中国资产证券化业务方面领先市场，积极地参与了包括信贷资产证券化和企业资产证券化业务在内的各类资产证券化业务的试点论证和法规的制定过程。中伦积极地协助了监管部门信息披露规则和针对类型化基础资产的操作指南的指定工作，并参与了各类资产证券化业务示范合同文本的制作。中伦作为创始会员之一牵头组建了中国资产证券化论坛。中伦的资产证券化法律服务核心业务组位于其北京办公室，由刘柏荣律师所带领的超过 30 名富有经验的律师组成；中伦的资产证券化服务网络延伸至中伦国内外办公室超过 20 名合伙人。凭借中伦各领域服务部门的有力支持，中伦资产证券化业务组可以为证券化市场中包括银行、汽车金融公司、租赁公司、信托公司、证券公司和基金子公司等各类参与者提供及时、全面、有价值的法律服务。

Zhong Lun Law Firm has led the market in the promotion and facilitation of securitisation transactions in China since 1995, having actively participated in pilot research and rule-making processes relating to all kinds of securitisation products, including credit asset securitisation and business asset securitisation. The firm has also actively assisted regulatory bodies with the development of information disclosure guidelines and practice guidelines, as well as model contracts for typical types of securitised assets. It co-founded the China Securitisation Forum in 2006. Based in Beijing, the core team consists of over 30 experienced lawyers led by Borong Liu; the wider securitisation practice group extends to a network of over 20 partners based in Zhong Lun's major offices around China and abroad. With the strong support of other practice groups, it is capable of providing prompt, valuable, and all-around assistance to all kinds of participants in securitisation transactions, including banks, automobile finance companies, lease companies, trust companies, securities companies and fund subsidiary companies.

刘柏荣律师是中伦律师事务所合伙人，同时担任该所金融部的负责人。刘律师专注于资产证券化、结构性融资、资产管理业务领域，拥有 18 年的相关领域法律服务经验。刘柏荣律师是中国资产证券化论坛执行委员会主席，中国银行间市场交易商协会非金融企业债务融资工具注册专家、法律委员会委员、资产证券化及结构化融资专业委员会委员，资本市场学院特聘教授，也是深圳证券交易所和上海证券交易所的资产证券化项目审核外部评审专家。

Borong Liu is a partner of the firm and head of its Financial Law department. He dedicates his practice to securitisation, structured finance and asset management, and has more than 18 years' experience providing legal services in related areas. He chairs the Executive Committee of the China Securitisation Forum, is a registration specialist

for Debt Financing Instruments of Non-Financial Enterprises at the National Association of Financial Market Institutional Investors (NAFMII), and sits on the NAFMII Legal Affairs Professional Committee and Asset Securitisation and Structured Finance Professional Committee. Borong Liu is an external securitisation product evaluation expert for the Shenzhen Stock Exchange and Shanghai Stock Exchange.

刘小丽律师是中伦律师事务所合伙人。刘小丽律师专注于资产证券化、结构性融资、资产管理业务领域，拥有超过 10 年的相关领域法律服务经验，参与过超过 150 单资产证券化项目，包括信贷资产证券化、企业资产证券化和资产支持票据项目，尤其熟悉信用卡、汽车贷款、个人住房贷款、消费贷款等消费金融领域的信贷资产证券化；在各种类型基础资产的企业资产证券化和资产支持票据领域也有丰富操作经验和深厚的理论积累，包括但不限于各类应收账款、保理资产、房地产、融资租赁债权、公路收费权、污水处理费等。刘小丽律师是中国资产证券化论坛未来应收款证券化专业委员会联席主席。

Xiaoli Liu is a partner of the firm and dedicates her practice to securitisation, structured finance and asset management. She has over 10 years of experience providing legal services in these and related areas, having been part of over 150 securitisation projects including credit asset securitisation, business asset securitisation and asset-backed notes. She is especially familiar with credit card receivables securitisation, automobile loan securitisation, residential mortgage-backed securitisation, consumer loan and other credit asset securitisations in consumer finance areas. She has rich practical experience and deep theoretical knowledge in business asset securitisation and asset-backed notes relating to all kinds of underlying assets, including but not limited to account receivables, factoring assets, property, debt claim of financial leasing, highway toll rights and sewage treatment fees. Xiaoli Liu is co-chair of the China Securitisation Forum's Future Receivables Securitisation Committee.

路竞玮律师是中伦律师事务所合伙人。路律师专注于资产证券化、结构性融资、资产管理业务领域，在资产证券化、结构性融资、资产管理业务法律服务领域具有丰富的实践经验。路律师长期为包括中国工商银行和中国银行在内的金融机构发行资产支持证券提供服务。路律师的服务经验涵盖对公贷款证券化（CLO）、个人住房贷款证券化（RMBS）、商业物业抵押贷款证券化（CMBS）、汽车贷款证券化（Auto Loan）、信用卡证券化（Credit Card）、不良资产证券化（NPL）、融资租赁资产证券化、信贷资产流转、企业资产证券化；资产支持票据（ABN），和保险资产支持计划等。路律师是中国资产证券化论坛法律专业委员会联席主席。

Jingyi Lu is a partner of the firm. He dedicates his practice to securitisation, structured finance and asset management, and has rich practical experience in securitisation, structured finance and asset management. He has provided long-term services to trust

companies and financial institutions including Industrial and Commercial Bank of China and Bank of China relating to the issuance of asset-backed securities. His work has included products such as collateralised loan obligations, residential mortgage-backed securitisation, commercial mortgage-backed securitisation, automobile loan securitisation, credit card receivables securitisation, non-performing asset securitisation, financial leasing asset securitisation, credit asset circulation, business asset securitisation, asset-backed notes and insurance asset-backed plans. Jingyi Lu is co-chair of the China Securitisation Forum's Securitisation Legal Issue Research Committee.

许苇律师是中伦律师事务所合伙人。许律师专注于资产证券化、房地产投资信托及相关领域，拥有超过 10 年的相关领域法律服务经验。许苇律师是国内最早参与中国 REIT 试点的法律专业人士，主办了金茂凯晨资产支持专项计划等具有影响力的项目，以及其它基于各种基础资产的类 REIT 和 CMBS 项目。许律师在 2017 年完成了中国首个类 REIT 项目清算工作，近期正在积极参与证监会、人民银行分别领导的新一轮 REIT 试点。许律师是中国资产证券化论坛资产支持票据专业委员会联席主席。

Wei Xu is a partner of the firm and has more than 10 years of experience in securitisation, REITs and related areas. One of the first legal specialists to advise on pilot REIT projects in China, she has been lead counsel on influential projects including the Gohigh-CMS-Jinmao Kaichen Asset-Backed Special Scheme, as well as other quasi-REIT and CMBS projects concerning various underlying assets. After completing the liquidation of China's first quasi-REIT project in 2017, Wei Xu recently took an active role in the new REIT pilot programme led by the China Securities Regulatory Commission and People's Bank of China. She is co-chair of the Asset-Backed Note Committee of the China Securitisation Forum.

■ 作者按

From the Authors

近年来，中国的资产证券化业务快速增长，对国内外各类市场参与者日益具有吸引力。作为世界范围内备受认可的法律专业评级机构之一，钱伯斯每年都出版全球知名执业律师排行榜单，并选取其中各领域排名靠前的律师撰写该领域的法律实务指南。我们非常荣幸受邀成为首个中国证券化实务指南的独家撰稿人。作为中国领先的证券化法律解决方案提供方之一，中伦积累了为发行人、投资者和各类金融机构提供证券化法律服务的丰富经验。截至 2018 年末，我们已经协助逾 450 单资产证券化项目成功发行，发行总规模累计超过 1.5 万亿元（CNABS 数据）。在深耕国内市场的同时，我们还协助多单信贷资产证券化项目通过债券通向国际投资者成功发行。我们注意到了外国参与方对中国证券化市场的浓厚兴趣，但长期缺乏系统化了解中国证券化市场的渠道。因此，我们在钱伯斯工作人员的鼎力支持下，花费三个多月时间，写成了本中英文版指南，冀望帮助国内外各类主体对中国的资产证券化市场的基本概念以及相关法律法规和监管政策形成全局性的认识。

Securitisation in China has grown exponentially in recent years, and has become increasingly attractive to all sorts of domestic and foreign market participants. As one of the internationally-recognized legal profession research firm, each year Chambers & Partners publishes the ranking of world-renowned legal practitioners, and invite highly ranked lawyers to provide their insights on their respective sphere of practice. We feel deeply honoured to be invited as the exclusive contributor to the first Chambers guide on the securitisation practice in China. As one of the leading securitisation legal solution providers in China, Zhong Lun has rich experience in providing issuers, investors and financial intermediaries with satisfactory services in the securitisation area. As of the end of 2018, we have assisted in the successful issuance of over 450 securitisation products, the aggregated issuance amount of which totals over 1.5 trillion yuan (data from CNABS). Aside from the domestic market, we have also assisted in the successful issuance of multiple credit asset securitisations to international investors via the Bond Connect. During the course we have become aware of the keen interest of the foreign parties in China's securitisation market, and the lack of systematic information on China's securitisation market. It is for that reason that we, with the kind support of the Chambers staff, worked on this Guide for over three months before it is presented here in both Chinese and English, in the hope that it could provide some assistance in forming a panoramic view of the basic concepts as well as the relevant legal and regulatory elements of China's securitisation market for interested parties both home and abroad.

与所有其他地区的“钱伯斯证券化指南”类似，本指南包含九个相互关联的部分，以便于读者比较各个地区的具体实践。该出版物的前三部分主要总结了对证券

化交易有显著影响的一般性适用法律，包括有关破产、基础资产转让有效性、税收、会计等方面的规定。第四部分主要涵盖了专门适用于证券化的有关法律法规，包括信息披露，信用风险自留，评级机构监管，证券化相关资本和流动性要求，证券化相关衍生品监管，特殊目的载体的形式，增信措施和投资者保护等方面的规则。在总结完毕前述监管政策后，第五部分主要描述证券化业务中涉及的交易文件及其常用条款。第六部分介绍了证券化的执行制度，以及违规行为的潜在法律责任和处罚规定。第七部分介绍了证券化各方的角色和责任，包括发行人，发起机构，承销机构，资产服务机构，投资者和受托人的主要责任、义务和权利。第八部分简要介绍了合成证券化在中国的监管现状。最后，第九部分总结了不同类型金融资产及其适用的不同类型证券化交易结构。

The Guide is presented with nine inter-related sections, which is uniform with the Chambers securitisation guide in all other regions to provide a comparative basis. The first three sections of the Guide summarise the ways that various types of laws of general application will almost certainly affect securitisation transactions, including those regarding insolvency, transfer validity of underlying assets, tax, and accounting issues. Section four deals with the regulations and laws that have been adopted specifically relating to securitisation, including regulations on disclosure, credit risk retention, rating agency regulation, capital and liquidity requirements related to securitisation, derivative regulation related to securitisations, forms of SPVs, credit enhancement, and investor protection rules. After regulatory review, section five focuses on the documentations involved in securitization transactions and the commonly used terms and provisions. Section six introduces the enforcement regime of the securitisation, and potential liabilities and sanctions of non-compliance. Section seven covers the roles and responsibilities of the parties to securitisations, including principal responsibilities, obligations and rights of issuers, sponsors, underwriters and placement agents, servicers, investors and trustees. A brief discussion on the regulatory situation of synthetic securitisation constitutes section eight. Finally, section nine concludes with different types of financial assets and their applicable different types of transaction structures.

另一方面，应该指出的是，证券化是一种高度复杂的金融产品，并且对监管变化高度敏感。当前证券化业务仍处于试点阶段，市场情况和监管体制保持快速发展态势，结构创新、资产创新以及新的市场参与者仍在不断涌现，这对于理解中国的资产证券化业务尤为重要。我们尽最大努力在本指南中涵盖本领域最新的问题，但由于我国资产证券化业务在立法和监管方面处于持续发展的过程中，同时为了避免文本过于冗长，本指南并非涵盖所有中国证券化业务内容的百科全书。还应该注意的，尽管中国法律体系有时与包括美国 and 英国在内的主要证券化市场的法律体系在很大程度上具有可比性，但有时也可能存在实质的不同之处。本指南中的英文术语采用了与中国法下概念最接近的术语，但在各个国家的法律体系下可能存在不同的理解或解释。就特定问题相关方应该依

赖于专业律师的意见。与此同时，我们也很乐意回答读者对本指南可能提出的任何问题。

Securitisation is a form of highly complex financial product and is affected acutely by regulatory changes. This is even more true given that the securitisation business in China remains a pilot programme, and the market reality and regulatory regime continue to be a rapidly developing landscape. Every now and then new variations of structure are experimented with, new kinds of underlying assets are used, and new kinds of players emerge. This Guide represents our best effort to describe the issues to date, but with the continued development of legislation and regulation in the field of securitization, and to avoid burdening the readers with an overextensive laundry list, the Guide is not intended to be an all-encompassing encyclopaedia with regard to China's securitisation market. Additionally, readers should bear in mind that, though largely comparable, Chinese legal system differs sometimes substantially from those in predominant securitisation markets including the US and the UK. English terminologies in this Guide represent the closest terms to the actual Chinese concepts, but there may be different understandings or interpretations under respective legal systems. Interested parties should rely on professional counsel on specific issues. Meanwhile, we are also happily obliged to answer any question the readers may have on this Guide.

最后，谨在此对参与本指南撰写的各位中伦同事，以及钱伯斯的各位朋友致以诚挚的感谢。本指南英文部分已经由钱伯斯《2019 年全球证券化法律实务指南》出版，详情请见 <https://practiceguides.chambers.com/practice-guides/securitisation-2019>。

Lastly, but certainly not least, we would like to take the chance to express our sincere gratitude to our colleagues at Zhong Lun, as well as our friends at Chambers for their indispensable efforts in writing this Guide. English version of this Guide has been published by Chambers in the 2019 Chambers Global Practice Guide - Securitisation, available at <https://practiceguides.chambers.com/practice-guides/securitisation-2019>.

■ 1 交易结构适用的一般性法律

Structurally Embedded Laws of General Application

1.1 破产法

Insolvency Laws

破产法¹对于资产证券化的开展起着至关重要的作用，因为在绝大多数资产证券化交易中，基础资产与发起机构的破产隔离²是首要的法律目标。金融资产与发起机构的破产隔离是否以“真实出售”为前提，因不同的交易结构而有所不同（“真实出售”从法律和会计角度可能存在不同的理解，除第 3 会计规则及相关问题 部分外，本指南中的“真实出售”主要从法律角度进行分析）。在银行间债券市场发行的信贷资产证券化、信托型资产支持票据业务（具体结构在后文第 9.2 常见结构 部分阐述）中，基础资产是由发起机构通过信托的方式转移给特殊目的信托，基础资产与发起机构的破产隔离效果直接由《中华人民共和国信托法》第十五条所直接规定，因此不涉及“真实出售”的问题。而在交易所开展的企业资产证券化业务中，基础资产是由原始权益人出售和转让给作为特殊目的载体的资产支持专项计划，该基础资产转移行为是否构成“真实出售”即会对基础资产能否实现与原始权益人的破产隔离起到决定性的作用。

Insolvency laws are crucial for securitisation, because a primary legal objective for most securitisation transactions is the insulation of the underlying assets from the originator's bankruptcy risks. Whether 'true sale' is a precondition for the bankruptcy remoteness of financial assets depends on the type and structure of the transaction (nb, the concept of 'true sale' may be interpreted differently from legal and accounting perspectives; apart from in 3 Accounting Rules and Issues, below, the analyses of 'true sale' in this guide are based on the legal perspective). For a 'credit asset securitisation' or a 'trust-type asset-backed note' transaction (the structure of which is elaborated in 9.2 Common Structures, below) in the Interbank Bond Market, the underlying assets are entrusted by an originator into a special purpose trust (SPT), and the underlying assets' bankruptcy remoteness is explicitly provided for under Article 15 of the Trust Law of the People's Republic of China (the 'Trust Law'), meaning that 'true sale' is not an issue for such transactions. However, in the case of a 'business asset securitisation' carried out on securities exchanges and where the underlying assets are transferred from an originator to a special purpose vehicle (SPV), called an 'asset-backed special scheme', the question of whether or not the transfer of the underlying assets constitutes a 'true

¹ 译注 Note on translation: 英文中的“Insolvency Law”泛指在主体缺乏偿付能力时对于主体治理、债务偿还等方面的所有规定，包括接管、托管等程序。在中国法中此类规定主要集中于《企业破产法》。另有零星规定散见于金融机构相关管理办法中关于接管、托管等情况的相关规定。此处概称为“破产法”。

² 译注 Note on translation: "Bankruptcy Remoteness"直译为“破产远离”，但在中国习惯称为“破产隔离”，故此处采取后一种翻译。

sale' is a decisive factor in determining the underlying assets' remoteness from the originator's bankruptcy risks.

真实出售与有担保的贷款是两种法律关系。根据《中华人民共和国合同法》（以下简称“《合同法》”）的有关规定，买卖合同是出卖人转移标的物的所有权于买受人，买受人支付价款的合同；借款合同是借款人向贷款人借款，到期返还借款并支付利息的合同。这两者主要的不同之处在于：在买卖交易中，买卖标的的所有权将由卖方转移给买方；而在担保贷款交易中，担保物的权属并不由借款人转移给贷款人，借款人只是在担保物上为贷款人设定了一项担保物权。

A true sale and a secured loan are two different legal relationships. According to relevant provisions of the Contract Law of the People's Republic of China (the 'Contract Law'), a sales contract is an agreement by which a seller transfers the ownership of an underlying asset to a buyer, and the buyer pays a purchase price for the underlying asset; a loan contract is an agreement whereby a borrower borrows money from a lender, and pays interest and repays the principal upon maturity of the loan. The main difference between the two transactions is that in a sales transaction, the ownership of the underlying asset will be transferred from the seller to the buyer, whereas in a secured loan transaction the borrower solely grants the lender a security interest over the underlying asset, instead of transferring the ownership of the asset.

“真实出售”是资产证券化业务中凸显出的热点问题，而中国开展资产证券化的历史还比较短，对于“真实出售”的构成要素或判断标准，中国司法实践尚未形成明确和统一的标准或指导意见。根据有限的相关司法案例，人民法院在判断一项交易的性质时强调尊重当事人意思自治，因此主要从相关交易合同的表述来探究当事人的真实意思表示是否符合《合同法》所定义的买卖合同的特征（所有权转移+对价），而较少运用公平原则（从风险与报酬转移的角度）去推翻当事人在交易合同中的明确意思表示。但是，如果当事人在达成借款交易的同时或在存在既有债权的情况下，借款人将其财产转让给贷款人并约定在还清贷款后取回财产，人民法院可能会根据交易实质将财产转让认定为让与担保，而参考担保贷款法律关系进行处理。

'True sale' is a hot issue in asset securitisation practice. China has a relatively short history of securitisation, and judicial practice has not come to a clear consensus over its constitutive elements or adjudicative standards. Based on limited judicial cases, a People's Court, in deciding the nature of a deal, tends to respect party autonomy, thus taking an approach whereby the text of the contract is closely analysed to determine whether its true meaning complies with the characteristics of a sales contract as defined under the Contract Law (ie, transfer of ownership versus consideration). The courts seldom use the equity principle (from the perspective of the transfer of risks and

rewards) to overturn the explicit expressions of will of the parties to a contract. However, in a transaction where a borrower transfers an asset to a lender under a loan agreement or with a pre-existing loan between them, and both parties agree that the borrower may take back the asset after paying off the debt, a People's Court may recognise the transfer of the asset as being essentially a security interest in the form of title alienation, and therefore deal with the issue with reference to the legal framework for secured loans.

就被转移的资产而言，真实出售相较于担保贷款更有利于资产的取得者。在担保贷款交易中，当借款人不能还款时，贷款人不能直接取得担保物所有权，而有权通过拍卖、变卖、折价等方式取得担保物的变现价款，用于偿还贷款债权，超过贷款债权金额的变现价款应当返还给借款人。在一项真实出售交易中，受让人可以确定地取得标的资产的所有权，除非有相反约定，标的资产所实现的任何现金价值及其他收益都将属于受让人。

In respect of the 'transferred' assets, a true sale usually provides stronger protection for the acquirer of the assets compared to a secured loan. In a secured loan transaction, when a borrower is unable to repay the loan, the lender cannot directly gain ownership of the collateral³, but is only entitled to the proceeds from auction, sale or compensation based on the estimated price of the collateral for the sake of repaying the loan, and any proceeds exceeding the amount of the debt should be returned to the borrower. In a true sale, on the other hand, the transferee can assuredly obtain the ownership of the underlying asset, and all the cash value and other proceeds arising from the underlying assets belong to the transferee, unless the parties agree otherwise.

根据《中华人民共和国破产法》（以下简称“《破产法》”）第三十条的规定，如在关于转让方（作为债务人）的破产申请受理时基础资产已经由转让方合法有效地转移给他人，则基础资产将不作为转让方的破产财产，除非该转让行为属于《破产法》第三十一条规定的破产申请受理前一年内可被撤销的行为（包括无偿转让、以明显不合理的价格进行交易）。而如果债务人仅以某项特定财产为其借款提供担保，根据相关规定，当债务人进入破产程序后，该财产将被认定为债务人财产，但担保权人对特定财产享有优先受偿的权利。根据《破产法》第十九条，人民法院受理破产申请后，有关债务人财产的保全措施应当

³ 译注 Note on translation: “Collateral” 一词一般译为“抵押物”，但在英文证券化著述中“collateral”有时指证券化项目中产生现金流的资产，而并不当然指用于创设担保权益的担保物。为避免混淆，本指南英文版中的“collateral”一律指中国法项下的抵押物或质物，证券化项目的基础资产对应英文表述为“underlying assets”。In English securitization literatures "collateral" sometimes refers to the assets which generate the cash flow for a securitization, and does not mean, per se, collaterals in which security interests are granted. For the avoidance of confusion, the word "collateral" used here refers to the asset that is mortgaged or pledged under PRC laws, whereas the cash-generating assets of a securitization deal is referred to as "underlying assets".

解除，执行程序应当中止，这意味着担保权人将暂停行使对该财产的担保权利，而需等待破产财产的变价和分配。因此，如果一项交易属于担保贷款，则债权人对担保物的权利行使将受到破产程序的影响，包括时间的拖延和变现决策流程，而在真实出售情况下转让方的破产程序不会对受让方行使基础资产有关权利产生任何影响。

Pursuant to Article 30 of the Bankruptcy Law of the People's Republic of China (the 'Bankruptcy Law'), if the underlying assets have already been legally transferred to others when a bankruptcy petition pertaining to a transferor (as the debtor) is accepted by a court, then the underlying assets will not be held as part of the bankruptcy estate of the transferor, unless the transfer falls within the scope of revocable transfers (including unrequited transfer and transaction at manifestly unreasonable price) within one year prior to the acceptance of the bankruptcy petition, as provided under Article 31 of the Bankruptcy Law. On the other hand, if a debtor only creates security rights over certain assets, then according to applicable laws, when the debtor enters into a bankruptcy proceeding, these assets shall be part of the debtor's bankruptcy estate, but the secured party has a priority claim on the assets. Under Article 19 of the Bankruptcy Law, after a court accepts a bankruptcy petition, preservation measures pertaining to the debtor's estate shall be lifted and enforcement procedures over the estate shall be suspended, which means the secured party must delay the exercise of security rights over the estate and wait for the liquidation of the estate. To conclude, in a secured loan transaction, a creditor's rights over the collateral will be affected by the debtor's bankruptcy procedure in terms of the time delay and the decision-making processes of the liquidation; in a true sale situation, by contrast, a transferor's bankruptcy will not have any impact on the transferee's exercise of rights over the underlying assets.

资产证券化交易中一般均要求法律顾问对基础资产能否实现破产隔离发表法律意见。法律顾问能否发表实现破产隔离的法律意见，一般而言取决于两个方面：一是基础资产本身的法律性质；二是交易结构的设计。就第一点而言，如果基础资产是发起机构未来将取得的应收账款或者应收账款的实现有赖于发起机构的持续经营或义务的履行（例如高速公路收费权、物业租金债权），则法律顾问将很难发表基础资产实现了破产隔离的法律意见。在这类项目中，如果发起机构能够提供较强的主体信用作为补充，投资者往往也能够接受该类资产。

In a securitisation transaction, legal counsel will normally be required to issue an opinion on the bankruptcy remoteness of the underlying assets. Whether the legal counsel can issue a clear opinion generally depends on two aspects, the first being the legal character of the underlying assets, and the second the design of the deal structure. As for the first aspect, if the underlying assets are future receivables, or the payment on the receivables depends on the continuing operation or performance of duties on the originator's side (like freeway toll rights and property rent claims), then it will be

difficult for the legal counsel to issue an opinion that the underlying assets can achieve bankruptcy remoteness. In this type of projects, if the originator can provide strong credit enhancement with its own or third-party corporate credit as a supplement, investors may still accept such assets.

就交易结构而言，是否要求出具法律意见书也需要分情况讨论。在银行间债券市场开展的信贷资产证券化和信托型资产支持票据业务中，法律顾问一般能够直接基于《信托法》第十五条的规定发表破产隔离法律意见，而作为发表该意见的前提条件，（1）信托需合法有效设立且信托财产已实际交付，（2）发起机构不是唯一受益人，（3）信托的设立未损害发起机构债权人的利益。在交易所市场开展的企业资产证券化业务中，作为发表破产隔离法律意见的前提，一般需要：（1）相关交易文件中有关于基础资产转移的真实、明确的意思表示；（2）交易文件所约定的基础资产转移的条件已经满足，包括但不限于转让对价的支付。同时，由于无偿或低价转让财产可能损害发起机构债权人的利益，并可能导致该转让行为根据《合同法》第七十四条及《破产法》第三十一条被撤销，因此在前述各类资产证券化业务中，法律顾问一般均假设发起机构信托/转让基础资产的行为均取得了合理对价。

With regard to the deal structure, the issue of obtaining legal opinions also depends on the particular situation. For credit asset securitisation and trust type asset-backed notes transactions carried out in the Interbank Bond Market, legal counsel is usually able to issue an opinion confirming bankruptcy remoteness pursuant to Article 15 of the Trust Law, provided that the trust has been lawfully and effectively set up and the trust properties have been actually delivered, the settlor is not the sole beneficiary of the trust, and the creation of the trust does not jeopardise the interests of the settlor's creditors. For business asset securitisation carried out on the securities exchanges, the issuance of an opinion affirming bankruptcy remoteness is conditional on the inclusion of true and explicit expressions of the transferor's will to transfer the underlying assets in the relevant transaction documents, and the satisfaction of the conditions provided in the transaction documents for the transfer of the underlying assets, including but not limited to the payment of the purchase price. Meanwhile, as unrequited transfer and below-market-price transfer may jeopardise the interests of the originator's creditors and can be revoked pursuant to Article 74 of the Contract Law and Article 31 of the Bankruptcy Law, legal counsel issuing affirmative opinions on bankruptcy remoteness in the aforementioned different types of securitisation transaction usually makes the assumption that the originator receives reasonable consideration for the transfer of the underlying assets.

1.2 特殊目的载体 (SPV)

Special-Purpose Vehicles (SPV)

在中国，资产证券化所能采取的交易结构基本上是在相关监管规定里面严格限定的，只能通过特殊目的信托（在信贷资产证券化和信托型资产支持票据业务中）或资产支持专项计划（在企业资产证券化业务中）来实现基础资产与发起机构的风险隔离。无论是特殊目的信托或资产支持专项计划，其都不构成法律上的实体（因此不适合被称为“特殊目的实体”或“SPE”），而是一种合同关系，由信托受托人或计划管理人代表信托或专项计划从事相关的交易行为或管理活动，受托人或计划管理人可进一步委托资产服务机构、托管银行等机构为 SPV 提供服务。虽然在实践中，投资者可以通过合伙型私募基金投资购买各类金融资产，但该类业务被纳入私募基金业务，而非标准的资产证券化业务，两者适用的法律法规是不同的。

In China, the structures that a securitisation deal may adopt are limited to those defined under relevant regulations; namely, only SPTs (for credit asset securitisation and trust type asset-backed notes) or asset-backed special schemes (for business asset securitisation) can be used to achieve the bankruptcy remoteness of underlying assets. Neither SPTs nor asset-backed special schemes constitute legal entities (this is why it may not be appropriate to refer to them as 'special-purpose entities'), but rather form contractual relationships, where the trustee or scheme manager conducts transactions or administrative activities on behalf of the trust or the special scheme, and may further engage the servicer, fund custodian and other institutions to provide services for the SPV. Though, in practice, investors may purchase various financial assets through private equity funds in the form of limited partnerships, these transactions are classified as private equity fund business instead of standard securitisation, and are therefore subject to different laws and regulations.

1.3 金融资产转让

Transfer of Financial Assets

在中国法下，债权的转让存在“对内效力”和“对外效力”的区分。债权转让的对内效力是指债权转让在转让方和受让方之间的效力。就此而言，只要约定资产转让的相关合同（“转让合同”）已生效且转让合同约定的资产转让的前提条件（如有，例如受让该资产的 SPV 的有效设立、转让价款的支付）已经满足，则资产的转移即可对抗转让方。相关联地，债权的从权利（包括保证担保、抵押权、质权等）也会随着债权的转让而一并转让给受让方。

Under PRC laws, the transfer of a creditor's claim can have both 'internal effect' and 'external effect'. The internal effect of the transfer refers to its effect in relation to the transferor and the transferee. In this regard, as long as the contract providing for the transfer of assets (transfer agreement) has come into effect, and the preconditions of the transfer provided in the transfer agreement (such as the establishment of the SPV that

will receive the assets, and the payment of the purchase price) have been met, then the transfer of the assets will be effective against the transferor. Correspondingly, the ancillary rights of the creditor's claim (including rights derived from guaranty, mortgage, pledge, etc) will be transferred to the transferee along with the creditor's claim.

债权转让的对外效力一般是指债权转让对债务人的效力，根据《合同法》第八十条的规定，债权转让未通知债务人的，该转让对债务人不发生效力。这意味着，如果债权转让尚未通知债务人，受让方将不能自行向债务人主张债权。债权转让的对外效力问题还可以扩大至对转让方的债权人 and 不特定第三人的效力，例如转让方在与受让方签订债权转让合同后、发送债权转让通知前，又将同一债权转让给第三人的，究竟哪一方可以取得该债权？又如，在转让方已将债权转让给受让方而尚未通知债务人的情况下，如果转让方的债权人为偿债目的申请法院查封或冻结已转让的债权，受让方可否对法院的强制执行提出有效的执行异议并排除法院的执行？由于中国法律尚未建立债权转让的公示制度，且最高人民法院就该等问题未出台明确的司法解释，理论上存在一定争议且司法实践并不统一。虽然中国人民银行发布的《应收账款质押登记办法》允许当事人通过中国人民银行征信中心的登记公示系统办理应收账款转让登记，但该登记由于缺乏上位法的明确支持，其法律效力处于不确定状态。因此，就目前而言，使债权转让足以对抗转让方债权人及不特定第三人的比较确定的方法仍然是向债务人发送债权转让通知。另外，就债权所附随的抵押权、质权而言，由于该等权利往往需要通过变更登记或转移占有作为公示和对抗不特定善意第三人的条件，如果抵押权、质权的转让没有办理相应登记或交付手续，而转让方在未经受让方同意的情况下自行或配合抵押人/出质人对抵押物或质物进行了处分，则受让方很可能无法对抗取得抵押物/质物或相关权利的善意第三人。

The external effect of the transfer of a creditor's claim generally means the effect of the transfer in relation to the debtor. According to Article 80 of the Contract Law, any transfer of a creditor's claim is invalid against the debtor unless the debtor has been informed. This means that if a debtor has not received notice of the transfer of the creditor's claim, the transferee cannot, on its own, assert the right against the debtor. The issue of external effect of transfer of a creditor's claim can also extend to the effect on the creditors of the transferor and any third parties. For example, if a transferor signs a transfer agreement with a transferee, and before giving notice of the transfer, it assigns the same claim to a third party, then the question of which party can assert a right on the claim is potentially fraught. Another example is that, in the case where a transferor has transferred a creditor's claim to a transferee but no notice was given to the debtor, and a creditor of the transferor files with a court for a seizure or stay on the transferred claim to satisfy its debt against the transferor, can the transferee file a valid objection to the court's enforcement and exclude the enforcement? Since China has not

established a public notice system for the transfer of creditor's claims, and no clear and specific judicial interpretation has been given on such questions by the Supreme Court, such questions remain theoretically controversial and are faced with different treatments in judicial practice. Although the People's Bank of China (PBOC) has published the Measures for the Pledge Registration of Account Receivables, which allow parties to register the transfer of account receivables with the registration and public notice system run by the Credit Reference Centre, PBOC, the legal force of the registration is uncertain due to a lack of support in higher-level law. Thus, at present, a relatively safe measure to make a transfer of creditor's claim enforceable against the creditors of the transferor and any third parties is to notify the debtor. In addition, as to the mortgage and pledge securing the creditor's claim, as transfer of such security interests often requires a change of registration or transfer of possession as a method of notice and perfection against unknown bona-fide third parties, if the transferor, without consent from the transferee, disposes of the collaterals on its own or in collaboration with the mortgagor/pledgor before such change of registration and transfer of possession could be effected, then the transferor is likely to lose its claim against the bona-fide third party that obtains such collaterals.

如上所述，为了使金融资产转让确定地产生对抗债务人、转让方债权人及善意第三人的效力，需要进一步采取若干权利完善措施，通常包括向债务人发送债权转让通知、办理抵押权/质权转移的变更登记手续、移交质物（针对动产）的占有等，具体可见下文第 **5.3 主要权利完善条款** 部分。

In summary, to make a transfer of financial assets definitively enforceable against the debtors, transferor's creditors, and bona-fide third parties, certain perfection measures are required. These usually include notifying the debtors of the transfer, change of mortgage/pledge registration, transfer of possession of the pledged movables, etc. For more detailed analysis, see **5.3 Principal Perfection Provisions**, below.

在一项真实出售中，为了保护受让方的权利，一般会约定在特定情况下采取前面所提到的这些权利完善措施；而对于一项担保贷款交易而言，由于不存在金融资产的转移，也就不存在相关要求。

In a true sale, for the purpose of transferee protection, the perfection measures mentioned above are usually foreseen for certain circumstances. In the case of secured loans, since there is no transfer of financial assets, there are no such requirements.

在中国的资产证券化实践中，考虑到有利于资产回收、维护发起机构客户关系、降低交易成本等因素，在正常情况下一般不要求在基础资产交割时即采取权利完善措施，而只在发生一些对交易不利的触发事件（通常称为“权利完善事件”）后才要求采取权利完善措施。

In normal securitisation practice in China, with a view to facilitating the collection of the financial assets, maintaining the originators' client relationship, and keeping the transaction costs under control, perfection measures are often not required at the delivery of the underlying assets, and are only required upon the occurrence of events unfavourable for the transaction (often called 'perfection events').

如前面提到的，如果尚未发送债权转让通知，受让方将不能直接向债务人主张还款，但受让方有权要求转让方（通常继续担任资产服务机构）将收到的回收款转付给受让方。就债权附属的抵押权/质权而言，如果尚未办理相应的权利转移变更登记或交付质物，受让方可能受到转让方违约处置抵押物/质物的行为的损害，受让方可能无法向取得抵押物/质物的善意第三人主张权利；为缓解该等风险，交易文件中一般会约定相关违约责任，包括要求转让方将相应资产作为不合格资产赎回等。

As mentioned above, a transferee cannot directly assert a claim against a debtor until the debtor has been given notice of the transfer, but the transferee may require the transferor (often acting as the servicer) to remit the collections arising from the assets. With respect to the mortgage or pledge securing the creditor's claim, the transferee may be harmed by the transferor's disposal of the collaterals, and the transferee's right may not be enforceable against a bona-fide third party. To mitigate such risks, responsibilities for acts in breach of the agreement are often provided in the transaction documents, including those requiring the transferor to repurchase the damaged assets as ineligible assets.

■ 2 税法及相关问题

Tax Laws and Issues

2.1 税法与避税

Taxes and Tax Avoidance

截至目前，我国专门针对资产证券化的税收文件仅有《财政部、国家税务总局关于信贷资产证券化有关税收政策问题的通知》（财税[2006] 5 号文）（以下简称“5 号文”）。该文件是针对银行信贷资产证券化试点而发布的税收规范性文件。针对资产支持票据和企业资产证券化，暂未出台特别的税收文件对其税收问题进行规范，需遵守一般性税法规定。

At present, China has only one regulation that deals exclusively with tax issues in respect of securitisation, namely the Notice of the Ministry of Finance and the State Administration of Taxation on Relevant Issues concerning Taxation Policies on the Securitisation of Credit Assets (Ministry of Finance [2006] No 5; hereinafter 'Document No 5'). Document No 5 was published with reference to credit asset securitisation pilot programmes. No special tax regulation in respect of asset-backed notes (ABNs) or business asset securitisation has been published yet. Therefore, tax issues arising out of ABNs and business asset securitisation are only subject to general tax laws and regulations.

发起机构转让基础资产的过程中主要涉及所得税和印花税。在所得税方面，如果发起机构转让资产的价格大于这些资产的计税基础（即历史成本，指取得该项资产时实际发生的支出），就取得的财产转让应纳税所得额部分将需要缴纳企业所得税。相反，如果发起机构转让资产的价格小于资产的计税基础而造成转让损失，在按照公允价格转让的情况下，这些损失也可以由发起机构在法定期限内向主管税务机关申报后在企业所得税税前扣除。由于实践中金融资产转让一般均为平价或折价转让，因此这个过程一般不需要缴纳所得税。

Potential taxes on the transfer of underlying assets mainly include income taxes and stamp duties. With regard to income taxes, if the transfer price is greater than the tax basis of the transferred assets (ie, the historical cost or the actual amount of costs incurred by the acquisition of the assets), then enterprise income tax may be due on the taxable income. On the other hand, if the transfer price is less than the tax basis of the transferred assets, leading to losses being incurred by the transferor, then the transferor may deduct such losses from its taxable income, provided that the transfer price has been based on fair market value, and the transferor has made a timely filing with the competent tax authority. In practice, since the financial assets are usually transferred at parity or discount to their historical cost, it is normally the case that no income tax is due on the transfer.

在印花税方面，根据《中华人民共和国印花税法暂行条例》规定，在中华人民共和国境内书立、领受该条例所列举凭证的单位和个人，都是印花税的纳税义务人，需要缴纳印花税。针对信贷资产证券化项目的 5 号文规定了相应的免税优惠，对项目涉及的信托合同等其他为证券化交易提供服务的机构签订的应税合同，及为信托设立的资金账簿，暂免征收印花税。目前无针对其他资产证券化业务的特殊免税规定，根据《印花税法暂行条例》的规定，对于在资产转移过程中签订的属于印花税法征税范围的基础资产转让合同，双方都需要缴纳印花税。

With regard to stamp duties, according to the Interim Regulations of the People's Republic of China on Stamp Duty (the 'SD Interim Regulations'), entities and individuals who execute or receive documents specified in the SD Interim Regulations within the territory of the People's Republic of China shall be subject to stamp duty. Document No 5 provides certain exemptions from stamp duties for credit asset securitisation, including exemption for agreements, such as trust agreements, that the entities providing services to the securitisation transaction enter into, as well as exemption for the fund accounting books established for the trust. So far, there are no other special tax exemptions for other types of asset securitisation. Therefore, parties to asset transfer agreements that are subject to stamp duty should pay stamp duty in accordance with the SD Interim Regulations.

2.2 SPV 的税务处理

Taxes on SPVs

在资产证券化业务中，基础资产转让环节一般不涉及 SPV 应缴纳的税收；就 SPV 从基础资产获取的收益，可能涉及的税收主要是企业所得税和增值税。

In asset securitisation, the transfer of underlying assets to the SPVs generally does not give rise to a tax burden for the SPV. On the other hand, income derived from the underlying assets by SPVs might be subject to enterprise income tax and value-added tax.

所得税

Income Tax

针对信贷资产证券化项目，根据 5 号文的相关规定，如年度中受托机构已将信托项目收益分配给机构投资人，机构投资人需就收益部分缴纳企业所得税，而信托环节无须缴纳企业所得税，以避免重复征税；但就受托机构在年度中未分配的信托项目收益，在信托环节需由受托机构申报缴纳企业所得税；如受托机构将已缴纳所得税的收益再分配给投资者，可以视同税后收益进行所得税处理，也即投资者无须再缴纳所得税，以避免重复征税。

With regard to credit asset securitisation, according to Document No 5, if the trustee has allocated the income of the trust to institutional investors during the fiscal year, then the institutional investors shall pay the enterprise income tax on this income and, in order to avoid double taxation, no income tax needs to be paid by the trust. However, the unallocated trust income during the fiscal year shall be subject to enterprise income tax at the trust level. If the income allocated to the investors has already been taxed, then to avoid double taxation, such income can be deemed after-tax income, meaning that the investors do not need to pay the income tax thereon.

就其他类型的资产证券化业务而言，并无专门性的税收规定，按照《企业所得税法》的规定，“企业”和“其他取得收入的组织”为企业所得税的纳税义务人。无论 SPV 是特定目的信托还是资产支持专项计划，均不构成法律上的“组织”，因此无需缴纳企业所得税。但机构投资者因持有各类资产支持证券而取得的利息或收益，或买卖资产支持证券获得的差价收入，应当按照企业所得税的法律规定缴纳企业所得税。

With regard to other types of securitisation, there is no special regulation on the income tax issues arising therefrom. According to the Enterprise Income Tax Law of the People's Republic of China, 'enterprises' and "*other organisations that have incomes*" shall pay the enterprise income tax. Whether the SPV is an SPT or asset-backed special scheme, neither constitutes an 'organisation' under the law, and therefore neither is not subject to enterprise income tax. That said, the interest or income acquired by institutional investors holding asset-backed securities, or the spread acquired from the trading of asset-backed securities, is still subject to enterprise income tax according to the laws.

增值税

Value-added Tax

如基础资产为贷款等生息资产，在基础资产转移至 SPV 后，SPV 将取得相应的利息或收益。根据《财政部、国家税务总局关于明确金融房地产开发教育辅助服务等增值税政策的通知》（财税[2016]140 号），资管产品运营过程中发生的增值税应税行为，以资管产品管理人为增值税纳税人。该规定同样适用于资产证券化业务，因此 SPV 的受托人或管理人应当就基础资产产生的利息或收益缴纳增值税。另外，在一些未来应收账款证券化项目（例如公路收费权证券化）中，原始权益人有可能对计划管理人从基础资产获得的现金流承诺保底，用以保障投资本金及一定水平的收益率，在此情况下，税务部门可能认为该项交易的实质为贷款，从而要求对计划管理人从原始权益人处取得的收益征收增值税。

If the underlying assets are interest-bearing assets such as loans, then after transfer to the SPV, the SPV will acquire rights to such interest or income. According to the Notice

of the Ministry of Finance and the State Administration of Taxation on Specifying the Value-added Tax Policies for Finance, Real Estate Development, Educational Support Services (Ministry of Finance [2016] No 140), the manager of the asset management products shall pay value-added tax (VAT) on its taxable activities during the operation of the asset management products. This rule also applies to securitisation, meaning that the trustee or the manager of the SPV shall pay VAT on the interest or income generated by the underlying assets. Meanwhile, for some types of future receivables securitisation (such as highway toll securitisation), the originator might provide guaranty to the scheme manager on the cash flow of the underlying assets, thus securing the investment principal and a certain level of rate of return. Under such circumstances, the tax authorities might deem such transactions as essentially loans, therefore requiring the scheme manager to pay VAT on the income obtained from the originator.

2.3 税务与跨境资产转让

Taxes on Transfers Crossing Borders

就中国目前的资产证券化实践而言，尚未有境外机构以其金融资产在中国境内发行资产支持证券，而由于外汇管制的原因，中国境内机构将其金融资产转让给境外 SPV 用于发行资产支持证券的交易也非常有限，以下仅对后一种情形下涉及的税收问题进行讨论。

With regard to the current securitisation practice in China, no foreign entity has yet issued any asset-backed securities in China with its financial assets. Because of the foreign exchange control, transactions where Chinese institutions transfer their financial assets to foreign SPVs for issuing asset-backed securities are also rare. The following discussion only deals with the tax issues of the latter scenario.

中国法律法规目前无针对中国境内金融资产转让到境外的专门税收规定，因此如果涉及到跨国的资产转让，相关方仍需要遵守有关金融资产转让的一般性税收规定。一般而言，如资产转让构成真实出售，境外 SPV 作为受让方并未在资产转让环节取得收入，境外投资者也并未从中国境内取得收入，不会涉及预提所得税的问题。但如果位于中国境内的发起机构和境外 SPV（或其投资者）之间的交易在税务上被认定是对发起机构的贷款时，可能产生预提税的缴纳问题。

So far there is no special Chinese law or regulation for the transfer of domestic financial assets abroad. Therefore, the relevant parties in an overseas assets transfer shall still follow the general tax regulations on the transfer of financial assets. Generally, if the transfer of assets constitutes a true sale, the foreign SPV has not acquired income as transferee during the transfer, and the foreign investors have not acquired any income from China, then the transfer will not give rise to any withholding tax issue. However, if the transaction between an originator in China and an overseas SPV (or its investors)

is deemed from a tax perspective to be a loan to the originator, then there will be an issue of paying withholding tax.

此外，如果中国境内发起机构以避税为主要目的在境外设立导管公司进行资产证券化，可能涉及反避税调查问题。中国 2008 年生效的《中华人民共和国企业所得税法》及国家税务总局 2009 年颁布的《特别纳税调整实施办法（试行）》（国税发[2009]2 号）确立了一般反避税制度。根据一般反避税制度，导管公司很可能因为涉及滥用公司组织形式和利用避税港避税而被税务机关启动反避税调查。2017 年修订的《中华人民共和国企业所得税法》及其实施条例延续了该制度。由于目前跨国资产证券化业务较少，且该等转让缺乏可公开获取的信息，税收征管部门是否会将发起机构在境外设立 SPV 进行资产证券化的操作按照一般反避税制度进行处理，目前无法准确预知。

Additionally, if the Chinese originator sets up a conduit company for securitisation for tax avoidance purposes, it may be subject to anti-tax-avoidance investigation. The Enterprise Income Tax Law of the People's Republic of China, which became effective in 2008, and the Measures for the Implementation of Special Tax Adjustments (Trial Implementation) (State Administration of Taxation [2009] No 2), published by the State Administration of Taxation in 2008, have established the general anti-tax-avoidance system, according to which a conduit company may be subject to anti-tax-avoidance investigation by the tax authorities for suspected abusive use of corporation form and tax havens in order to avoid taxes. The Enterprise Income Tax Law of the People's Republic of China as amended in 2017, and the implementation rules thereof, reaffirmed this system. As the number of cross-border securitisation transactions is small and there is little public information on the asset transfers contained therein, it cannot be said for certain whether or not the tax authorities will handle the originator's establishment of foreign SPVs in securitisation under the general anti-tax-avoidance system.

2.4 其他税务问题

Other Taxes

除了上述主要税种，如果证券化交易中基础资产涉及不动产或股权（如中国的类 REITs 项目，目前是在资产证券化的法律框架下进行），可能还将涉及房产持有、交易相关的税种，包括房产税、土地增值税、契税，且股权转让常涉及企业所得税等。由于中国目前尚未出台针对类 REITs 交易的税收优惠政策，实践中需在交易结构设计时重点考虑税收问题，避免给发起机构或其关联方造成过重的税收负担，为此，该类交易一般避免直接转让不动产，而通过不动产持有公司的股权转让将不动产装入 SPV。

In addition to the aforementioned kinds of taxes, if the underlying assets in a securitisation transaction (for example quasi-REITs which are carried out within the securitisation legal framework) include real estate or equity interests, the transaction might also be subject to taxes related to real estate ownership and transactions, such as property tax, land value-added tax, and title deed tax, or enterprise income tax. Since China has not published any tax exemption policy for quasi-REITs transactions, in practice tax issues shall be given serious consideration when designing the transaction structure, in order to avoid heavy tax burdens for the originator or other related parties. To achieve this, the direct transfers of real estate shall be avoided in favour of transfers of equity rights in a company that holds the real estate to be transferred.

2.5 税务与法律意见

Obtaining Legal Opinion

如交易方认为有必要，可能会要求注册税务师出具专门的涉税鉴证意见，交易律师一般不就税务问题发表专门意见。

If necessary, transaction parties may ask accredited tax advisers for professional opinions concerning specific tax issues. Lawyers advising on a transaction do not usually provide opinions on specific tax issues.

■ 3 会计规则及相关问题

Accounting Rules and Issues

3.1 证券化会计准则中的法律问题

Legal Issues with Securitisation Accounting Rules

会计师对 SPV 合并问题和真实出售问题的判断在一定程度上取决于通过合同条款所反映出的交易实质。根据《企业会计准则第 33 号》，合并财务报表的合并范围应当以控制为基础予以确定。在判断控制问题时，会计师可能从三个方面进行判断：权力、可变回报、权力与回报之间的联系，其中第一项要素主要以转让合同、服务合同中所反映出的发起机构对 SPV 握有的权力来进行判断。在判断发起机构能否对金融资产终止确认时，根据《企业会计准则第 33 号》的规定，需判断发起机构是否已将金融资产所有权上几乎所有的风险和报酬转移给受让方，而这需要对交易文件的约定进行详细的考察，包括发起机构是否已转让收取现金流量的权利，如果没有，是否承担了资产现金流量过手的义务。在绝大多数资产证券化交易中，在发送债权转让通知前，发起机构仍承担了资产现金流量过手的义务，因此会计师需要进行“过手测试”，判断发起机构是否遵循了不垫款原则、不挪用原则、无延误原则，这涉及到对资产服务机构垫款及补偿、资产服务机构的资产管理方式、闲置资金投资、储备金账户的设置、现金流分配频率等方方面面交易安排的考察。

The accountant's determination regarding consolidation of SPV and true sale is, to some extent, based on the economic essence of the transaction reflected in the terms of the transaction agreements. According to the Accounting Standards for Business Enterprises No 33, published by the Ministry of Finance, the scope of consolidation for the consolidated financial statements shall be determined on the basis of control. When determining control, the accountant may consider three factors: power, variable returns, and the relationship between power and returns. For the assessment of the first factor, power, the originator's power over the SPV as reflected in the transfer agreement and the servicing agreement is determinative. Regarding the determination of whether the originator can de-recognise certain financial assets, according to the Accounting Standards for Business Enterprises No 33, factors taken into consideration shall include whether or not the originator has transferred almost all the risks and rewards relating to the ownership of the financial assets to the transferee. This requires detailed analysis of the provisions of the transaction documents, including whether the originator has transferred the rights to collect the cash flow, and if not, whether it has undertaken to pass on the cash flow of the financial assets. For most securitisation transactions, before sending the notice of transfer of debt claim, the originator still bears the obligation to pass on the cash flow of the financial assets. Therefore, the accountant needs to conduct the 'pass-through test' by examining whether the originator has complied with the 'no-advance', 'no-misappropriation' and 'no-delay' principles, which involves the inspection

on the advance payment and reimbursement by the servicer, asset management method of the servicer, investment of idle funds, establishment of reserve accounts, frequency of cash flow allocation, and many other aspects of the transaction.

3.2 证券化会计准则中法律问题的处理

Dealing with Legal Issues

为了实现终止确认的目标，法律顾问可能需要根据会计师的要求并在征得相关交易方同意的情况下对交易文件的具体条款进行修改。除此之外，根据《金融机构信贷资产证券化试点监督管理办法》（中国银行业监督管理委员会令 2005 年第 3 号）的规定，发起机构证明对被转让的信贷资产不再拥有实际的或者间接的控制，需要由执业律师出具法律意见书，表明发起机构与被转让的信贷资产实现了破产隔离。关于破产隔离法律意见的结论和一般要求，见上文第 **1.1 破产法** 部分。

For the purpose of de-recognising financial assets, at the request of the accountant, the legal counsel may have to modify the specific provisions of the transaction documents, subject to the agreement of the participating parties. Additionally, according to the Measures for Supervising and Administrating the Pilot Securitisation of Credit Assets of Financial Institutions (Order of CBRC [2005] No 3), a legal opinion from a practising lawyer is needed for proving that the originator does not have any actual or indirect control over the credit assets that have been transferred, and that the originator has achieved bankruptcy-remoteness from the transferred credit assets. For the conclusion and general requirement of legal opinion regarding bankruptcy remoteness, please refer to **1.1 Insolvency Laws**, above.

■ 4 证券化专门适用的法律法规

Laws and Regulations Specifically Relating to Securitisation

4.1 专门信息披露法律法规

Specific Disclosure Laws or Regulations

由于中国的资产证券化市场是分割的市场，不同市场和业务类型都有各自不同的规则体系，以下将分别进行介绍。

Since the securitisation market in the PRC is segmented, and each market segment and business type is subject to different sets of regulations and rules, introductions to these regulations and rules will be given separately in the following.

信贷资产证券化的信息披露相关内容主要遵循《资产支持证券信息披露规则》（中国人民银行公告[2005]第 14 号）、《关于加强信贷资产证券化基础资产池信息披露有关事项的公告》（中国人民银行公告[2007]年第 16 号），以及中国银行间市场交易商协会（以下简称“交易商协会”）针对常见类型基础资产陆续发布的信息披露指引，包括：《微小企业贷款资产支持证券信息披露指引（2018 版）》、《个人汽车贷款资产支持证券信息披露指引（试行）》、《个人住房抵押贷款资产支持证券信息披露指引（试行）》、《棚户区改造项目贷款资产支持证券信息披露指引（试行）》、《个人消费贷款资产支持证券信息披露指引（试行）》、《不良贷款资产支持证券信息披露指引（试行）》。

Information disclosure regarding credit asset securitisation shall mainly follow the rules published by the PBOC, including the Rules for the Information Disclosure of Asset-Backed Securities (Announcement of PBOC [2005] No 14), the Announcement of Matters Regarding Information Disclosure of Credit Asset Securitisations' Underlying Asset Pool (Announcement of PBOC [2007] No 16), and the disclosure guidelines for various kinds of underlying assets published by the National Association of Financial Market Institutional Investors (NAFMII), which include the Disclosure Guidelines on Micro and Small Enterprise Loans Asset-Backed Securities (2018), the Disclosure Guidelines on Retail Auto Loans Asset-Backed Securities (Trial Implementation), the Disclosure Guidelines on Individual Residential Mortgage Loans Asset-Backed Securities (Trial Implementation), the Disclosure Guidelines on Redevelopment of Shantytowns Loans Asset-Backed Securities (Trial Implementation), the Disclosure Guidelines on Personal Consumer Loans Asset-Backed Securities (Trial Implementation), and the Disclosure Guidelines on Non-Performing Loans Asset-Backed Securities (Trial Implementation).

在银行间债券市场发行的资产支持票据的信息披露主要需遵循《银行间债券市场非金融企业债务融资工具管理办法》（中国人民银行令（2008）第 1 号）及交易商协会制定的有关信息披露的规范性文件，如《银行间债券市场非金融企业债务融资工具信息披露规则》（中国银行间市场交易商协会公告[2012]2 号）、《非金融企业资产支持票据公开发行注册文件表格体系》（中国银行间市场交易商协会公告[2017]27 号）。

Information disclosure regarding ABNs issued in the Interbank Bond Market shall mainly follow the Measures for the Administration of Debt Financing Instruments Issued by Non-Financial Enterprises in the Interbank Bond Market (Order of PBOC [2008] No 1) and the rules published by the NAFMII in relation to information disclosure, such as the Rules for Information Disclosure on Debt Financing Instruments of Non-Financial Enterprises in the Inter-bank Bond Market (Announcement of NAFMII [2012] No 2) and the Registration Documents and Forms System for the Public Offerings of Asset-Backed Notes by Non-Financial Enterprises (Announcement of NAFMII [2012] No 27).

企业资产证券化的信息披露相关内容主要遵循《证券公司及基金管理公司子公司资产证券化业务管理规定》（证监会公告[2014]49 号）和《证券公司及基金管理公司子公司资产证券化信息披露指引》（证监会公告[2014]49 号）。在此基础上，上海证券交易所（以下简称“上交所”）针对不同类型的基础资产分别发布了《上海证券交易所关于融资租赁债权资产支持证券信息披露指南》、《上海证券交易所政府和社会资本合作（PPP）项目资产支持证券信息披露指南》、《上海证券交易所企业应收账款资产支持证券信息披露指南》和《上海证券交易所基础设施类资产支持证券的信息披露指南》；深圳证券交易所（以下简称“深交所”）和中证机构间报价系统股份有限公司（作为机构间私募产品报价与服务系统的运营机构，以下简称“报价系统”）也就前述各类基础资产同步发布了内容基本相同的信息披露指南。

Information disclosure regarding business asset securitisation shall mainly follow the regulations published by the China Securities Regulatory Commission (CSRC), including the Administrative Provisions on Asset Securitisation of Securities Companies and Subsidiaries of Fund Management Companies and the Disclosure Guidelines for Securities Companies and Subsidiaries of Fund Management Companies on Asset Securitisation (Announcement of CSRC [2014] No 49). Based on these provisions, the Shanghai Stock Exchange (SSE) has published disclosure guidelines for different types of underlying assets, including the SSE Disclosure Guidelines on Financial Lease Debt Claims Asset-Backed Securities, the SSE Disclosure Guidelines on Public-Private Partnership (PPP) Asset-Backed Securities, the SSE Disclosure Guidelines on Account Receivable Asset-Backed Securities and SSE Disclosure

Guidelines on Infrastructure Asset-Backed Securities. The Shenzhen Stock Exchange (SZSE) and China Securities Internet System Co, Ltd (which operates the Inter-Institutional Price Quoting and Serving System, referred to hereinafter as the 'Quoting System') also published disclosure guidelines regarding the types of underlying assets above, with similar contents.

关于信息披露的方式，针对信贷资产证券化，无论资产支持证券是公募还是私募发行，受托人的信息披露应通过中国货币网、中国债券信息网以及交易商协会认可的其他方式进行。针对资产支持票据，对于公开发行的，企业应当通过交易商协会认可的网站披露发行文件；定向发行资产支持票据的，向定向投资者进行信息披露。针对企业资产证券化，管理人的信息披露渠道为产品所挂牌的证券交易场所、基金业协会信息披露平台，及其他被认可的网站（如管理人公司网站）。

Regarding the forms of information disclosure, in credit asset securitisation, whether the securities will be issued/placed publicly or privately, information disclosure by the trustee shall be conducted via the China Money website (www.chinamoney.com.cn), the China Bond website (www.chinabond.com.cn) and other methods approved by the NAFMII. For ABNs issued publicly, the parties shall disclose the documents via the websites approved by the NAFMII; for ABNs issued privately, the information will only be disclosed to the private investors. For business asset securitisation, the information disclosure channels used by the scheme manager shall be the exchanges where the securities are listed, the information disclosure platform of the Asset Management Association of China (AMAC) and other approved websites (such as the website of the scheme manager).

关于信息披露的主要内容，针对信贷资产证券化，信息的披露主要分为注册环节、发行环节和存续期间。如资产支持证券采取一次注册、分期发行模式，在注册环节，受托人、发起机构应在资产支持证券接受注册后十个工作日内，按照要求披露注册申请报告、与交易框架相关的标准化合同文本、评级安排等文件。在发行环节，受托机构应在资产支持证券发行前的第五个工作日，向投资者披露发行说明书、评级报告、募集办法和承销团成员名单。在信托存续期内，受托机构应在每次兑付前公布受托机构报告，反映当期资产支持证券对应的资产池状况和各档次资产支持证券对应的本息兑付信息；每年4月30日前公布经审计的上年度受托机构报告。受托机构还应于资产支持证券存续期内每年的7月31日前向投资者披露上年度的跟踪评级报告。在发生可能对资产支持证券投资价值有实质性影响的临时性重大事件时受托机构还应进行临时信息披露。

Regarding the material contents of information disclosure, for credit asset securitisations the information disclosure is divided into disclosure during registration,

during issuance and during the life cycle of the securities. If the securities adopt the shelf registration model, then during registration the trustee and originator shall disclose the registration application report, the standard transaction documents, the rating arrangements, etc, within ten business days of the securities registration being accepted. In the issuance stage, the trustee shall disclose the offering circular, rating report, offering plan and the list of members of the underwriting syndicates on the fifth business day before the securities' issuance. During the life cycle of the securities, the trustee shall make periodic trustee reports before each payment of principal and interest, which shall disclose the status of the asset pool backing the securities, along with information relating to the principal and interest payment of the securities of each class. The audited annual trustee report of the previous year shall be disclosed prior to 30 April of each year. The trustee shall also disclose the monitoring report of the previous year before 31 July each year during the life cycle of the securities. The trustee shall also disclose relevant information on an ad hoc basis when major events having a material effect on the investment value of the securities occur.

针对资产支持票据，公开发行业资产支持票据的，需要披露募集说明书、法律意见书、信用评级报告及跟踪评级安排以及交易商协会规定的其他文件。在资产支持票据存续期内，发行载体应在每期兑付前披露资产运营报告；每年的 4 月 30 日和 8 月 31 日前需分别披露上年度资产运营报告和半年度资产运营报告（定向发行的资产支持票据无需披露半年度资产运营报告）；每年 7 月 31 日前向投资者披露上年度的跟踪评级报告并及时披露不定期跟踪评级报告；如发生可能对投资价值及投资决策判断有重要影响的重大事项，发行载体和发起机构应当应在三日内披露信息并向交易商协会报告。如果是定向发行资产支持票据的，应在注册发行文件中明确约定信息披露的具体标准，向特定投资者披露信息。

For ABNs issued publicly, the issuer shall disclose the offering circular, legal opinions, rating report, credit monitoring arrangement and other documents stipulated by the NAFMII. During the life cycle of the ABNs, the issuer shall disclose the asset operation report before each payment of the notes. The annual asset operation report and semi-annual asset operation report shall be disclosed prior to 30 April and 31 August of each year (for notes issued privately, no semi-annual asset operation report need be disclosed). The issuer shall also disclose the monitoring report of the previous year before 31 July each year, along with intermittent monitoring reports. The issuer and originator shall also disclose relevant information within three days if major events having substantial influence on the investment value of securities or the investment decisions regarding the securities occur, and report to the NAFMII. For ABNs issued to particular investors, the specific standard of information disclosure shall be stipulated clearly in the registration documents, and only be disclosed to the particular investors.

针对企业资产证券化，信息披露主要分为发行环节和存续期间。在发行环节，管理人应当在发行前向合格投资者披露计划说明书、法律意见书、评级报告等文件，并在发行结束的当日或次一工作日向资产支持证券认购人披露资产支持证券发行情况。资产支持证券存续期内，管理人应在每期兑付前向合格投资者披露专项计划收益分配报告，每年4月30日前披露经审计的上年度资产管理报告和托管银行出具的托管报告。评级机构应当于资产支持证券存续期内每年的6月30日前向合格投资者披露上年度的定期跟踪评级报告，并应当及时披露不定期跟踪评级报告。在发生可能对资产支持证券投资价值或价格有实质性影响的重大事件时，管理人应及时向合格投资者披露相关信息，并向中国基金业协会报告。采用循环资产池结构的，管理人应当定期披露循环购买的资产规模及实际操作情况。

For business asset securitisation, the information disclosure can be mainly divided into disclosure which takes place at the issuance stage, and disclosure which takes place during the life cycle of the securities. At the issuance stage, the scheme manager shall disclose the offering circular, the legal opinions, the credit monitoring arrangement and other documents to the permitted investors before issuance, and disclose the issuance conditions of the securities to the subscribers on the day or the business day after the day when the issuance of the asset-backed securities is completed. During the life cycle of the asset-backed securities, the scheme manager shall disclose the income distribution report before each payment of the securities to the permitted investor. The audited annual asset management report and fund custody report shall be disclosed prior to 30 April each year. Rating agencies shall disclose the credit monitoring report of the previous year before 30 June, and disclose the intermittent monitoring report in a timely manner. Scheme managers shall also disclose relevant information promptly to the qualified investor, in the case that some material events having substantial influence on the investment value of the securities or the investment decisions regarding the securities occur, and report to AMAC. For transactions with revolving structures, the scheme manager shall disclose the scale of the assets to be purchased and the actual execution periodically.

前述信息披露规则，尤其是交易商协会、交易所、报价系统针对不同类型基础资产发布的信息披露指南，对于发行说明书、受托机构报告、中介机构意见等信息披露的内容和/或格式均有详细规定。

The information disclosure rules above, especially the disclosure guidelines for different types of underlying assets published by the NAFMII, SSE, SZSE and Quoting System, have detailed provisions on the forms and contents of the offering circular, trustee report, intermediary opinions, etc.

信贷资产证券化和资产支持票据的信息披露主要监管机构为中国人民银行和中国银行间市场交易商协会（后者属于市场自律组织），且银保监会也会对存在违规行为的银行业金融机构进行处罚。企业资产证券化的信息披露主要监管机构为中国证监会及其派出机构、中国基金业协会（属于市场自律组织）、证券交易场所。

The principal regulators of information disclosure regarding credit asset securitisation and ABNs are the PBOC and the NAFMII (which is a self-regulatory organisation). The China Banking and Insurance Regulatory Commission (CBIRC), which is a successor organisation to the original China Banking Regulatory Commission (CBRC), can also sanction the banking financial institutions that have violated the rules. The principal regulators of information disclosure regarding business asset securitisation are the CSRC and its local counterparts, the AMAC (which is a self-regulatory organisation) and securities exchanges.

针对信贷资产证券化，银保监会在《金融机构信贷资产证券化试点监督管理办法》(中国银行业监督管理委员会令 2005 年第 3 号)的规定，金融机构从事信贷资产证券化业务活动，有提供虚假的或者隐瞒重要事实的报表、报告等文件、资料的情形的，银保监会可以责令改正、没收违法所得、处以罚款；情节特别严重或者逾期不改正的，可以责令停业整顿或者吊销其经营许可证；构成犯罪的，依法追究刑事责任。

With regard to credit asset securitisation, the CBIRC stipulates in the Measures for the Supervision and Administration of the Pilot Scheme on Securitisation for Credit Assets of Financial Institutions (Order of CBRC [2005] No 3) that if financial institutions provide false reports or reports concealing important facts when engaging in the credit asset securitisation, then the CBIRC may order correction, confiscate any illegal gains or impose fines; if the circumstances are especially serious or the institution fails to make rectifications within a prescribed time limit, then the CBIRC may order it to suspend its business operation or revoke its permit for operation; criminal activities will be subject to criminal sanctions.

同时，针对在银行间市场的信贷资产证券化和资产支持票据业务，交易商协会对于信息披露义务人的不良行为一般可采取通报批评、责令整改、给予相关责任人通报批评处分、要求相关责任人参与交易商协会信息披露相关培训等自律处分，情节严重的，可以暂停其相关业务。涉嫌违反相关法律法规的，交易商协会将移交中国人民银行等有关部门处理。

At the same time, in relation to credit asset securitisation and ABNs in the Interbank Bond Market, the NAFMII may impose self-regulatory sanctions on non-compliant

information disclosers. These include public denouncement, order to correct, public denouncement of relevant responsible persons and order for relevant responsible persons to participate in mandatory training at the NAFMII on information disclosure. In serious cases, the NAFMII may suspend the relevant business operation. If the non-compliant act is suspected of violating the laws, the NAFMII shall hand the matter over to relevant authorities, including the PBOC.

针对企业资产证券化的信息披露违规行为，中国证监会及其派出机构可采取责令改正、出具警示函、责令公开说明、责令参加培训、责令定期报告等监管措施，并有权给与没收违法所得、处以罚款、暂停或撤销责任人的从业资格等行政处罚；涉嫌犯罪的，可追究其刑事责任。中国基金业协会对证券公司、基金管理公司子公司可以进行定期或不定期的现场和非现场自律检查，可以视情节轻重对其违规行为采取书面警示、限期改正、公开谴责、暂停备案、取消会员资格等纪律处分，情节严重的，移交证监会处理。此外，根据上交所和深交所的自律管理规则，信息披露义务人未履行信息披露义务或所出具的文件含有虚假记载、误导性陈述、重大遗漏，证券交易所可将违规行为记入诚信档案，审慎受理和审核相关主体的后续申请或出具的相关文件。情节严重的，证券交易所可以上报相关主管机关查处，追究相关当事人的法律责任。

For misconduct in the disclosure of information regarding business asset securitisation, the CSRC and its local agencies may impose regulatory measures such as orders to correct, issuing warning letters, orders for public explanation, orders to participate in mandatory training and orders to make periodic reports. It also has the power to impose administrative penalties such as confiscation of illegal gains, fines, suspension or revocation of the professional qualification of responsible persons; in cases where the violation constitutes a crime, the relevant parties may be subject to criminal liabilities. The AMAC may conduct regular or ad hoc on-site and off-site self-regulatory investigation of securities companies and fund management company subsidiaries, and may impose disciplinary sanctions such as written warnings, orders to correct within a time limit, public condemnations, suspensions of record-filing and cancellation of membership, depending on the seriousness of the case. If the circumstances are serious, the case shall be transferred to the CSRC. In addition, according to the self-regulatory rules of the SSE and SZSE, if the party responsible for information disclosure fails to fulfil its disclosure obligation, or the documents issued contain false or misleading statements or major omissions, the securities exchange may record such violations in credit files, and prudently receive and review the subsequent application or documents submitted by the relevant parties. If the circumstances are serious, the securities exchange may report to the supervision authorities for investigation, and seek legal action against the relevant parties.

在中国，标准的资产证券化产品均仅向合格机构投资者发行，无论其采用公募还是私募发行方式。标准的资产证券化产品一般均在特定市场发行或交易，不同场所的规则存在不同。例如，信贷资产证券化产品均在银行间债券市场发行，优先级资产支持证券一般采用公开发行人方式，次级资产支持证券采用定向发行方式且仅能在初始持有人之间转让，但无论私募还是公募，其审批/备案/注册流程均相同，且信息披露要求也基本一致。资产支持票据可在银行间债券市场公募或私募发行，两者注册流程相同，但私募产品的信息披露局限于特定投资者，不进行公开信息披露。企业资产证券化产品实际上全部是私募发行，但发行后可申请在上海交易所、深圳交易所或报价系统挂牌交易（投资者仍限定为合格机构投资者），因此资产支持证券发行时的信息披露对象一般仅限于初始认购人，但挂牌后仍需公开披露计划说明书等发行文件。标准的资产证券化产品（无论采用公募还是私募发行方式）一律需经过相关监管部门的批准/备案/注册，仅能向合格机构投资者发行并在机构投资者之间转让，有严格的信息披露要求，优先级资产支持证券一般均由评级机构提供初始评级及跟踪评级，且信贷资产支持证券要求由两家评级机构进行评级。监管机构对资产证券化业务的监管重点在于基础资产的质量、交易结构设计的合理性和信息披露的履行情况，其中企业资产证券化业务中交易所也会重点关注原始权益人和担保人的资信情况。

In China, standard securitisation products are only issued to qualified institutional investors, whether the issuance is public or private. Standard securitisation products are generally issued or traded in specific markets. The rules of different markets are different. For example, credit asset securities are all issued in the Interbank Bond Market, wherein the senior securities are generally issued publicly, and the subordinated securities are issued in private placements and can only be transferred between the initial holders. However, the approval, filing and registration process is the same regardless of whether the placement or issuance is private or public, and the requirements relating to information disclosure are basically the same. ABNs can be issued in the Interbank Bond Market publicly or privately. The registration processes of the public and private issuances are the same, but the information disclosure in private placements shall be limited to particular investors and shall not be disclosed publicly. All business asset securitisation products are actually placed privately, but thereafter an application could be filed for the listing of the securities on the SSE, SZSE or Quoting System (investors are still limited to qualified institutional investors). Therefore, information disclosure during issuance is generally limited to initial subscribers, but the offering circulars shall be disclosed publicly after listing in exchanges. Standard securitisation products (whether publicly or privately placed) must be approved, filed and registered by the relevant regulatory authorities, and can only be issued to qualified institutional investors and transferred among institutional investors, with strict information disclosure requirements. Senior securities are generally rated by rating agencies initially and monitored, and credit asset securitisation products need to be rated by two rating agencies. The regulatory supervision of securitisation focuses on

the quality of the underlying assets, the rationality of the transaction structure and the fulfilment of information disclosure obligations. In business asset securitisation, the securities exchanges will also focus on the creditworthiness of the originators and the guarantors.

除了标准的资产证券化产品，还有一些信托公司、商业银行、证券公司等金融机构发行的资管产品，它们具有资产证券化的交易特点，但未在任何一个交易场所发行或交易，其不适用资产证券化的监管规定，习惯上被笼统称为私募资产证券化产品。由于其未经过监管事前审查，信息披露的透明度较弱，且没有相对成熟的交易市场，该等产品的流动性相对较差，投资者投资于该类产品存在较多限制（包括但不限于投资比例、风险资本计提等）。

In addition to the standard securitisation products, there are also some asset management products issued by trust companies, commercial banks, securities companies and other financial institutions which possess the transaction characteristics of securitisation but are not issued or traded on any trading venue. The regulations on securitisation are not applicable to these products. These products are commonly referred to as 'private securitisation products'. Due to the lack of prior regulatory review, weak transparency or information disclosure, and the absence of a mature trading market, the liquidity of such products is relatively low. Investors face more restrictions when investing in such products (including but not limited to restrictions on proportion, risk capital reserve, etc).

在信贷资产证券化项目中，律师一般不对受托人是否遵守信息披露规则发表法律意见，而仅对交易结构整体的合法有效性和基础资产的合法合规性发表意见。各阶段信息披露文件的合规性主要由相关监管机构或行业自律组织进行事前审核或事后监督。

In credit asset securitisation, lawyers do not generally give legal opinions on whether or not trustees have complied with the information disclosure rules, but only on the overall validity of the transaction structure and the legality of the underlying assets. Compliance with information disclosure rules in the disclosure documents at each stage is mainly reviewed in advance or supervised afterwards by the relevant regulatory authorities or self-regulatory organisations.

在企业资产证券化和资产支持票据项目中，律师需要在法律意见书中对相关交易文件或发行说明书是否符合信息披露的相关规则发表法律意见。为此，律师一般需审查交易文件及发行说明书中是否按照有关信息披露规则规定了项目存续期间信息披露的形式、信息披露的内容与时间、信息披露文件的存放与查阅等内容，以及发行说明书是否按照监管要求进行编制。

In business asset securitisation and ABNs, lawyers need to give legal opinions on whether the relevant transaction documents or offering circulars are in conformity with the relevant rules on information disclosure. Therefore, lawyers generally need to review whether the transaction documents and offering circulars have provided for the format of information disclosure during the life cycle of the securitisation project, contents and time of the information disclosure documents, the storage of and access to information disclosure documents in accordance with the relevant disclosure rules, and whether the offering circulars are compiled in accordance with the regulatory requirements.

4.2 信用风险自留

'Credit Risk Retention'

在中国，早期的资产证券化法规没有对风险自留作出任何要求，但由于市场投资者尚不成熟，次级档资产支持证券很难出售，所以一般由发起机构自行持有，有助于建立投资者对产品的信心。

In China, early securitisation regulations contained no requirement on risk retention. However, since the investors in the market were not very experienced and subordinated securities were difficult to sell, the subordinated securities were usually held by originators themselves, which helped to build the confidence of investors in the products.

2008 年全球金融危机爆发，中国的资产证券化发行暂停，中国的监管部门开始研究和总结资产证券化的国际经验及教训。2012 年 5 月，中国人民银行、银监会及财政部联合发布的《关于进一步扩大信贷资产证券化试点有关事项的通知》(银发[2012]127 号)开始提出风险自留的要求，要求信贷资产证券化产品的发起机构应持有由该单资产证券化产品中不低于占全部证券发行规模的 5% 的最低档次资产支持证券。由于该规定设定的风险自留要求过于严格，实际上导致以出表为目的的资产证券化业务难以操作。随后，2013 年 12 月，中国人民银行、中国银行业监督管理委员会以[2013]第 21 号公告对资产证券化风险自留规则做出了调整并沿用至今。调整后的规则要求发起机构自持的资产支持证券的比例不得低于该单证券化产品全部发行规模的 5%，持有最低档次资产支持证券的比例不得低于该档次资产支持证券发行规模的 5%，且发起机构可以在满足最低要求的基础上选择“横向持有”和“纵向持有”任一种风险自留方式。

With the outbreak of the global financial crisis in 2008, asset securitisation in China was suspended, and Chinese regulatory authorities began to study and summarise the international experience and lessons of securitisation. In May 2012, the PBOC, CBIRC and Ministry of Finance jointly issued the Notice of the Peoples Bank of China, China

Banking Regulatory Commission and Ministry of Finance on Further Expanding the Pilot Programme on Credit Asset Securitisation (Yin Fa [2012] No 127) and began to require risk retention, namely, that the originator should retain the lowest class of securities, representing no less than 5% of the aggregate volume of the securities issued. Since the risk retention requirement set by this regulation was very strict, it was actually difficult to conduct off-balance-sheet securitisation. Subsequently, in December 2013, the PBOC and CBIRC made adjustments to the risk retention rules with the Announcement on Further Regulating the Risk Retention of Originators in Credit Asset Securitisation (Announcement of PBOC and CBRC [2013] No 21), which is still in effect today. The adjusted rules require the originator to retain no less than 5% of the total issuance amount of the securitisation product, and the percentage of the lowest class of asset-backed securities held by it shall not be less than 5% of the issuance amount of the corresponding class. The originator may choose either horizontal retention or vertical retention, as long as it meets the minimum requirements.

就证监会监管的企业资产证券化业务而言，一般性规定中未对风险自留作出强制要求。但自 2017 年底起，沪深交易所及报价系统陆续发布了分别针对企业应收账款、融资租赁债权、基础设施类资产支持证券的挂牌条件确认指南，明确提出了风险自留要求，但不同类型基础资产适用的规则略有不同。例如针对应收账款资产支持证券，原始权益人及其关联方可以选择横向持有相当于项目总发行规模 5% 以上的最低档次资产支持证券，或者纵向持有各档次资产支持证券的 5%，但在符合以下两种条件之一时原始权益人可免于上述风险自留要求：一是基础资产涉及核心企业供应链应付款等情况的，基础资产池包含的债权人分散且债务人资信状况良好；二是原始权益人资信状况良好，且专项计划设置担保、差额支付等有效增信措施。而针对基础设施类资产支持证券，相关规则要求原始权益人及其关联方横向持有相当于总发行规模 5% 的最低档次资产支持证券，而未允许纵向持有或提供任何豁免。

As far as business asset securitisation under the supervision of the CSRC is concerned, no compulsory requirement on risk retention is stipulated in the general rules. However, since the end of 2017, the SSE, SZSE and Quoting System have issued guidelines on the confirmation of eligibility for the listing of asset-backed securities backed by financial lease debt claims, account receivables and infrastructure respectively, which clearly stipulate the requirement on risk retention. But the applicable rules for different types of underlying assets are slightly different. For example, for account receivables-backed securities, the originator and its affiliates may choose to horizontally retain the lowest class securities of no less than 5% of the total issuance, or to vertically retain 5% of each class of securities. However, the originator may be exempted from the above-mentioned requirement on risk retention if one of the following two conditions is met: first, that the underlying assets involve the receivables from the core enterprise supply chain, the creditors in the underlying assets pool are dispersed and the creditworthiness

of the debtors is good; second, that the creditworthiness of the originator is good, and the asset-backed special scheme provides effective credit enhancements such as guaranty and deficiency supplement. For infrastructure-backed securities, the relevant rules require the originator and its affiliates to retain the lowest class securities of no less than 5% of the total issuance, without permitting vertical retention or any exemption.

在资产支持票据方面，目前没有关于风险自留的强制性规定，但如融资方选择风险自留则一般会在发行文件做出披露。

In respect of ABNs, there are not currently any compulsory requirement on risk retention, but if the fund-raising party chooses to retain the risk, such arrangements will generally be disclosed in the offering documents.

就各类资产证券化业务而言，发起机构/原始权益人的风险自留安排一般会在交易文件中作出明确约定，包括在产品存续期间不得进行转让，资产支持证券的登记托管机构也会在办理资产支持证券过户登记的过程中予以控制，因此总体而言发起机构能够较好地遵守风险自留的相关要求。

For various types of securitisation, the originator's risk retention arrangement will generally be clearly stipulated in the transaction documents, including the forbearance on transfer during the life cycle of the products. The depository of the asset-backed securities will also have control over the arrangement of the process of transferring registration of the securities. Therefore, generally speaking, the originators should be able to comply with the relevant risk retention arrangements.

如果交易文件中关于风险自留的安排不符合上述风险自留的强制性要求，将无法通过该项目的发行前备案或挂牌条件确认；在发行完成后，由于资产支持证券的登记托管机构将在办理资产证券化过户申请时进行核查，发起机构一般也无法直接转让被禁止转让的资产支持证券。而如果在发行前的备案或挂牌条件确认阶段声称将会认购部分资产支持证券但实际没有认购的，属于信息虚假披露，将面临针对虚假信息披露的行政处罚。另外，实践中有的发起机构可能私下将自留的资产支持证券的收益权协议转让给其他方，尽管在某些情况下该种做法并未被明确禁止，但严格来说其不符合风险自留规则的要求，且交易所发布的多个挂牌条件确认指南禁止“任何形式变相转让”，实际对该种做法予以了否认。目前尚不存在明确的违反风险自留要求的处罚规则；但一般而言，相关监管部门可就资产证券化的违规行为采取责令改正、监管谈话、出具警示函、责令公开说明等监管措施。但一般而言，相关监管部门可就资产证券化的违规行为采取责令改正、监管谈话、出具警示函、责令公开说明等监管措施。

If the risk retention arrangements in the transaction documents do not comply with the compulsory requirements above, the project will not be able to make the pre-issuance record-filing or receive confirmation of listing eligibility. After the issuance is completed, the security depository of the asset-backed securities will conduct verification when reviewing the application for transfer of securities, meaning that the originator cannot generally transfer the prohibited asset-backed securities directly. If, at the stage of pre-issuance record-filing or confirmation of listing eligibility, the originator promises to subscribe to part of the securities, but does not actually subscribe, then it has made a false statement and may face administrative penalties. In addition, some originators may privately transfer the right to the income on the retained securities to other parties. Despite that in some cases this is not explicitly prohibited, it does not strictly conform to the requirements of the risk retention rule. In addition, several guidelines on confirmation of the listing conditions published by the securities exchanges prohibit “*any form of disguised transfer*”, which has in fact denied such practice. Currently there are no explicit rules relating to penalties for violations of the relevant requirements. However, generally speaking, the relevant regulatory authorities can take regulatory measures such as orders to correct, giving regulatory lessons, issuing warning letters and ordering public statements for violations of any regulatory rules on asset securitisation.

信贷资产证券化的风险自留规则主要是由中国人民银行和银保监会共同制定。企业资产证券化的风险自留规则是由证监会授权的挂牌交易场所（上海证券交易所、深圳证券交易所、报价系统）制定。银保监会、人民银行在受理有关备案/核准申请时将会对具体项目的风险自留安排进行审查，交易场所也会在确认是否符合挂牌条件时进行监督。

The risk retention rules for credit asset securitisation are mainly formulated by the PBOC and CBIRC. The risk retention rules for business asset securitisation are formulated by exchanges authorised by the CSRC (the SSE, SZSE, and Quoting System). The CBIRC and PBOC will review the risk retention arrangements for specific projects when accepting applications for record-filing and approval. The exchanges will also supervise the arrangement when confirming whether the listing conditions are met.

虽然以上机构尚未发布过违反风险自留要求的后果或公开处罚的先例，但如前所述，如果进行了风险自留的信息披露但没有实际自持的属于信息披露不实，各类资产证券化均对虚假信息披露规定了罚则。

Although the above institutions have not published information regarding the consequences of violating the risk retention requirement, or precedents of public penalties, as mentioned above, if risk retention has been disclosed but no actual

retention occurs, the information disclosure shall constitute false statement, for which the regulations on all kinds of asset securitisation have corresponding penalty rules.

现有规定没有提及已遵守了其境外居住国类似规则的境外投资者可以视为替代性合规。事实上，中国现行资产证券化规则未对外国发行人或发起机构在中国市场进行资产证券化作出专门规定。

The existing regulations make no mention of foreign issuers complying with any similar laws in their country of residence (ie, 'substitutive compliance'). In fact, the current rules on securitisation in China include no specific provisions relating to securitisations by foreign issuers or sponsors in China.

对于发表风险自留法律意见的律师而言，其在实务中会在整体审查交易方案时审查发起机构/原始权益人在交易文件和发行文件中披露的自持方案是否符合规则的要求，但由于自持方案会在受托人/管理人报送监管部门的材料中介绍，而方案安排本身并不复杂，所以一般不需要律师专门就自持方案是否合法合规在法律意见书中发表意见，也不需要律师对自持证券的实际认购情况进行追踪核验。

Lawyers issuing legal opinions on risk retention rules will, in practice, examine whether the risk retention plan disclosed by the originator in the transaction documents and offering circulars satisfies the requirements of the risk retention rules when examining the transaction plan as a whole. However, since the risk retention plan will be introduced in the materials submitted by the trustee or scheme manager to the regulatory authorities, and the arrangement itself is not complicated, it is usually not necessary for lawyers to issue legal opinions on the legality and compliance of a risk retention plan, or to track or verify the actual subscription of securities.

4.3 定期报告规定

Periodic Reporting

针对信贷资产证券化，在存续期内，受托机构应按资产支持证券兑付频率以及按年度公布《受托机构报告》，反映当期资产支持证券对应的资产池状况和各档次资产支持证券对应的本息兑付信息、资产池统计信息、资产循环购买情况（如涉及循环购买结构）、违约贷款处置情况等内容；评级机构每年还应向投资者披露年度《跟踪评级报告》，需包括基础资产池的变动情况和信用风险分析。

As far as credit asset securitisation is concerned, for the duration of the securities, the trustee shall provide trustee reports at the same frequency as the payments on the

securities are made, as well as on an annual basis. These reports must disclose the status of the asset pool in relation to the securities, as well as providing information in relation to the principal and interest payments of each class of the securities, statistics on the asset pool, the reinvestment of the assets (if a revolving structure is involved), disposal of loans in default, etc. The rating agencies shall also disclose the annual monitoring report to the investors, which shall include information on the changes in the underlying asset pool and credit risk analysis.

针对资产支持票据，在存续期内，发行载体应在每期资产支持票据收益支付日的前披露《资产运营报告》，公开发行的资产支持票据每年4月30日、8月31日前需分别披露年度《资产运营报告》和半年度《资产运营报告》，定向发行资产支持票据在每年4月30日前披露上年度资产运营报告，需包含票据基本信息、履约情况、资产池本期运行情况及总体信息、各档次票据的收益及税费支付情况、募集资金使用情况、风险自留、循环结构安排等信息；评级机构应每年向投资者披露年度《跟踪评级报告》并及时披露不定期《跟踪评级报告》，需包含评级对象、基础资产和发起机构的状况、现金流分析、宏观政策环境等。

With regard to ABNs, the issuer shall disclose the asset operation report before each payment on the notes, and throughout the life cycle of the notes. The annual asset operation report and semi-annual asset operation report shall be disclosed prior to 30 April and 31 August of each year for notes issued publicly; for the notes privately placed, the annual asset operation report shall be disclosed prior to 30 April each year, and shall include the basic information on the notes, the contract performance status, the operation and overall condition of the asset pool, the payment of the returns and taxes on each class of notes, the use of the issuance proceeds, risk retention, the reinvestment arrangement, etc. The rating agencies shall disclose the annual monitoring report and intermittent monitoring report in a timely manner, which shall include the target products, the condition of the originator and underlying assets, and the analysis of cash flow and macro policy.

针对企业资产证券化，在存续期内，管理人应在每期资产支持证券收益分配日前向合格投资者披露《专项计划收益分配报告》；并按年度披露《资产管理报告》，主要披露基础资产的运行情况、原始权益人、管理人和托管人等参与人的履约情况、原始权益人的经营情况、专项计划账户的资金收支情况、各档次自持支持证券的本息兑付情况、管理人认购资产支持证券的情况等。《资产管理报告》披露的同时还应披露专项计划托管银行出具的托管报告。《评级机构报告》需按年度进行披露，主要包括基础资产的变动情况、交易结构、当期证券的还本付息情况、现金流运行情况、压力测试结果、原始权益人及交易结构相关方的信用分析及评级结果等，如涉及循环购买，还需对循环购买机制有效性进行分析；除披露跟踪评级年度报告外，评级机构还需进行不定时的披露。

With regard to business asset securitisation, throughout the life cycle of the asset-backed securities the scheme manager shall disclose the income distribution report before each payment date of the securities to the qualified investor; it shall also disclose the asset management report annually, which shall include information on the operation status of the originator, the inflow and outflow of the funds in the special scheme, the payment of principal and interest on each class of securities, the subscription of the securities by the scheme manager, etc. The fund custody report, by the fund custodian, shall also be disclosed at the same time as the asset management report. The monitoring report shall also be disclosed annually, including information on the change in the underlying assets, the transaction structure, the payment of the securities, the operation of cash flow, the result of the stress test, the credit analysis and ratings of the originator and its affiliates, etc. If the transaction adopts a revolving structure, the validity of the revolving structure should also be analysed. In addition to the annual rating report, the rating agencies shall also disclose its intermittent monitoring report in a timely manner.

另外，2018年5月11日上交所、深交所分别发布了《上海证券交易所资产支持证券定期报告内容及格式指引》和《深圳证券交易所资产支持证券定期报告内容及格式指引》，更加详细的规定了年度资产管理报告和年度托管报告的编制和披露要求，使得信息披露更富有针对性和有效性，以帮助投资者有效投资决策和强化风险揭示。

In addition, on 11 May 2018, the SSE and SZSE issued the SSE Guidelines on the Periodic Report Content and Format of Asset-Backed Securities and the SZSE Guidelines on the Periodic Report Content and Format of Asset-Backed Securities, which stipulate the compilation and the disclosure requirements for the annual asset management report and annual fund custodian report, making information disclosure more targeted and effective for the purpose of helping investors to make better investment decisions and enhancing risk disclosure.

无论在信贷资产证券化、企业资产证券化，资产支持证券存续期间的定期报告均为信息披露的重要环节。信贷资产证券化和资产支持票据的受托机构报告披露由交易商协会进行自律管理，并由中国人民银行进行监管。企业资产证券化的资产管理报告、收益分配报告披露由证券交易场所、证券业协会、基金业协会进行自律管理，并受中国证监会及其派出机构监管。违反相关定期报告披露规则的处理方式见上文第**4.1 专门信息披露法律法规**部分。

In the case of both credit asset securitisation and business asset securitisation, the periodic reports made throughout the life cycle of the securities constitute a substantial part of the information disclosure. The disclosure of trustee reports in credit asset securitisation and ABNs shall be subject to self-regulatory management by the NAFMII and the supervision of the PBOC. The disclosure of asset management reports and

income distribution reports in business asset securitisations shall be subject to self-regulatory management by the securities exchanges, the Securities Association of China ('SAC') and AMAC, and supervision by the CSRC and its local counterparts. Please see **4.1 Specific Disclosure Laws of Regulations**, above, for the administrative handling of violations of the relevant rules on disclosure of periodic reports.

4.4 评级机构证券化业务

Activities of Rating Agencies (RA)

就评级机构的评级服务而言，其受到相应发行/交易市场的主管部门及行业自律组织的规制。在银行间债券市场发行的信贷资产证券化和资产支持票据主要受到人民银行和交易商协会的规制，在证监会监管的沪深交易所等挂牌交易场所发行资产证券化产品受到来自证监会、中国证券业协会、中国基金业协会及证券交易所的规制。在资产证券化评级领域这些规制的实质内容可以分为如下三个方面：

Rating services provided by Rating Agencies (RAs) are regulated by the regulatory authorities of the respective issuance/trading markets and the professional self-regulatory organisations. Credit asset securitisation and ABNs issued on the Interbank Bond Market are subject to the regulation of the PBOC and NAFMII; securitisation products issued on the listing venues regulated by the CSRC, such as the SSE and SZSE, are subject to the regulation by the CSRC, SAC, AMAC and the securities exchanges. With regard to the RAs in securitisation transactions, the substantive regulations may be divided into three categories, as follows:

- 一是行业准入。目前只有符合中国人民银行公告[2017]第 7 号公告规定的条件并经交易商协会注册、中国人民银行备案的评级机构才可以对银行间债券市场的资产支持证券提供进行初始评级和跟踪评级服务。只有符合证监会颁布的《证券市场资信评级业务管理暂行办法》规定的条件并取得证监会核准的证券市场资信评级业务资格的资信评级机构才能对企业资产证券化产品进行初始评级和跟踪评级。以往信用评级机构不能跨市场提供评级服务，最新的一项变化是，中国人民银行、中国证券监督管理委员会公告[2018]第 14 号允许信用评级机构同时开展银行间债券市场和交易所债券市场业务，中国人民银行、中国证监会、中国银行间市场交易商协会将协同审核或注册。

Firstly, market entry regulations. Currently only RAs which meet the criteria set out in PBOC Announcement [2017] No 7, registered with the NAFMII and filed with the PBOC, are allowed to provide initial rating and monitoring services in respect of asset-backed securities traded on the Interbank Bond Market. Only RAs

which meet the criteria set out in the Interim Measures for the Administration of the Credit Rating Business Regarding the Securities Market, and have obtained the credit rating business qualification approved by the CSRC, are allowed to provide initial rating and monitoring services in respect of the business asset securitisation products. Previously, RAs were not allowed to provide rating services to both markets; however, the recently issued PBOC and CSRC Announcement [2018] No 4 has permitted RAs to conduct business on the Interbank Bond Market and the securities exchange bond market concurrently, jointly reviewed and registered by the PBOC, CSRC, and NAFMII.

就境外评级机构的行业准入而言，监管部门允许境外评级机构在境内以设置分支机构或子公司的方式开展评级服务。中国人民银行在中国人民银行公告[2017]第 7 号中对于境外评级机构开展银行间债券市场信用评级业务提出了具体的准入条件。2018 年 3 月交易商协会发布《银行间债券市场信用评级机构注册评价规则》，正式接受境外评级机构的注册申请，并明确境外评级机构申请注册时所需要提交的材料。2018 年，穆迪、惠誉和标准普尔三家国际知名评级机构相继设立了其中国子公司；2019 年 1 月，人民银行和交易商协会相继发布公告，宣布标普信用评级（中国）有限公司已获准正式进入中国银行间债券市场开展信用评级业务。

Regarding the marketplace eligibility of foreign RAs, the regulators permit foreign RAs to provide rating services within China via their local branches or subsidiaries. PBOC Announcement [2017] No 7 sets out the detailed eligibility criteria for foreign RAs to provide rating services on the Interbank Bond Market. In March 2018, the NAFMII published the Rules on Assessing the Registration of Credit Rating Agencies in the Interbank Bond Market, officially starting to accept registration applications of foreign RAs and setting out detailed document requirements for foreign RAs' applications for such registration. Three widely recognized rating agencies, Moody's, Fitch, and S&P, in 2018, have established its Chinese subsidiaries. In January 2019, PBOC, along with NAFMII, announced that S&P Credit Ratings (China) Co., Ltd. has been officially admitted to provide credit rating services to the Interbank Bond Market

- 二是对业务流程和工作方法的要求。具体的流程要求体现在中国人民银行 2008 年发布的《关于加强银行间债券市场信用评级作业管理的通知》、中国证券业协会 2012 年发布的《证券资信评级机构执业行为准则》和 2015 年发布的《证券市场资信评级机构评级业务实施细则（试行）》、交易商协会 2012 年发布的《非金融企业债务融资工具信用评级业务自律指引》等规则中。不同的交易场所的评级流程和工作方法有类似的要求，例如：两个市场的自律规则都要求只有委托方支付费用之后评级机构才能启动实地调

查等评级流程；两个市场的自律规则都对最短作业时间做出了要求。中国证券业协会提出证券评级机构开展首次信用评级时从现场尽职调查结束之日起至评级报告初稿完成之日就单个公司主体的信用评级或其发行的债券评级而言一般不少于 10 个工作日（就集团公司而言一般不少于 30 个工作日）；中国人民银行则要求信用评级机构初次对某企业或债券开展信用评级时从初评工作开始日到信用评级报告初稿完成日一般不少于 15 天（就集团公司而言一般不少于 45 天）。

Secondly, requirements relating to business processes and methods. Requirements for processes are detailed in the Notice on Strengthening the Management of Credit Rating Works in the Interbank Bond Market, published by the PBOC in 2008, the Code of Conduct for Securities Credit Rating Institutions promulgated by the SAC in 2012, the Implementing Rules for Credit Rating Business of Credit Rating Agencies in the Securities Market (Trial Implementation) promulgated by the SAC in 2015, and the Self-regulatory Guidelines for the Credit Rating Services for Debt Financing Instruments of Non-financial Enterprises promulgated by the NAFMII in 2012, etc. Similar requirements for business processes and methods apply to RAs in both markets. For example, the self-regulatory rules of both markets require that a RA can only initiate the rating processes such as on-site inspection after a client has made payment; likewise, both markets' self-regulatory rules set requirements for the minimum work time. The SAC requires that, with regard to the first-time ratings conducted by RAs, for the rating of a single corporate entity or bonds issued thereby, the time from the conclusion of on-site due diligence inspection to the production of the first draft of the rating report shall generally be no less than ten business days (and for the rating of corporate groups, no less than 30 days). The PBOC requires that, for the first-time rating conducted by RAs on a certain entity or bond, the time from the commencement date of the initial rating work to the completion date of the first draft of the credit rating report shall be no less than 15 days (and for corporate groups, no less than 45 days).

- 三是对评级报告信息披露的要求。除对跟踪评级报告的披露时间均有明确要求外，监管规则或市场自律规则对评级信息披露的内容也有具体要求。在信贷资产证券化方面，中国人民银行在 2007 年发布了《关于信贷资产证券化基础资产池信息披露有关事项的公告》（人民银行公告[2007]第 16 号），对信用评级机构在发行前的《信用评级报告》中至少应披露的有关基础资产池的内容进行了列举，且该等内容要求在交易商协会针对各类基础资产发布的信息披露指引中得到了重申和细化。

Thirdly, requirements on the disclosure of rating reports. Aside from the timing requirements for the disclosure of credit monitoring reports, regulations and self-regulatory rules also set detailed requirements for the contents of a rating

information disclosure. Regarding credit asset securitisation, the PBOC published the Announcement of the People's Bank of China on Relevant Issues concerning Information Disclosure of Underlying Assets Pool for Securitisation of Credit Assets (PBOC Announcement [2017] No 16), which itemised the information to be disclosed in RAs' pre-sale credit rating report regarding the asset pool; such enumeration is reiterated and elaborated on in the information disclosure guidelines for different types of underlying assets published by the NAFMII.

就企业资产证券化而言，证监会 2014 年公布的《证券公司及基金管理公司子公司资产证券化业务信息披露指引》具体列举了评级报告内容应当包括的基本内容，要求评级机构除了发表评级基本观点、评级意见及参考因素、跟踪评级安排的内容外，还要有基础资产池及入池资产概况、基础资产（池）信用风险分析以及特定原始权益人的信用风险分析及法律风险分析的内容，要对专项计划交易结构及管理人、托管人等服务机构的履约能力进行分析，还必须进行现金流分析及压力测试。此外中国证券业协会 2015 年联合上海证券交易所、深圳证券交易所发布的《关于进一步明确债券评级信息披露规范的通知》（中证协发[2015]7 号）也对评级信息披露提出了许多具体要求。

With regard to business asset securitisation, the CSRC has published the Guidelines on Information Disclosure regarding the Asset Securitisation Business of Securities Companies and Subsidiaries of Fund Management Companies, which listed the basic content requirements for a rating report, requiring the RAs to disclose the basic rating views, rating opinions, reference factors, and monitoring arrangement, an overview of the asset pool and the underlying assets, a credit risk analysis of the assets/asset pool, a credit risk analysis and a legal risk analysis of 'specific originators', an analysis of the transaction structure of the special scheme, and a contract performance capability analysis on the manager, the custodian and relevant service providers. Additionally, the SAC, together with the SSE and SZSE, published the Notice on Further Clarifying the Regulations on Bond Rating Information Disclosure (Zhong Zheng Xie Fa [2017] No 7), which also imposed various detailed requirements on the rating information disclosure.

在资产支持票据方面，交易商协会在 2017 年公布的《非金融企业资产支持票据公开发行注册文件表格体系》以“信用评级报告信息披露表”的表格形式明确列举了信用评级报告应包括的要点内容。

As to ABNs, the NAFMII published the Registration Documents and Forms System for the Public Offerings of Asset-backed Notes by Non-Financial Enterprises in 2017, which enumerated the key points to be included in rating reports given in the Rating Report Information Disclosure Form.

评级机构受到的监管包括来自于主管部门的监管和来自于自律组织的自律管理。中国人民银行及其分支机构、中国证券监督管理委员会及其派出机构有权对在各自监管的市场开展评级业务的信用评级机构进行监督检查，交易商协会和中国证券业协会有权对信用评级机构开展自律调查。对违反法律法规或监管规定的评级机构，中国人民银行及其分支机构、中国证券监督管理委员会及其派出机构依法给予其罚款、责令停业整顿或者吊销经营许可证等行政处罚，或采取责令改正、出具警示函、责令公开说明、责令参加培训、责令定期报告等监管措施；涉嫌犯罪的，依法移送司法机关，追究其刑事责任。评级机构违反自律规则的，相关自律组织将依法给予警告、严重警告、公开谴责、责令致歉、暂停会员权利等自律处分；发现违法事实的，也可以移交对应的主管部门依法立案处罚。

RAs are subject to the regulation of regulatory authorities and professional self-regulatory organisations. The PBOC and its branches, and the CSRC and its branches, all have the power to supervise and inspect the RAs providing rating services in the markets under their respective jurisdictions. The NAFMII and SAC have the power to initiate self-regulatory investigations of the RAs. If RAs are found to be violating any law, regulation or rule, then the PBOC and its branches, or the CSRC and its branches, may, according to the laws, impose administrative sanctions such as fines, suspension of business, or revocation of business approval; or impose regulatory measures such as issuing a directive to correct, warning letter, directive to make public explanation, directive to attend training, directive to make regular reports, etc. In the case of RAs being involved in criminal activities, the matter may be transferred to the judiciary department for criminal sanctions. In the case of RAs violating self-regulatory rules, the relevant self-regulatory organisation may impose self-regulatory sanctions including warning, severe warning, public denouncement, directive to apologies, suspension of membership, etc; if there is violation of any laws, the self-regulatory organisations shall turn the RAs over to the competent authorities to be sanctioned in accordance with the law.

4.5 金融机构对于证券化产品的处理

Treatment of Securitisation in Financial Entities

对于商业银行而言，在资本计量方面，《商业银行资本管理办法（试行）》对商业银行的核心一级资本充足率、一级资本充足率、资本充足率指标提出了最低要求。风险加权资产的规模将影响该等资本充足率指标，商业银行从事资产证券化业务将对其风险加权资产的计量产生影响。根据《商业银行资本管理办法（试行）》，对金融机构而言，只要该金融机构在从事信贷资产证券化业务中产生了证券化风险暴露，就应当根据风险加权资产计量规则计提相应的资本。在流动性风险监管指标方面，根据 2018 年 7 月 1 日起施行的《商业银行流动性

风险管理办法》的规定，流动性风险监管指标包括流动性覆盖率、净稳定资金比例、流动性比例、流动性匹配率和优质流动性资产充足率五个监管指标，其中资产规模在 2000 亿元（含）以上的商业银行应当持续达到流动性覆盖率、净稳定资金比例、流动性比例和流动性匹配率的最低监管指标，资产规模小于 2000 亿元的商业银行应当持续达到优质流动性资产充足率、流动性比例和流动性匹配率的最低监管指标。但经银保监会批准，资产规模小于 2000 亿元人民币的商业银行可适用流动性覆盖率和净稳定资金比例监管要求，不再适用优质流动性资产充足率监管要求。银保监会将从商业银行资产负债期限错配情况、融资来源的多元化和稳定程度、无变现障碍资产、重要币种流动性风险状况以及市场流动性等方面，定期对商业银行的流动性风险进行分析和监测，其中针对合同期限错配情况的监测指标主要是流动性缺口率。商业银行从事资产证券化或投资于资产支持证券，主要会对其流动性覆盖率/优质流动性资产充足率、净稳定资金比例、流动性缺口率产生影响。商业银行被允许在一定的过渡期内逐渐达到前述监管指标，其中流动性覆盖率应当在 2018 年底前达到 100%，在过渡期内不低于 90%。

With regard to the capital measurement of commercial banks, the Measures for Administration of Capital of Commercial Banks (Trial Implementation) provide the minimum requirement for the core tier 1 capital adequacy ratio, the tier 1 capital adequacy ratio, and the capital adequacy ratio of commercial banks. The volume of risk-weighted assets will affect such capital adequacy ratios, and the securitisations that a commercial bank engages in will affect the measurement of its risk-weighted assets. According to the Measures for Administration of Capital of Commercial Banks (Trial Implementation), if a financial institution incurs securitisation risk exposure as a result of its business of credit asset securitisation, then the institution shall set aside corresponding capital reserves according to the risk-weighted asset measurement rules. In terms of liquidity risk regulatory indicators, according to the Measures for Administration of Liquidity Risk of Commercial Banks, which came into effect on 1 July 2018, there are five liquidity risk regulatory indicators: liquidity coverage ratio, net stable funding ratio, liquidity ratio, liquidity matching rate and high-quality liquid asset adequacy ratio. Commercial banks whose asset scale is larger than CNY200 billion (inclusive) must constantly comply with the minimum regulatory requirement for liquidity coverage ratio, net stable funding ratio, liquidity ratio and liquidity matching rate; commercial banks whose asset scale is less than CNY200 billion must constantly comply with the minimum regulatory requirement for high-quality liquid asset adequacy ratio, liquidity ratio and liquidity matching rate. However, subject to the approval by the CBIRC, commercial banks whose asset scale is less CNY200 billion must only comply with the regulatory requirement for liquidity coverage ratio and net stable funding ratio, and are exempt from the requirements for the high-quality liquid asset adequacy ratio. The CBIRC will regularly analyse and monitor the liquidity risk of commercial banks posed by aspects such as the banks' asset-liability maturity

mismatch, diversity and stability of funding sources, unencumbered assets, liquidity risk of significant currency and market liquidity, whereby the key indicator for asset-liability maturity mismatch is the liquidity gap ratio. Engaging in securitisation or investing in asset-backed securities will affect a commercial bank's liquidity coverage ratio or high-quality liquid asset adequacy ratio, net stable funding ratio and liquidity gap ratio. A certain transition period is provided for commercial banks to gradually comply with the requirements for the aforementioned regulatory indicators, whereby the liquidity coverage ratio shall reach 100% before the end of 2018, and shall not be lower than 90% during the transition period.

对于证券公司而言，根据《证券公司风险控制指标管理办法》（2016 年修订）、《证券公司风险控制指标计算标准规定》，证券公司应当根据审慎、实质重于形式的原则，计算净资本、风险覆盖率、资本杠杆率、流动性覆盖率、净稳定资金率等各项风险控制指标。证券公司持有资产支持证券需要根据证监会规定的计算标准计提风险资本准备；且在计算流动性覆盖率和净稳定资金率指标时，不同评级等级的资产支持证券将对应不同的折算率。

With regard to securities companies, according to the Administrative Measures for Risk Control Indicators of Securities Companies (2016 Revision) and the Provisions on the Calculation Standard for Risk Control Indicators of Securities Companies, securities companies shall, in line with the principles of prudence and substance over form, calculate the risk control indicators such as net capital, risk coverage ratio, capital leverage ratio, liquidity coverage ratio, net stable funding ratio, etc. Securities companies shall set aside capital reserve for asset-backed securities held according to the measurement standard provided by the CSRC; in measuring such indicators as liquidity coverage ratio and net stable funding ratio, different measurement factors shall be applied to asset-backed securities of different ratings.

对于保险公司而言，其重要的监管指标为偿付能力充足率（即实际资本与最低资本的比率）；相关监管规定要求保险公司偿付能力充足率不得低于 100%。所谓实际资本，即认可资产与认可负债的差额。在评估其偿付能力时，对保险公司所投资的信贷资产支持证券可以根据外部评级的不同而确定不同的认可价值，具体而言：信用评级为 AAA 级的信贷资产支持证券，以账面价值作为其认可价值；其他较低信用评级的信贷资产支持证券的认可价值均在账面价值上乘以一定的折扣系数；信用评级为 A 级以下或没有评级的信贷资产支持证券，为非认可资产。

With regard to insurance companies, the most important regulatory indicator is the solvency ratio (ie, the ratio of the actual capital to the minimum capital); the relevant regulations require that an insurance company's solvency ratio shall not be lower than 100%. Actual capital refers to the difference between the recognised assets and the

recognised liabilities. In evaluating an insurance company's solvency ratio, different recognised values may be assigned to the credit asset-backed securities of different outside ratings in which such an insurance company has invested. Namely, for credit asset-backed securities with a AAA rating, the recognised value shall be the book value of such securities; other credit asset-backed securities of lower ratings will be measured based on the book value multiplied by certain discount factors; credit asset-backed securities of ratings lower than A or that are not rated shall be regarded as unrecognised assets.

在资产证券化资本计量方面，我国的《商业银行资本管理办法（试行）》附件九“资产证券化风险加权资产计量规则”在相关的定义、规则和体例方面参考了巴塞尔协议的相关内容。但在风险加权资产的计量方法上存在一定差别，例如巴塞尔协议规定了标准法、基于内部评级的方法、基于外部评级的方法和内部评估法，在《商业银行资本管理办法（试行）》附件九中规定了标准法和内部评级法两种方法，其中内部评级法包括评级基础法和监管公式法。商业银行根据银保监会的批准和要求确定使用标准法或内部评级法。

As for the capital measurement of securitisation in China, Annex 9 – Rules on Risk Weighted Asset Measurement in Securitisation of the Measures for Administration of Capital of Commercial Banks (Trial Implementation) is similar to the relevant contents of the Basel framework in terms of applicable definition, rules and structure. However, there are some differences in the measurement of risk-weighted assets. For instance, the Basel framework provides for four measurement approaches: the standardised approach (SEC-SA), the internal ratings-based approach (SEC-IRBA), the external ratings-based approach (SEC-ERBA), and the internal assessment approach (IAA), whereas Annex 9 of the Measures for Administration of Capital of Commercial Banks (Trial Implementation) provides two broad approaches: the standardised approach and the internal ratings-based approach, with the latter further divided into the ratings-based approach and the regulatory formula approach. Commercial banks shall decide whether to use the standardised approach or the internal ratings-based approach according to the approval and requirements of the CBIRC.

在流动性风险管理方面，2018 年 7 月 1 日施行的《商业银行流动性风险管理办法》借鉴巴塞尔委员会于 2014 年推出的新版净稳定资金比例国际标准，结合我国商业银行业务特点，在原来流动性比例和流动性覆盖率两项监管指标基础上，新引入三个量化指标，即净稳定资金比例、优质流动性资产充足率和流动性匹配率。但在流动性覆盖率、优质流动性资产充足率等监管指标的计算上，巴塞尔 III 将合格 RMBS 产品纳入了合格优质流动性资产（HQLA）中的 2B 资产（Level 2B Assets，即可以由各国监管机关自行决定是否纳入二级资产的资产类

型)并设定了75%的折扣系数(Factor),但在中国监管部门出台的《商业银行流动性风险管理办法》中未将资产支持证券纳入HQLA范围。

As for liquidity risk management, the Measures for Administration of Liquidity Risk of Commercial Banks, which came into effect on 1 July 1 2018, drew on the net stable funding ratio rule published by the Basel Committee in 2014, and, in line with the business realities of China's commercial banks, introduced three new quantitative indicators: the net stable funding ratio, high-quality liquid asset adequacy ratio, and liquidity matching rate, in addition to the original two indicators of liquidity ratio and liquidity coverage ratio. However, Basel III included qualified residential mortgage-backed securities as level 2B assets with a discount factor of 75% within the high-quality liquid assets (HQLA) category, and left it to the discretion of national authorities whether to include them as level 2 HQLA under the national regulations, whereas the Measures for Administration of Liquidity Risk of Commercial Banks did not include RMBS as level 2 HQLA.

以下将对资产证券化相关的监管资本计提和风险加权资产计量规则进行简要列举。需要说明的是,中国目前处于信贷资产证券化试点阶段,监管机关规定在试点阶段禁止进行再证券化、合成证券化产品试点,因此,以下列举的监管规定主要是针对传统型资产证券化业务。

The following passage briefly lists the rules on regulatory capital reserve and risk-weighted asset measurement related to securitisation. It should be noted that credit asset securitisation in China is still in the pilot phase, during which the regulatory authorities do not allow the piloting of resecuritisation and synthetic securitisation products. The following list of regulations therefore pertains to traditional securitisations.

- 对于传统资产证券化交易,在符合以下全部条件时,发起机构在计算风险加权资产时可以扣减证券化基础资产:

With regard to traditional securitisation transactions, the sponsor may deduct the securitised assets from the calculation of risk weighted assets if:

- a) 与被转让资产相关的重大信用风险已经转移给了独立的第三方机构;
material credit risk related to the transferred asset has been transferred to independent third parties;
- b) 发起机构对被转让的资产不再拥有实际的或者间接的控制;
the sponsor does not retain actual or indirect control over the transferred assets;

- c) 发起机构对资产支持证券的投资机构不承担偿付义务和责任;
the sponsor does not bear payment obligations or responsibilities towards the asset-backed securities' investors;
- d) 在信托合同和资产证券化其他相关法律文件中不包括特定条款;
the trust agreement and other legal documents related to the securitisation do not contain certain specific provisions; and
- e) 清仓回购操作符合监管要求。
the procedures for clean-up call are in compliance with the regulatory requirements.

此外，商业银行以超过合同义务的方式为资产证券化交易提供隐性支持的，应当按照基础资产证券化之前的资本要求计提资本，而且应当公开披露所提供的隐性支持及其对监管资本要求的影响。

In addition, if a commercial bank provides implicit support for the securitisation transaction beyond its contractual obligations, it shall set aside capital reserves according to the capital requirements for the underlying assets before the securitisation, and shall disclose the implicit support it provided and its impact on the regulatory capital requirements.

- 在标准法项下，以经商业银行评估的合格评级机构的外部评级确定风险权重依据的，资产证券化风险暴露的风险权重按照监管规定列示的信用评级和风险权重对应表来确定，其中不同的长期信用评级等级与资产证券化暴露的风险权重的对应关系为：AAA 到 AA-（20%）、A+到 A-（50%）、BBB+到 BBB-（100%）、BB+到 BB-（350%，但对发起机构而言 1250%）、B+及 B+以下或者未评级（1250%）；不同的短期信用评级等级与资产证券化风险权重的关系为：A-1/P-1（20%）、A-2/P-2（50%）、A-3/P-3（100%）、其他评级或未评级（1250%）。

Under the standard approach, if external ratings issued by qualified rating agencies evaluated by the commercial banks are used to determine the risk weight, then the risk weight of the securitisation risk exposure should be determined according to the conversion table of risk weights for ratings provided by the regulations. The different long-term ratings and the corresponding risk weights of securitisation exposures are as follows: AAA to AA- (20%), A+ to A- (50%), BBB+ to BBB- (100%), BB+ to BB- (350%, but for sponsors, 1250%), B+, below B+ or unrated (1250%); the different short-term ratings and their corresponding risk weights of

securitisation exposures are as follows: A-1/P-1 (20%), A-2/P-2 (50%), A-3/P-3 (100%), other ratings or unrated (1250%)

对于无信用评级或者信用评级未被商业银行认可作为风险权重依据的资产证券化风险暴露，则按如下方式计提资本：

If a securitisation risk exposure is not rated, or the rating is not recognised by the CBIRC to be admitted as a reference for risk weight, then the following rules shall apply when measuring capital reserves:

- a) 对于最高档次的资产支持证券风险暴露，如果商业银行能够确定资产池的平均风险权重，则可以按照资产池的平均风险权重确定资产证券化风险暴露的风险权重；
with regard to the risk exposure of the highest class of asset-backed security, if the commercial bank is able to determine the average risk weight of the asset pool, then it may determine the risk weight according to the average risk weight of the asset pool;
- b) 对于没有合格外部评级且符合规定的合格流动性便利，按照资产池中单个风险暴露的最高风险权重确定风险权重；
with regard to qualified liquidity facility that complies with the regulation but has no qualified external rating, the risk weight will be the risk weight of the single exposure with the highest risk weight in the asset pool; and
- c) 其他未评级的资产证券化风险暴露按照 1250% 的风险权重计算风险加权资产。
risk-weighted assets of other unrated securitisation risk exposures shall be calculated with the risk weight of 1250%.

- 在资产证券化内部评级法项下，具体包括评级基础法和监管公式法两种方法，对于有外部评级或者未评级但可以推断出评级的资产证券化风险暴露，应当使用评级基础法计量监管资本要求；对于未评级而且无法推断出评级的资产证券化风险暴露，可以选择监管公式法或者按资产证券化风险暴露的 12.5 倍计算风险加权资产。采用监管公式法所计算的资产证券化风险暴露的风险权重不得低于 7%。

Under the internal ratings-based approach of securitisation, there are two sub-categories: the ratings-based approach and the regulatory formula approach. With regard to securitisation risk exposures which have external ratings or which are unrated but whose ratings can be inferred, the ratings-based approach shall be used

to measure the regulatory capital requirement. With regard to securitisation risk exposures which have no external ratings and whose ratings cannot be inferred, the risk-weighted asset may be calculated under the regulatory formula approach or calibrated at 12.5 times the exposure. The risk weight for securitisation risk exposures calculated under the regulatory formula approach shall not be lower than 7%.

对商业银行而言，前述规则主要涉及《商业银行资本管理办法（试行）》及其附件、《金融机构信贷资产证券化试点监督管理办法》、和《商业银行流动性风险管理办法》，均由银保监会发布并进行监管。

For commercial banks, the aforementioned regulations are mostly included in the Measures for Administration of Capital of Commercial Banks (Trial Implementation) and the annexes thereto, the Measures for the Supervision and Administration of Pilot Credit-Based Asset Securitisation of Financial Institutions, and the Measures for Administration of Liquidity Risk of Commercial Banks, which are all published and enforced by the CBIRC.

按照前述规定，为充分抵御因从事资产证券化业务而承担的风险，商业银行应当基于交易的经济实质，而不仅限于法律形式计提监管资本。银保监会有权根据交易的经济实质，判断商业银行是否持有资产证券化风险暴露，并确定应当如何计提资本。商业银行应当按照规定及时进行资本充足率的信息披露，披露频率分为临时、季度、半年及年度披露。商业银行应该按月报送（银保监会另有规定除外）流动性监管指标，并于每年 4 月底前向银行业监督管理机构报送上一年度的流动性风险管理报告。

According to the above-mentioned regulations, to effectively mitigate the risks associated with securitisation, commercial banks shall set aside regulatory capital reserves on the basis of the economic substance of a transaction, rather than just the legal form of the transaction. The CBIRC has the authority to make a determination on a commercial bank's securitisation risk exposure on the basis of the economic substance of the securitisation transactions, and impose methods to set aside capital reserves. Commercial banks shall disclose the capital adequacy ratio in a timely manner, according to the regulations. Disclosures shall be made on a quarterly, semi-annual, or annual basis, supplemented by ad hoc disclosures. Commercial banks shall file the liquidity regulatory indicators on a monthly basis (unless otherwise required by the CBIRC), and shall file the liquidity risk management report of the previous year to the banking regulatory and administrative authority before the end of April each year.

我国的信贷资产证券化业务目前基本是按照“简单、透明、可比较”（即 STC）规则的要求开展，比如《金融机构信贷资产证券化试点监督管理办法》明确规

定发起机构拟证券化的信贷资产应当具有较高的同质性，《中国人民银行、中国银行业监督管理委员会、财政部关于进一步扩大信贷资产证券化试点有关事项的通知》（银发[2012]127号）明确要求信贷资产证券化产品结构要简单明晰，扩大试点阶段禁止进行再证券化、合成证券化产品试点，《中国人民银行公告[2007]第16号》以及交易商协会针对部分类型基础资产的信息披露指引均对信息披露进行了明确规定，使信贷资产证券化的投资者能够有效获得关于基础资产、交易结构和交易方的充足信息。在现阶段，我国所有证券化产品都应该同等适用前述的资本及流动性监管要求。

Generally, all credit asset securitisation conducted in China at this stage is in compliance with the 'simple, transparent and comparable' (STC) principle. For instance, the Measures for the Supervision and Administration of Pilot Credit-Based Asset Securitisation of Financial Institutions require that the credit assets to be securitised by the sponsor shall have relatively high homogeneity; the Notice of the People's Bank of China, China Banking Regulatory Commission and Ministry of Finance on Further Expanding the Pilot Program on Credit Asset Securitisation (Yin Fa [2012] No 127) requires that the structure of credit asset securitisation products shall be simple and clear, and in the expanded pilot stage no resecuritisation or synthetic securitisation shall be allowed. Announcement of PBOC [2007] No.16 and the information disclosure guidelines published by the NAFMII on certain types of underlying assets set out clear rules on information disclosure, which would allow the investors of credit asset securitisation to effectively obtain sufficient information on the underlying assets, transaction structure and transaction parties. At the current stage, all securitisation products in China shall be held to the capital and liquidity rules mentioned above.

根据《商业银行资本管理办法（试行）》的规定，银保监会将对商业银行的资本充足率报表和报告进行监管，如果商业银行未按规定提供资本充足率报表或报告、未按规定进行信息披露或提供虚假的或者隐瞒重要事实的报表和统计报告的，银保监会将依据《中华人民共和国银行业监督管理法》的相关规定实施行政处罚，银保监会有权责令其改正，并处二十万元以上五十万元以下罚款；情节特别严重或者逾期不改正的，可以责令停业整顿或者吊销其经营许可证；构成犯罪的，依法追究刑事责任。

According to the Measures for Administration of Capital of Commercial Banks (Trial Implementation), where commercial banks fail to provide capital adequacy ratio statements or reports pursuant to the provisions therein, fail to make information disclosure pursuant to the provisions, provide false statements or statistical reports, or provide statements and statistical reports which conceal important facts, the CBIRC will impose administrative sanctions in accordance with the relevant provisions of the Law of the People's Republic of China on Banking Supervision and Administration, under which the CBIRC has the authority to issue directives to correct and impose fines

of between CNY200,000 and CNY500,000; in cases that are of substantial gravity or are not corrected within a specified time, the CBIRC has the power to suspend a bank's operation or revoke its business license; in cases that constitute crimes, criminal sanctions will be pursued.

根据《商业银行流动性风险管理办法》，对于未遵守流动性风险监管指标最低监管标准的商业银行，银保监会有权要求其限期整改，并视情况按照《中华人民共和国银行业监督管理法》实施行政处罚。

According to the Measures for Administration of Liquidity Risk of Commercial Banks, if a commercial bank fails to comply with the minimum regulatory standards for regulatory indicators of liquidity risk, then the CBIRC has the authority to order it to make corrections within a stipulated period, and impose, based on the circumstances, regulatory measures or administrative sanctions pursuant to the Law of the People's Republic of China on Banking Supervision and Administration.

4.6 衍生品的运用

Use of Derivatives

证券化交易中可根据交易的需要使用利率掉期、外汇掉期、货币掉期、信用风险缓释工具等金融衍生品。中国目前并无针对证券化交易中使用金融衍生品的专门规定，但相关机构（包括但不限于计划管理人、受托人、投资者）应遵循金融衍生品交易的一般性规则和各类具体衍生品的具体规则。其中，各类金融衍生品交易应遵循的一般性规则主要包括：《银行业金融机构衍生产品交易业务管理暂行办法（2011年修订版）》（中国银行业监督管理委员会令2011年第1号）、《关于银行间市场金融衍生产品交易备案事项的通知》（中市协发[2009]14号）、《中国银行间市场金融衍生产品交易主协议（2009年版）》、《中国银行间市场金融衍生产品交易主协议（凭证特别版）》。

Derivatives such as interest rate swaps, currency swaps, foreign exchange swaps and credit risk mitigation instruments could be used in securitisation transactions, based on the needs of the particular transactions. Currently, there are no specific laws or regulations on the use of derivatives in securitisations; however, relevant parties (including but not limited to the scheme manager, trustee and investors) shall comply with the general rules applicable to the trading of derivatives and to each type of specific derivatives. Among these, the general rules applicable to the trading of derivatives mainly include the Interim Measures for Administration of Derivative Product Transactions of Banking Financial Institutions (2011 Revision) (Order of CBRC [2011] No 1), the Notice on the Filing of Derivative Product Transactions on the Interbank Market (Zhong Shi Xie Fa [2009] No 14), the Master Agreement of Derivative Product Transactions on the Interbank Market (2009 version), and the Master Agreement of

Derivative Product Transactions on the Interbank Market (Special Version for Warrants).

就信用衍生产品而言，证券化项目中可采用的工具主要包括信用风险缓释合约、信用风险缓释凭证，其中前者是信用保护买卖双方之间的一种金融合约，后者是由凭证创设机构创设的可交易流通的有价证券。相关交易主要适用交易商协会发布的系列规则，主要包括《银行间市场信用风险缓释工具试点业务规则》（交易商协会公告[2016]25号）、《信用风险缓释合约业务指引》（交易商协会公告[2016]26号）、《信用风险缓释凭证业务指引》（交易商协会公告[2016]27号）。虽然客观上资产证券化业务中可以使用该等信用风险缓释工具，但由于交易主体资质许可、交易成本等原因，目前仅有极个别项目（如农盈2016年第一期不良资产证券化项目）中使用了该等工具。

With respect to credit derivatives, the available instruments in securitisation transactions mainly include credit risk mitigation agreements and credit risk mitigation warrants. The former is a kind of financial agreement between the buyer and seller of credit protection, the latter a kind of security of value created by the warrant issuer. The trading of such instruments is mainly subject to a series of rules published by the NAFMII, including the Business Rules for the Pilot Program of Inter-bank Market Credit Risk Mitigation Instruments (Announcement of NAFMII [2016] No 25), the Guidelines on the Credit Risk Mitigation Agreement (Announcement of NAFMII [2016] No 26), and the Guidelines on the Credit Risk Mitigation Agreement Business (Announcement of NAFMII [2016] No 27). Though it is admissible to use such credit risk mitigation instruments in securitisation, due to various reasons including transaction party qualifications and transaction cost, they have only been utilised for a few products (eg, the Nongying 2016-1 Non-performing Asset Securitisation).

由于不存在强烈需求，目前资产证券化项目中也较少使用利率互换。就利率互换而言，主要适用的规则包括《中国人民银行关于开展人民币利率互换业务有关事宜的通知》（银发[2008]18号），以及中国外汇交易中心、全国银行间同业拆借中心发布的《人民币利率互换交易操作规程》（中汇交发[2008]182号）、《全国银行间同业拆借中心利率互换交易确认规则》（中汇交公告[2012]38号）等。

Due to the lack of strong demand, interest rate swaps are also seldom used in current securitisation transactions. The main rules applicable to interest rate swaps include the Notice on the Issues Concerning the Commencement of RMB Interest Rate Swap Business (Yin Fa [2008] No 18), the Operational Rules for RMB Interest Rate Swaps (Zhong Hui Jiao Fa [2008] No 182), and the Rules for RMB Interest Rate Swap Trade Confirmation of the National Interbank Funding Centre (Zhong Hui Jiao Fa [2012] No

38), published by the China Foreign Exchange Trade System and the National Interbank Funding Centre, etc.

如涉及跨境资产证券化交易，可能使用外汇掉期或货币掉期，主要适用的规则包括：《中国人民银行关于加快发展外汇市场有关问题的通知》（银发[2005]202号），以及中国外汇交易中心发布的《银行间外汇市场交易确认细则》、《全国银行间外汇市场人民币外汇掉期交易规则》、《全国银行间外汇市场人民币外汇货币掉期交易规则》等。

Currency swap or foreign exchange swap may be used in cross-border securitisation transactions. The main applicable rules include the Circular of the People's Bank of China on Issues Concerning Accelerating the Development of the Foreign Exchange Market (Yin Fa [2005] No.202), as well as the Rules for Trade Confirmation in the Interbank Foreign Exchange Market, the Rules for RMB Foreign Exchange Swap Transactions in the National Interbank Foreign Exchange Market, and the Rules for RMB Currency Swap Transactions in the National Interbank Foreign Exchange Market, etc, published by the China Foreign Exchange Trade System.

《银行业金融机构衍生产品交易业务管理暂行办法》主要对商业银行等银行业金融机构和信托公司、金融资产管理公司等特定非银行业金融机构从事金融衍生品交易的市场准入管理（应取得中国银保监会批准的衍生产品交易业务资格）、风险管理、产品营销与后续服务、罚则作出了规定。证券公司及其他金融机构开展衍生品交易一般还需获得各自主管部门的批准或备案。根据中国人民银行公告[2009]第4号及其他相关规则，银行间市场参与者开展金融衍生产品交易应加入交易商协会成为银行间市场会员，并签署交易商协会制订和发布的主协议。根据《中国人民银行关于加快发展外汇市场有关问题的通知》，银行间市场会员参与银行间远期外汇交易还应通过中国外汇交易中心向国家外汇管理局办理备案。适用于每一类金融衍生品的市场规则还对该等衍生品的一般交易条款及术语定义、交易场所或系统、交易确认流程、交易清算等具体事项作出了规定。另外根据交易商协会《关于银行间市场金融衍生产品交易备案事项的通知》，金融机构还应将其未通过全国银行间同业拆借中心交易系统进行的金融衍生产品交易情况定期报送交易商协会备案。

The Interim Measures for Administration of Derivative Product Transactions of Banking Financial Institutions mainly impose requirements on banking financial institutions such as commercial banks, and non-banking financial institutions such as trust companies and financial asset management companies, regarding their eligibility for derivatives trading (which requires the derivatives trading business licence from the CBIRC), risk management, product marketing and subsequent service, as well as sanctions for non-compliance. Securities companies and other financial institutions are

also required to obtain approval from or file with the corresponding supervisory authorities. According to the Announcement of PBOC [2009] No 4 and other applicable rules, participants in the interbank market engaging in derivatives trading shall also be enrolled with the NAFMII as members of the interbank market, and execute the master agreement prepared and published by the NAFMII. According to the Circular of the People's Bank of China on Issues Concerning Accelerating the Development of the Foreign Exchange Market, members of the interbank market participating in the interbank foreign exchange forwards transactions shall also file with the State Administration of Foreign Exchange (SAFE) via the China Foreign Exchange Trade System. The exchange rules applicable to each type of derivatives include provisions on the general terms of trade, terms definition, trading venue or system, trade confirmation process, and clearance of trade, etc. Aside from that, according to the Notice on Matters Concerning Filing of Derivatives Transaction in the Interbank Market published by NAFMII, financial institutions shall also, on a regular basis, file the derivatives transactions they have engaged in outside the National Interbank Funding Centre Trading System with NAFMII.

各类金融机构各自的监管部门将会对金融机构遵守监管规则的情况进行监督，中国人民银行有权对全国银行间市场金融衍生品业务开展的情况进行监督，国家外汇管理局根据中国人民银行的授权对远期外汇市场进行监督管理。此外，交易商协会根据中国人民银行授权对银行间市场成员及其交易实施行业自律管理，中国外汇交易中心暨全国银行间同业拆借中心为银行间市场成员提供交易相关服务并根据中国人民授权对交易行为进行日常监控，上海清算所为利率掉期、外汇掉期和信用风险缓释凭证业务提供清算服务。

The compliance of particular institutions with the regulations will be supervised by the regulatory authorities relevant to each particular institution. The PBOC has the power to supervise the derivatives business in the national interbank market; SAFE, under the authorisation of the PBOC, supervises and manages the foreign currency forward market. Other than that, the NAFMII is authorised by the PBOC to conduct self-regulatory administration of members of the interbank market and the transactions carried out therein; the China Foreign Exchange Trade System & National Interbank Funding Centre provide services related to transactions carried out by members of the interbank market, and conducts day-to-day monitoring of transactions under the authorisation of the PBOC; the Shanghai Clearing House provides clearance services for interest rate swaps, foreign exchange swaps and credit risk mitigation warrants.

根据《银行业金融机构衍生产品交易业务管理暂行办法》、《中华人民共和国银行业监督管理法》，银行业金融机构未经批准擅自开办衍生产品交易业务的，中国银保监会有权给予没收违法所得、罚款、责令停业整顿、吊销经营许可证等行政处罚，构成犯罪的，将依法追究刑事责任。对未能有效执行衍生产品交

易风险管理和内部控制制度的银行业金融机构，可以暂停或终止其衍生产品交易资格，并进行经济处罚。对于违法违规行为直接负责的高级管理人员、主管人员和直接责任人可给予记过直至开除的纪律处分；构成犯罪的，移交司法机关依法追究刑事责任。

According to the Interim Measures for Administration of Derivative Product Transactions of Banking Financial Institutions and the Banking Industry Supervision Law of China, banking financial institutions engaging in derivatives trading activities without approval will be subject to administrative sanctions including confiscation, fine, suspension of business and revocation of business licence by the CBIRC; anything constituting criminal activity will be subject to criminal punishment by law. For banking financial institutions that have failed to effectively implement derivatives trading risk management and internal control systems, the CBIRC has the power to suspend or revoke their licence to engage in derivative trading, and impose monetary sanctions. Regarding senior management, executives and persons directly responsible for the violation of laws or regulations, the CBIRC has the power to impose disciplinary sanctions ranging from recording of demerit to expulsion; activities constituting crimes will be subject to criminal punishment by law.

根据《中国银行间市场交易商协会会员管理规则》、《全国银行间同业拆借中心利率互换交易确认规则》、《银行间外汇市场管理暂行规定》，交易商协会、全国银行间同业拆借中心暨中国外汇交易中心作为市场自律组织，对于违反相关金融衍生品交易规则的市场主体可根据情节严重程度给予通报批评、警告、暂停交易或取消会员/交易资格等自律处分。

According to the Membership Rules of the National Association of Financial Market Institutional Investors, the Rules for RMB Interest Rate Swap Trade Confirmation of the National Interbank Funding Centre, and the Interim Administrative Provisions on the Interbank Foreign Exchange Market, the NAFMII and the China Foreign Exchange Trade System & National Interbank Funding Centre, as the relevant market self-regulatory organisations, have the power to impose self-regulatory sanctions, based on the seriousness of the violation, on market participants in violation of the trading rule for derivatives. These may include denouncement, warning, suspension of trade or revocation of membership/trade qualifications.

4.7 特殊会计准则

Specific Accounting Rules

中国的资产证券化业务适用中华人民共和国财政部颁布的系列《企业会计准则》，主要涉及《企业会计准则第 23 号——金融资产转移》和《企业会计准则第 33 号——合并财务报表》。

Securitisation businesses in China must comply with a series of Accounting Standards for Business Enterprises published by the Ministry of Finance, especially the Accounting Standards for Business Enterprises No 23 – Transfer of Financial Assets and the Accounting Standards for Business Enterprises No 33 – Consolidated Financial Statement.

4.8 投资者保护

Investor Protection

中国没有就金融产品的投资者保护单独出台法律法规，但投资者保护的措施广泛见于《中华人民共和国证券法》、《中华人民共和国证券投资基金法》等基本法以及资产证券化的各种规则中，这些法律法规涵盖了投资者资格/人数限制、尽职调查、风险自留、市场交易规则、信息披露等各个方面，形成对投资者利益的全面保护。

China has not published any law or regulation dealing exclusively with the protection of investors in ABS products. Investor protection is provided for in the basic laws, including the Securities Law of the People's Republic of China, Securities Investment Fund Law of the People's Republic of China, etc, as well as various securitisation regulations. These laws and regulations cover matters including investor qualifications and limits on the number of investors, due diligence, credit risk retention, market trading rules and information disclosure, among many others, and provide comprehensive protection of the interests of the investors.

关于投资者保护，其中一项机制为资产支持证券持有人大会。各类型资产证券化的法规都规定发行载体要建立资产支持证券持有人大会制度并作为发行载体的权力机构，从而对有关发行载体的重大事项进行决策。例如《信贷资产证券化试点管理办法》允许资产支持证券持有人通过资产支持证券持有人大会对影响其利益的重大事项进行决策，规定持有人大会有权决定更换信托受托机构、资金保管机构、资产服务机构和决定信托合同约定的其他事项，并且法规具体规定了资产支持证券持有人召集持有人大会的权利及大会的基本流程要求。

One of the mechanisms for protection of investors is the meeting of security-holders. The various securitisation regulations all require the issuing vehicle to establish the institution of the meeting of security-holders as the governing organ of the issuing vehicle, to conduct decisions on important matters of the issuing vehicle. For example, the Administrative Measures for the Securitisation of Credit Assets allow the security-holders to make decisions on important matters that would affect their benefits by means of the meeting of security-holders, and stipulate that this meeting of security-holders has the right to change the trustee, fund custodian and/or servicer, and to decide other matters provided in the trust agreement. The regulation specifically provides for

the right of security-holders to convene the meeting of security-holders, and the basic procedural requirements thereof.

有两类机构负责投资者保护机制的实施：一类是拥有行政执法权的银保监会、中国人民银行和证监会，它们可以针对受托人或管理人没有尽到诚实勤勉义务的失职行为行政处罚或者监管措施，其中监管措施包括但不限于责令改正、监管谈话、出具警示函、责令公开说明、责令参加培训、责令定期报告、认定为不适当人选；行政处罚则包括罚款、责令停业整顿或者吊销经营许可证。第二类是自律管理组织，主要包括中国基金业协会（针对企业资产证券化业务）、交易商协会（针对资产支持票据和信贷资产证券化业务）。以中国基金业协会为例，按照中国基金业协会 2014 年发布的《资产支持专项计划备案管理办法》，就违反自律规则的行为，中国基金业协会可以视违法类型和情节轻重相应采取书面警示、责令改正、公开谴责、暂停备案、取消会员资格等纪律处分；对相关责任人员，基金业协会可相应采取书面警示、要求参加强制培训、行业内谴责、认定为不适当人选、暂停从业资格、取消从业资格等纪律处分。

Two kinds of authorities are in charge of the implementation of the investor protection mechanism: the first kind are the authorities that have administrative law enforcement power, such as the CBIRC, PBOC and CSRC. These may impose a number of administrative penalties or regulatory measures on the trustee or the scheme manager for failure to fulfil the duties of honesty and diligence, including but not limited to order to rectify, regulatory talk, warning letter, order to make public statement, order to participate in training, order to make regular reports, and/or identification as inappropriate candidate. Administrative penalties include fine, suspension of business for rectification, and revocation of business licence. The second kind of authorities are the self-regulatory organisations, including mainly the AMAC (for business asset securitisation) and the NAFMII (for ABNs and credit asset securitisation). AMAC, for example, according to the Measures for the Administration of the Record Filing of Asset-Backed Special Schemes published by it in 2014, may respond to behaviours that violate the self-regulatory rules by imposing written warning, order to correct, public condemnation, suspension of filing, revocation of membership and/or other actions based on the type and seriousness of the violation. The AMAC may also take disciplinary measures against the responsible personnel, such as written warning, order to participate in compulsory training, industry-wide condemnation, identification as inappropriate candidate, suspension of business qualification, revocation of business qualification, etc.

4.9 银行与金融资产证券化

Banks Securitising Financial Assets

商业银行投资于信贷资产证券化产品受到一些特殊规则的调控，包括但不限于：

Commercial banks investing in credit asset securitisation products are regulated by some specific rules, including but not limited to the following:

- 商业银行作为发起机构不得投资由其发起的资产支持证券，但其根据风险自留规则持有的部分除外；
a commercial bank as the originator shall not invest in securitisation products originated by itself, except for the part retained by itself according to the credit risk retention rule;
- 商业银行发行的理财产品不得直接或间接投资于本行发行的次级档信贷资产支持证券；
the asset management products offered by a commercial bank cannot directly or indirectly invest in the subordinated class of asset-backed securities issued by itself;
- 商业银行面向非机构投资者发行的理财产品不得直接或间接投资于不良资产支持证券；
the asset management products issued by a commercial bank for non-institutional investors cannot directly or indirectly be invested in non-performing asset securitisation products; and
- 商业银行购买持有单只资产支持证券的比例不得超过该单证券发行规模的 40%。
a commercial bank's holding in one issuance of asset-backed securities as a percentage of the total volume of the issuance shall not exceed 40%.

此外，根据银保监会 2018 年发布的《商业银行大额风险暴露管理办法》，商业银行投资于资产证券化产品原则上应使用穿透方法，将资产证券化产品基础资产的最终债务人作为交易对手，并将基础资产风险暴露计入该交易对手的风险暴露。但该办法同时提供了若干安全港规则，例如对于风险暴露小于一级资本净额 0.15% 的基础资产，如果商业银行能够证明不存在人为分割基础资产规避穿透要求等监管套利行为，可以不使用穿透方法，但应将资产证券化产品本身作为交易对手，并视同非同业单一客户，将基础资产风险暴露计入该客户的风险暴露。

Additionally, according to the Measures for the Administration of the Large Exposures of Commercial Banks published by the CBIRC in 2018, in principle, a commercial bank's investment in securitisation products shall be treated in a manner consistent with the 'look-through approach', according to which the ultimate obligor of the underlying assets of the securitisation products shall be identified as the bank's counterparty and

the risk exposure of the underlying assets will be counted towards the risk exposure of the ultimate obligor. Meanwhile, the same measures provide a number of safe harbours. For example, for underlying assets whose risk exposure is less than 0.15% of the tier 1 net capital of a commercial bank, if the commercial bank can prove that there is no deliberate division of underlying assets to avoid the look-through treatment or other regulatory arbitrage activities, then the investment can be exempted from the look-through approach, in which case the securitisation product itself shall be identified as the counterparty and deemed a non-interbank single client. The risk exposure of the underlying assets shall be counted towards the risk exposure of this client.

如前文所述，中国市场上不同的资产证券化产品种类适用不同的规则。单就信贷资产证券化而言，银行开展信贷资产证券化统一适用银行间债券市场信贷资产证券化的法律规则，在信息披露、风险自留、报告、会计处理等方面与其他金融机构所适用的法律规则并无不同。

As mentioned above, different types of securitisation products on the Chinese market are subject to different rules. Banks engaging in credit asset securitisation should comply with the laws and regulations on credit asset securitisations in the Interbank Bond Market, which do not differ from laws and regulations applicable to other financial institutions in such aspects as information disclosure, credit risk retention, reporting, accounting treatment, etc.

4.10 SPV 及其他实体 **SPVs or Other Entities**

中国的资产证券化业务主要包括信贷资产证券化、企业资产证券化（证券公司及基金管理公司子公司资产证券化）和资产支持票据，每种类型的资产证券化业务适用的特殊目的载体的规定也各有区别。其中《信贷资产证券化试点管理办法》（中国人民银行、中国银行业监督管理委员会公告[2005]第7号）规定了信贷资产证券化的特殊目的载体为“特定目的信托”；《非金融企业资产支持票据指引》（中国银行间市场交易商协会公告[2017]27号）规定了资产支持票据的特殊目的载体为“特定目的信托、特定目的公司或交易商协会认可的其他特定目的载体”。无论是信贷资产证券化还是信托型资产支持票据，信托的设立和运作应适用《信托法》的规定，同时作为受托人的信托公司还应遵守《信托公司管理办法》的规定。就企业资产证券化而言，《证券公司及基金管理公司子公司资产证券化业务管理规定》（中国证券监督管理委员会公告[2014]49号）规定了特殊目的载体为“资产支持专项计划或者中国证监会认可的其他特殊目的载体”；同时，由于目前一般认为资产支持专项计划项下的委托人和管理人为委托代理关系，因此还适用《合同法》、《民法总则》等关于委托代理的相关规定。资产支持专项计划实质上为一种合同关系，而非独立实体。

Securitisations in China mainly include credit asset securitisation, business asset securitisation (securitisations by securities companies and the subsidiaries of fund management companies) and ABNs. The regulations relating to SPVs are different for each type of securitisation. Among them, the Administrative Measures for the Securitisation of Credit Assets (Announcement of the PBOC and CBRC [2005] No 7) stipulate that the SPV for credit asset securitisation shall be a special purpose trust. The Guidelines for Asset-Backed Notes Issued by Non-Financial Enterprises (Announcement of the NAFMII [2017] No 27), meanwhile, stipulate that the SPVs for ABNs shall be a special purpose trust, a special purpose company or other special purpose vehicle approved by the NAFMII. Whether in the case of credit asset securitisation or trust-type ABNs, the establishment and operation of the trust shall be governed by the provisions of the Trust Law, and the trust company acting as the trustee shall abide by the provisions of the Administrative Measures for Trust Companies. In regard to business asset securitisation, the Provisions on the Administration of the Securitisation Business of Securities Companies and the Subsidiaries of Fund Management Companies (Announcement of the CSRC [2014] No 49) stipulate that the SPV shall be an asset-backed special scheme or other special purpose vehicles approved by the CSRC. Meanwhile, since the legal relationship between the originator and the scheme manager under the asset-backed special scheme is generally considered as a principal-agent relationship, the relevant provisions of the Contract Law and the General Principles of Civil Law are also applicable. The asset-backed special scheme is essentially a contractual relationship rather than an independent entity.

根据现有规定，信贷资产证券化只能使用特定目的信托作为破产隔离载体；企业资产证券化除了资产支持专项计划外，还可以是中国证监会认可的其他形式，但哪些属于中国证监会认可的形式，目前尚未有明确规定和实践；《非金融企业资产支持票据指引》虽然允许特殊目的载体采取特定目的公司或交易商协会认可的其他形式，但哪些属于交易商协会认可的形式，目前也尚未有明确规定和实践。由于《公司法》、《企业破产法》并未对特定目的公司做出任何规定，中国目前尚无采用特定目的公司作为证券化 SPV 的先例。

According to the existing regulations, credit asset securitisation can only use SPT as the bankruptcy remote vehicle. In addition to the asset-backed special scheme, business asset securitisation can use other forms approved by the CSRC. However, the forms recognised by the CSRC are neither specified in regulations nor confirmed in practice at present. The Guidelines for Asset-Backed Notes Issued by Non-Financial Enterprises allow SPVs to adopt the form of specific purpose companies, or other forms recognised by the NAFMII. However, the forms recognised by the NAFMII are neither specified in regulations nor confirmed in practice at present. Since the Company Law of People's Republic of China and the Bankruptcy Law do not contain any rules on special purpose companies, China currently does not have a precedent of adopting the special purpose company as the SPV in securitisation.

目前各种类型资产证券化业务的特殊目的载体主要不同在于其管理人或受托机构的主体资质有区别。特定目的信托的受托机构由信托公司或中国银保监会批准的其他机构担任，但目前银保监会尚未批准信托公司之外的其他机构担任受托人，且信托公司应专门申请特定目的信托受托人资格；资产支持专项计划的管理人主要由证券公司或基金管理子公司担任，但经中国证监会认可，期货公司、证券金融公司、中国证监会负责监管的其他公司以及商业银行、保险公司、信托公司等金融机构也可以作为管理人，实践中已有信托公司作为管理人。

At present, the main difference between the various types of SPVs used for securitisation lies in the qualifications of the scheme manager or the trustee. The trustee of an SPT shall be a trust company or other institutions approved by the CBIRC. However, the CBIRC has not yet approved other institutions other than trust companies as trustees, and trust companies shall specifically apply for the trustee qualification for the specific purpose trust. Securities companies or subsidiaries of fund management companies usually serve as the scheme managers of the asset-backed special scheme. However, if recognised by the CSRC, futures companies, securities finance companies, other companies under the supervision of the CSRC, commercial banks, insurance companies, trust companies and other financial companies may also serve as scheme managers, and there have been trust companies serving as scheme managers in practice.

如前所述，由于中国分业监管和市场分割的原因，不同类型的资产证券化的特殊目的载体基本是由监管规则严格限定的，并无太大选择空间。对于非金融企业而言，其既可以选择在银行间债券市场发行资产支持票据，也可以选择交易所开展企业资产证券化，投资者的关注点可能更多放在不同市场的发行成本、审批难度、产品创新性等方面，至少从目前来看，信托结构或资产支持专项计划在税收优惠、破产隔离等方面并无明显优劣之分。

As mentioned above, due to the separate industry supervision and market segmentation in China, the SPVs for different types of securitisation are usually narrowly defined under the regulatory rules, and there is not much room for choice. Non-financial companies can choose to issue ABNs in the Interbank Bond Market, or they can choose to conduct business asset securitisation on the securities exchanges. Investors may pay more attention to the issuing costs on different markets, the difficulty of obtaining approval, the product innovativeness, etc, of the securitisation. At least from the current perspective, neither the trust structure nor the asset-backed special scheme has any obvious advantages or disadvantages over the other in terms of tax treatment or bankruptcy remoteness.

对于信贷资产证券化、企业资产证券化和资产支持票据业务而言，均是根据其适用的监管规定选择特殊目的载体形式，监管规定未明确规定的特殊目的载体将不会被采用。

For credit asset securitisation, business asset securitisation and ABNs, the form of the SPV is chosen according to the applicable regulatory requirements; forms not specified in the regulatory provisions will not be adopted.

4.11 信用增级⁴的重要形式

Material Forms of Credit Enhancement

根据增信措施来源不同，证券化市场领域的增信措施可分为内部增信措施和外部增信措施。内部增信措施来源于基础资产及证券化产品本身的结构设计；外部增信措施来源于特殊目的载体外的第三方机构。

Based on the sources of the credit enhancement, credit enhancement in the securitisation market can be divided into internal credit enhancement and external credit enhancement. Internal credit enhancement derives its credit from the underlying assets and the structural design of the securitisation products; whereas external credit enhancement derives its credit from third-party institutions beyond the SPV.

内部增信措施主要包括超额抵押、资产支持证券分层结构、现金抵押账户、利差账户（或称“现金储备账户”）等；外部增信措施主要包括差额支付承诺、第三方保证担保、外部流动性支持、保险、信用风险缓释凭证等。在这方面，不同市场的资产证券化实践呈现出不同的特点。就信贷资产证券化而言，由于多数项目以出表为目标，发起机构不能向 SPT 提供现金抵押账户或差额支付承诺等增信，而第三方机构提供的外部信用增级会增加交易成本，因此目前的信贷资产证券化项目中主要通过资产支持证券分层结构和利差账户实现信用增级，较少采用外部增信措施，只有一些不良资产证券化项目设置了外部流动性支持。

Forms of internal credit enhancement mainly include overcollateralisation, asset-backed securities hierarchy, cash collateral accounts, spread accounts (or cash reserve accounts), etc. Forms of external credit enhancement mainly include shortfall payment commitments, third-party guaranties, and external liquidity support, insurance, credit risk mitigation documents, etc. In this regard, securitisation practices in different markets present different characteristics. In terms of credit asset securitisation, since most projects aim for off-balance sheet treatment of assets, the originator cannot provide the SPT with a cash collateral account or a shortfall payment commitment or

⁴ 信用增级(Credit Enhancement)，也表述为信用增进、信用增强，此处采用通用表述。

other external credit enhancement. On the other hand, the external credit enhancement provided by third parties will usually increase the transaction cost. Therefore, credit enhancement is mainly achieved through asset-backed securities hierarchy and spread account in the current credit asset securitisation market. External credit enhancement measures are rare. Only some non-performing securitisation projects have used external liquidity support.

这些信用增级措施容易遇到的问题包括:

Issues that may arise out of these credit enhancement measures include:

- 首先, 由于利差账户的资金来源于基础资产现金流, 如果该部分资金无法及时 (一般最长期限为一个季度) 兑付给投资者, 可能会被会计师认定为“重大延迟”, 对基础资产出表产生不利影响;

First, since the funds of the spread account are derived from the cash flow of the underlying assets, if such a fund cannot be paid promptly to the investor (generally the longest period is one quarter), it may be recognised as 'significantly delayed' by the accountants, which may adversely affect the off-balance sheet treatment of the underlying assets.

- 其次, 如果现金抵押账户的资金来源于发起机构, 则可能因合并信托导致基础资产无法出表。另外, 无论是利差账户还是现金抵押账户, 其账户内资金在使用前只能投资于特定的高流动性、低风险的产品, 资金闲置成本比较高。

Second, if cash collateral accounts are funded by the originator, the underlying assets may not be successfully removed from the balance sheet due to the merger of the trusts. In addition, the funds in a spread account or cash collateral account can only be invested in specific high-liquidity, low-risk products before being used, and the cost of idle funds could be high.

在资产支持票据和企业资产证券化业务中, 很多情况下基础资产的回收受到原始权益人持续经营和对基础合同履行情况的影响, 不能实现与原始权益人很好的风险隔离, 或者资产池本身的分散度较差从而不能较好地控制现金流的波动性, 因此该类项目对外部信用增级措施的依赖较强。较多项目会由原始权益人或其关联方提供差额支付承诺或保证担保; 如果原始权益人及其关联方的主体信用较弱, 则由第三方担保公司提供增信。

In ABNs and business asset securitisations, the collection of the underlying assets often depends on the continued operation of the originator and the performance of the underlying contracts, which makes risk insulation from the originator harder to achieve.

Sometimes, the volatility of the cash flow cannot be well controlled due to the lack of dispersion of the asset pool itself. In these situations, securitisation projects rely more on external credit enhancement. Often, the originator or its affiliates will provide shortfall payment commitments or guaranties as external credit enhancement; but if the corporate credit of the originator or its affiliates is weak, then third-party guarantee companies may need to provide the external credit enhancement needed.

早期企业资产证券化领域，部分项目会由担保人直接对专项计划优先级资产支持证券的本金及预期收益提供保证担保。但根据中国法律，在担保法律关系中，保证合同是从合同，以主债权的存在和有效为前提；而资产委托管理法律关系中管理人对投资者的兑付义务是以 SPV 的资产为限的，对于 SPV 资产不足以偿付投资者的部分，管理人并无支付义务，相应地，担保人不应对并不存在的债务提供担保。故目前通常由差额支付承诺人承诺对专项计划资产不足以支付优先级资产支持证券的本金及预期收益的部分进行差额补足。由于差额支付协议不是典型合同，中国法律对于承诺人应当取得的内部授权无明确规定，多数公司章程中也无明确规定，但由于其效果类似于担保，通常会要求承诺人比照对外担保履行内部决策流程。

In the early years of business asset securitisation in China, it sometimes happened that a guarantor directly provided guaranty on the principal and interest of the senior securities of a special scheme. However, according to Chinese law, a guaranty contract is an ancillary contract to a debt claim and its validity depends on the existence and validity of the master debt claim. On the other hand, in an asset management relationship, the SPV manager's obligation to the investor is restricted to the financial assets of the SPV. The SPV manager has no obligation to pay the investor for the shortfall in the assets of the SPV. Therefore, the guarantor shall not undertake the guaranty responsibility for a principal debt claim that is non-existent. For this reason, a practice has been adopted by the market in which a shortfall payment promiser acts as external credit enhancement provider by promising to make up for the shortfall in the principal and expected returns of the senior securities. Since the shortfall payment agreement is not an enumerated type of contract, Chinese law has not specified the internal authorisation that the promiser should obtain; most of the companies' articles of association do not clearly stipulate it either, but since its effect is similar to guaranty, the promiser should usually perform internal decision-making procedures in reference to the procedures regarding external guaranty.

4.12 政府资助实体的参与

Participation of Government Sponsored Entities

政府参股或控股企业（即“政府资助实体”，Government Sponsored Entities，下称“GSE”）与其他市场主体平等地参与各类资产证券化业务实践，其在证券化相

关法律法规项下并不享有特殊的待遇或豁免。GSE 参与资产证券化业务的直接经济动因与其他市场参与主体类似，但该等动因的形成可能对国家政策导向更加敏感。例如有的政策性银行会基于政府的指导政策发放一些政策性贷款，通过资产证券化可以获取更多资金进行相关领域的投放，国家开发银行就曾以铁道专项贷款、棚户区改造贷款进行资产证券化。此外，GSE 开展资产证券化还需遵守国家关于国有资产管理以及 GSE 主体本身的特殊规定。例如，根据《企业国有资产交易监督管理办法》，GSE 一定金额以上的资产对外转让，原则上应当在产权交易机构公开进行，且还应该委托第三方机构对标的资产进行评估并根据评估结果确定转让价格。

Government-invested or government-controlled enterprises (referred to collectively as government-sponsored enterprises, or GSEs) participate equally with other market participants in all kinds of securitisation practices. GSEs are not entitled to special treatment or exemptions under the laws and regulations applicable to securitisation. The direct economic motives for GSEs' participation in the securitisation business are similar to those of the other market participants, but the formation of such motives is more sensitive to national policies. For instance, some policy banks will grant loans in favour of certain fields under the government's policy directives, and by securitisation they can secure more funds for granting more loans in such fields. China Development Bank has originated securitisation products with its railroad loans and shanty-town redevelopment loans. In securitisation deals, GSEs will have to abide by the rules for the management of state-owned assets and special rules applicable to GSE themselves. For instance, according to the Measures for the Supervision and Administration of the Trading of State-owned Assets in Enterprises, transfer of assets above a certain value has to be, in principle, conducted publicly in an asset exchange, and third-party agencies shall be engaged to appraise the assets to be transferred and the price shall be determined accordingly.

4.13 证券化投资实体

Entities Investing in Securitisation

信贷资产证券化产品和资产支持票据在银行间债券市场交易，投资者投资该等产品需要自行或委托其他机构开立银行间市场账户。目前银行间债券市场的主要机构投资者包括商业银行、信用社、证券公司、保险公司等金融机构、证券投资基金、企业年金、全国社保基金、保险资金、各类金融机构发行的资管产品、私募基金，以及非金融企业。此外，境外投资者根据其不同类型可通过如下方式进入银行间债券市场进行投资：

Credit asset securitisation products and ABNs are traded on the Interbank Bond Market. Investors investing in such products must open an interbank market account, either on their own or by commissioning another institution to do so. At present, the main

institutional investors in the Interbank Bond Market include commercial banks, credit unions, securities companies, insurance companies and other financial institutions, securities investment funds, enterprise annuities, national social security funds, insurance funds, asset management products issued by various financial institutions, private equity funds, as well as non-financial companies. In addition, foreign investors can enter the Interbank Bond Market for investment in the following methods based on their types:

- 合格境外机构投资者（QFII）和人民币合格境外机构投资者（RQFII）经中国证券监督管理委员会、国家外汇管理局以及中国人民银行批准后可进入银行间债券市场进行投资；

Qualified Foreign Institutional Investors (QFII) and RMB-Qualified Foreign Institutional Investors (RQFII) can enter Interbank Bond Market for investment after approval by the CSRC, the SAFE and the PBOC;

- 允许的境外机构投资者在中国人民银行备案后可通过结算代理人在银行间市场进行交易和结算，上述境外机构投资者包括：

eligible foreign institutional investors may conduct transactions in the interbank market through settlement agents after filing with the PBOC, which include:

- 境外央行或货币当局、国际金融组织、主权财富基金；
overseas central banks or monetary authorities, international financial organisations, sovereign wealth funds,
- 境外商业银行、保险公司、证券公司、基金管理公司及其他资产管理机构；
financial institutions such as commercial banks, insurance companies, securities companies, fund management companies and other asset management institutions,
- 前述金融机构依法合规面向客户发行的投资产品；
investment products lawfully issued to clients launched by the aforementioned financial institutions,
- 养老基金、慈善基金、捐赠基金；
pension funds, charity funds and endowment funds,
- 中国人民银行认可的其他中长期机构投资者。
other long-term and mid-term institutional investors recognized by PBOC; and

- 符合中国人民银行要求的境外投资者可通过香港与内地债券市场基础设施机构连接，投资于银行间债券市场（即“北向通”）。
foreign investors in compliance with the requirements of the PBOC can invest in the Interbank Bond Market through the infrastructure link between Hong Kong and the mainland Chinese bond market (namely the 'Northbound Trading').

企业资产证券化产品主要在证券交易所市场进行交易，其合格投资者的范围与信贷资产证券化投资者范围相似，主要包括：

Business asset securitisation products are mainly traded in the securities exchange market. The scope of qualified investors is similar to that of credit asset securitisation investors, including:

- 银行、证券公司、基金管理公司、信托公司和保险公司等金融机构；
banks, securities companies, fund management companies, trust companies and insurance companies, and other financial institutions;
- 前述金融机构发行的银行理财、信托产品等各类资管产品；
bank financing, trust products and other asset management products issued by the aforementioned financial institutions;
- 经有关金融监管部门认可的境外金融机构及其发行的金融产品，包括但不限于 QFII，以及 RQFII；
overseas financial institutions recognised by the relevant financial regulatory authorities and their issued financial products, including but not limited to QFIIs and RQFIIs;
- 社会保障基金、企业年金等养老基金，慈善基金等社会公益基金；
social security funds, enterprise annuities and other pension funds, charitable funds and other social welfare funds;
- 在行业自律组织备案或登记的私募基金及私募基金管理人；
private equity funds and private equity scheme managers filed or registered with the industry self-regulatory organisations; and
- 净资产不低于人民币 1000 万的非金融机构。
non-financial institutions with a net asset of not less than CNY10 million.

除前文提及的商业银行投资资产证券化产品的限制外，现行监管规定对于不同类型的合格投资者进行的资产支持证券投资设定的限制还包括：

In addition to the restrictions on commercial banks' investment in the securitisation products mentioned above, the current regulatory restrictions on securities investments by different types of qualified investors also include:

- 对信贷资产证券化受托机构而言，受托机构不得用自有资金或者信托资金投资由其发行的资产支持证券，但受托机构依据有关规定或合同进行提前赎回的除外；
for the trustees in credit asset securitisations: a trustee may not use its own funds or trust funds to invest in the securities issued by it, except for the early redemption by the trustee in accordance with relevant regulations or contracts;
- 对于作为投资者的银行业金融机构和信托公司而言，单个银行业金融机构购买持有单只资产支持证券的比例不得超过该单证券发行规模的40%；
for banking financial institutions and trust companies acting as the investors: the ratio of a single banking financial institution purchasing the securities from a single securitisation product shall not exceed 40% of the issuance scale of the product;
- 信托公司所有者权益项下资产支持证券的投资余额不得超过其净资产的50%，自用固定资产、股权投资和资产支持证券的投资余额总和不得超过其净资产的80%；
the balance of the investment of the securities under the owners' equity of the trust company shall not exceed 50% of its net assets, and the total balance of the own-use fixed assets, equity investment and the investment of the securities in securitisation shall not exceed 80% of its net assets;
- 就养老金而言，养老金投资资产支持证券的比例，合计不得高于养老金资产净值的135%；
in the case of pension funds, total investment in the securities as a percentage of the net asset shall not exceed 135%; and
- 就QFII和RQFII而言，在中国人民银行同意其进入银行间债券市场后，应在获批的额度内进行投资。

regarding RQFIIs: after obtaining PBOC approval for entry into the Interbank Bond Market, RQFIIs shall invest within the approved maximum amount.

■ 5 文件

Documentation

5.1 破产隔离转让

Bankruptcy Remote Transfers

在信贷资产证券化业务中，具有破产隔离效果的资产转让通过《信托合同》的约定来实现。发起机构将其所有的基础资产委托给受托人设立信托，由受托人管理、运用和处分信托财产，信托财产具有独立性，不受委托人、受托人破产的影响，与资产证券化的风险隔离要求相符合；同时信托可以实现有限追索，委托人和受托人均以信托财产为限对受益人承担有限责任。《信托合同》是信贷资产证券化交易过程中最核心的交易文件之一，主要的条款包括：信托财产的范围、种类、标准和状况、信托财产的交付、信托设立的条件、不合格资产的赎回、权利完善机制、信托当事人的权利与义务、资产支持证券的类型和特征、现金流分配顺序、信托终止与清算、资产支持证券持有人大会的组织形式与权力、违约责任与赔偿等。

In credit asset securitisations, the transfer of assets while maintaining bankruptcy remoteness is achieved through the provisions of the 'trust agreement'. The originator entrusts its underlying assets to the trustee to create the trust, and the trustee manages, uses and disposes of the trust property. The trust property is independent and is not affected by the bankruptcy of the settlor and the trustee, which meets the requirements of the risk insulation in securitisation. Meanwhile, the trust can achieve limited recourse, and both the settlor's and the trustee's liabilities to the beneficiaries are limited to the trust property. The trust agreement is one of the core transaction documents in credit asset securitisation transactions, and its main provisions include the scope, type, standard and status of the trust property, the delivery of the trust property, the conditions for the establishment of the trust, the redemption of ineligible assets, rights perfection mechanism, rights and obligations of the trust parties, types and characteristics of the securities, cash flow allocation order, trust termination and liquidation, organisational form and power of the security holders, liability for defaults and indemnities.

在企业资产证券化业务中，具有破产隔离效果的资产转让则通过《资产买卖协议》来实现。《资产买卖协议》由原始权益人和专项计划的管理人签订，原始权益人将基础资产的所有权转让给计划管理人，保证基础资产的真实出售，以实现破产隔离。《资产买卖协议》的主要内容包括：基础资产的现状、基础资产的买卖及交割方式、购买价款及其交付、不合格资产赎回、资产池回购选择权、买卖双方的陈述与保证、违约责任、协议的生效与终止等。

In business asset securitisations, the transfer of assets while maintaining bankruptcy remoteness is realised through the 'asset transfer agreement'. This agreement is signed between the originator and the scheme manager of the special scheme. The originator transfers the ownership of the underlying assets to the scheme manager to ensure the true sale of the underlying assets, in order to achieve bankruptcy remoteness. The main contents of the asset transfer agreement include the status of the underlying assets, the purchase and delivery methods of the underlying assets, the purchase price and payment, the redemption of the ineligible assets, the repurchase option of the asset pool, the covenants and warranties of the buyer and the seller, defaults and liabilities, effectiveness and termination of the agreements, etc.

5.2 主要保证

Principal Warranties

“资产保证”是发起机构/原始权益人在证券化项目的特定时间点（如初始起算日、信托/专项计划设立日等）对基础资产基本情况所作的陈述与保证。资产保证的内容基于不同类型的基础资产可能有所区别，但资产保证条款中比较常见内容包括：

'Asset warranties' refer to the representations and warranties on the underlying assets of the originator as of a specific date or time (such as the cut-off date, the effective date of the trust or the special scheme, etc) of the securitisation project. The contents of asset warranties may differ based on the different types of underlying assets, but the contents of an asset warranties clause usually include:

- 基础资产符合合格标准；
the underlying assets meet the eligibility criteria;
- 基础资产的全部相关资料及信息披露均为真实准确和完整的；
all relevant information and information disclosure of the underlying assets are true, accurate and complete;
- 发起机构/原始权益人对基础资产享有唯一的且合法有效的所有权；
the originator has sole and legally valid ownership of the underlying asset;
- 基础资产不存在质押担保等权利负担，无转让限制；
the underlying assets are not encumbered by pledge or other forms of burdens, nor restrictions on transfer;
- 基础资产项下的义务人履行基础资产合同的先决条件均已满足；

the conditions precedent for the obligor's obligations to perform on contracts concerning the underlying assets have been satisfied;

- 基础资产合同的约定在任何时候都是相关义务人合法有效和有约束力的义务，基础资产转让后，受托人/计划管理人可按照基础资产合同约定对相关义务人主张权利；

the provisions of the contracts concerning the underlying assets are the legally valid and binding on the relevant obligors at any time, and after the transfer of the underlying assets, the trustee or the scheme manager may assert claims against the relevant obligors in accordance with the contracts concerning the underlying assets; and

- 除基础资产合同另有约定外，发起机构/原始权益人没有给予任何对基础资产的可回收性产生重大不利影响的选择权。

unless otherwise provided in the contracts concerning the underlying assets, the originator has not been given any option affecting the recoverability of the underlying assets.

如果基础资产在入池时点或转移时点不符合资产保证的内容，此类基础资产将被认定为“不合格资产”，需由委托人/资产卖方按照交易文件的约定进行赎回。其中，合格标准是交易各方在组建资产池时即设定的筛选基础资产的重要标准，就优良贷款作为基础资产的情形而言，一般包括：基础资产的权属及合法有效性、债务未发生逾期（或在允许的宽限期内）、贷款风险分类、债务人标准（国籍、年龄、信用评分、历史逾期记录等）、债权到期时间、单笔债权金额上限、不涉及诉讼/仲裁/执行或其他争议、不涉及军工或国家机密，等等。不同基础资产类型的合格标准将根据资产特点进行必要调整。

If the underlying assets do not satisfy the requirements of the asset warranties at the time of entering the asset pool or transfer, then the underlying assets will be recognised as ineligible assets and must be redeemed by the transferor or originator in accordance with the terms of the transaction documents. The eligibility criteria are significant criteria stipulated by the transaction parties for selecting the underlying assets when creating the asset pool. In the case of the underlying assets being well-performing loans, the criteria usually include the validity of the ownership and/or other legal rights of the underlying assets, the debts not being overdue (or within the grace period allowed), loan risk classification, debtor criteria (eg, nationality, age, credit score, records on past overdue, etc), maturity of the claims, amount limit of a single claim, no litigation, arbitration, enforcement, or disputes, no military or national secrets involved, and so on. The eligibility criteria for different types of underlying assets will be adjusted as necessary based on the features of the assets.

5.3 主要权利完善条款

Principal Perfection Provisions

在资产证券化交易文件中，权利完善事件通常包含以下情况：

Perfection events in an asset securitisation transaction document usually include the situations in which:

- 发生资产服务机构解任事件，导致资产服务机构被解任；
the servicer is terminated due to the occurrence of servicer termination events;
- 资产服务机构不具备特定的评级等级；
the servicer loses a certain credit rating; and/or
- 发起机构/原始权益人不具备特定的评级等级或发生丧失清偿能力事件的情况。
the originator loses a certain credit rating or solvency.

当事人还可能根据需要约定其他情形作为权利完善事件。

The parties may also agree on other circumstances that could trigger the perfection provisions.

发生权利完善事件后，资产卖方/委托人一般应采取如下措施完善资产买方/受托人所取得的权利：

After the occurrence of perfection events, the asset seller or the settlor shall generally take the following measures to protect the rights acquired by the asset buyer or the trustee:

- 向基础资产项下义务人发送权利完善通知，将基础资产已转让或已设立信托的情况进行通知；
sending a perfection notice to the obligor under the underlying assets, informing the obligor of the transfer of the underlying assets or the establishment of the trust;
- 指示相应义务人自收到权利完善通知之日起直接向专项计划账户/信托账户还款。
instructing the corresponding obligor to repay directly to the special scheme account or the trust account from the date of receipt of the perfection notice.

另外，资产卖方/委托人应于专项计划设立日/信托设立日之前向计划管理人/受托人出具授权书，授权计划管理人/受托人以资产卖方/委托人的名义，在发生权利完善事件且资产卖方/委托人不履行前述通知义务时，代为履行该等通知义务。

In addition, the asset seller or the settlor shall issue an authorisation letter to the scheme manager or the trustee before the establishment date of the special scheme or the trust, authorising the scheme manager or the trustee to perform such a notification obligation in the name of the asset seller or the settlor if the asset seller or the settlor fails to perform the aforementioned notification obligations.

如基础资产附带抵押或质押担保的，且相应的抵押权或质权依据中国法律需要办理登记方可有效设立的，资产卖方/委托人应在权利完善事件发生后及时办理抵押权或质权的转移登记，以确保计划管理人/受托人所受让的抵押权或质权能够获得对抗善意第三人的效力。如基础资产所附质权自质物或权利凭证交付时设立的，资产卖方/委托人应在权利完善事件发生后及时将质物或权利凭证交付给计划管理人/受托人。如在采取前述权利完善措施之前，出现善意第三人对抵押物、质物或权利凭证主张所有权或担保权利，导致计划管理人/受托人享有的权利无法对抗善意第三人的，资产卖方/委托人应将该等基础资产作为不合格资产予以赎回。

If the underlying assets are mortgaged or pledged, and the corresponding mortgage or pledge is required to be registered in accordance with Chinese law, the originator shall conduct the transfer registration of the mortgage or pledge promptly after the occurrence of a perfection event to ensure that the mortgage or pledge held by the scheme manager or the trustee will be valid against any bona fide third party. If the pledge of the underlying assets is perfected through the delivery of the pledged assets or their title documents, the originator shall deliver the pledged assets or their title documents to the scheme manager or the trustee promptly upon occurrence of the perfection events. If there are any bona fide third-party claims of ownership or security interests in the property, pledge or title documents prior to the occurrence of the perfection events, resulting in the failure of the scheme manager or the trustee to assert a valid claim against the bona fide third party, then the originator shall redeem the underlying assets as ineligible assets.

5.4 主要承诺

Principal Covenants

为确保证券化交易过程顺利进行，在交易文件中发起机构/原始权益人通常会做出以下承诺：

In order to ensure a smooth transaction, the originator in the transaction usually makes covenants as to the following matters in the transaction documents:

- 继续全面、完整并及时履行其在基础资产合同项下的义务，不放弃或不急于行使其权利；
the originator will continue to fulfil its obligations under the contracts concerning the underlying assets in a comprehensive, complete and timely manner, and not relinquish or delay the exercise of its rights;
- 基础资产被转让或设立信托后，不向任何第三方再次转让或处置该基础资产，也不在基础资产上设立任何担保；
after the transfer of the underlying assets or the establishment of the trust, the underlying assets will not be transferred to or disposed of for the benefit of any third party, nor will any security interests be established on the underlying assets;
- 对于可能影响基础资产转让交易的瑕疵，应尽职尽责进行补救，以促进交易顺利合法进行；
any defects in assets or the transaction that might hinder the transfer of the underlying assets shall be remedied with due diligence to facilitate the smooth and lawful execution of the transaction;
- 不随意修改基础资产合同，也不得豁免基础资产义务人的任何义务或责任，以致对基础资产造成重大不利影响；
the contract concerning the underlying assets shall not be arbitrarily modified, nor any obligations or liabilities of the obligor on the underlying assets waived, so that material adverse effects on the underlying assets are avoided;
- 对基础资产以及相关权益提供保护，以避免此等权益受到第三方的侵害；
the originator will provide protection for the underlying assets and related interests to prevent such rights and interests from being infringed upon by third parties;
- 在可合理预见的未来，不会因专项计划或信托的设立而丧失清偿能力；
the originator will not lose solvency in the foreseeable future due to the establishment of the special scheme or the trust;
- 不主动从事可能导致相应义务人对基础资产行使抵销权的行为等。
the originator will not engage in any act or omission that might result in the corresponding debtor exercising set-off rights on the underlying assets, and so on.

如果违反该等承诺的，视为发起机构/原始权益人违约，发起机构/原始权益人将承担损害赔偿等违约责任。

The originator will be deemed in default of the contract and be liable for indemnities and other liabilities upon breach of any covenant.

5.5 主要服务条款

Principal Servicing Provisions

证券化交易中的资产服务机构通常由原始权益人或发起机构来担任，服务的内容和条款由专门签订的《服务合同》进行约定。各类项目中的资产服务内容基于不同的基础资产类型而有所不同，但其中最为主要的服务内容可总结为以下几类：

The servicer in a securitisation transaction is usually the originator itself. The contents and conditions of the service provided by the servicer are stipulated in the servicing agreement and vary according to the types of the underlying assets. However, the main services can be summarised into the following categories:

- 收取基础资产的回收款并转付至 SPV;
collecting the receivables on the underlying assets and transferring them to the SPV;
- 管理和监控基础资产的情况;
managing the underlying assets and monitoring their conditions;
- 基础资产的风险管理和催收处置;
risk management, recovery, and disposal of the underlying assets;
- 准确、及时记录资金回收情况;
recording the status of the collection of funds in an accurate and timely manner;
- 妥善保管基础资产相关资料和记录;
safekeeping the data and records concerning the underlying assets; and
- 定期报告资产池情况。
reporting the conditions of the asset pool regularly.

若资产服务机构未履行其在《服务合同》中的义务或其在《服务合同》项下的陈述、保证、承诺严重失实、不准确或存在误导的，则视为资产服务机构违约。

资产服务机构应向守约方承担继续履行、采取补救措施、赔偿守约方因此遭受的全部损失的违约责任，并应赔偿由此给专项计划资产/信托财产造成的全部损失。同时，资产服务机构仅以《服务合同》约定以及其它与基础资产相关的合同或协议的约定为限承担管理基础资产的义务，对回收款不作任何保证或担保，且不表明其为资产证券化业务活动中可能产生的损失承担义务和责任。资产服务机构一般也不对交易文件项下前任或后任资产服务机构的违约行为负责。

If the servicer fails to perform its obligations under the servicing agreement or any of its representations, warranties and commitments under the servicing agreement is materially false, inaccurate or misleading, it is deemed in default. The servicer is liable for the breach of contract and shall continue to perform, shall take remedial measures and compensate for all losses suffered by the non-breaching party, and shall compensate for all losses caused by the breach to the special scheme assets or the trust property. However, the servicer's obligations regarding the underlying assets are limited to those agreed upon in the servicing agreement and other contracts or agreements in relation to the underlying assets. It does not provide any guarantee or assurance for the amount to be collected, nor does it undertake any responsibilities or liabilities for the losses that may arise in the securitisation. The servicer generally is not responsible for the defaults of its predecessor or successor servicer organisations under the transaction documents.

5.6 主要违约

Principal Defaults

见下方第 5.7 主要赔偿部分

See 5.7 Principal Indemnities, below.

5.7 主要赔偿

Principal Indemnities

违约与赔偿条款通常在交易文件中一同约定，违约与赔偿责任的基本原则是：如一方未履行合同约定的义务，或一方在合同项下的声明、陈述、保证严重失实或不准确，则视为该方违约。除非合同另有规定，违约方应向守约方承担继续履行、采取补救措施、赔偿守约方因此遭受的全部损失的违约责任。具体而言，原始权益人/发起机构可能的违约行为包括但不限于：

The defaults and liabilities clauses are usually stated together in the transaction documents. The fundamental principle of defaults and liabilities is that if one party fails to perform its obligations stipulated in the contract, or if one party's representations or warranties under the contract are materially false or inaccurate, then that party is the default party. Unless otherwise stipulated in the contract, the default party shall be liable

to the non-breaching party and shall continue to perform, take remedial measures, and/or compensate the non-breaching party for all losses suffered. Specifically, the possible actions of the originator that might result in breach of transaction documents include, but are not limited to:

- 转让不符合资产保证的基础资产且不按照交易文件约定对相关资产进行赎回;
transferring underlying assets that fail to satisfy the assets warranties or failing to redeem relevant assets in accordance with the transaction documents;
- 在交易文件中作出的任何陈述和保证以及提供的任何信息或报告存在重大方面的虚假、错误、误导性陈述或重大遗漏;
making any covenants or warranties or providing any information or report in the transaction documents that is false, erroneous, misleading in material aspects or contain material omissions;
- 未履行或未全部履行合同约定的任何承诺或义务;
failing to perform, wholly or partly, any of the covenants or obligations in the contract;
- 因原始权益人/发起机构违反其在任何基础资产合同项下的任何义务或怠于行使或放弃任何基础资产合同项下的任何权利, 导致基础资产消灭、遭受损失或不受法律保护等。
violating any obligation or relinquishing or neglecting any rights under the contracts concerning underlying assets, which results in the extinction of, losses to, or loss of non-legal protection of the underlying assets.

如果原始权益人/发起机构发生上述任意一种违约, 计划管理人/受托人有权根据交易文件的相关约定请求已经违约的原始权益人/发起机构进行相应的损害赔偿。

If the originator commits any of these breaches, the scheme manager or the trustee has the right to request the originator to pay damages in accordance with the transaction documents.

5.8 其他主要事项

Other Principal Matters

交易文件中还经常涉及债权抵销问题的处理, 因为根据《中华人民共和国合同法》第八十三条的规定, 债务人接到债权转让通知时, 可以向受让人主张其原本对转让方享有的抵销权。为此, 交易文件一般约定, 如果基础资产债务人依

法行使抵销权且被抵销债权属于原始权益人/发起机构已转让的被证券化资产，则原始权益人/发起机构应无时滞地将相当于被抵销款项的资金全额支付给受托人/计划管理人或其指定的资产服务机构。

The transaction documents often also cover the issue of set-off regarding the underlying assets. According to Article 83 of the Contract Law, when a debtor receives notice of the assignment of a creditor's claims, it can assert the same set-off right against the assignee that it may assert against the assignor. Therefore, the transaction documents usually stipulate that if the debtor of the underlying assets exercises the set-off right lawfully and the claims thus set off belong to the securitised assets that have been transferred from the originator, then the originator shall pay an amount equal to the amount set off to the trustee, the scheme manager, or their designated servicers.

■ 6 执行 Enforcement

6.1 其他执行 Other Enforcements

需补充提到的是资产证券化交易的审批/备案流程。目前的交易审批/备案流程相比若干年前有所简化，发行的效率因此大大提高。

The aspects of enforcement that need additional explanation concern the regulatory approval and record-filing processes of securitisation transactions. The simplification of these processes has led to great improvement in the efficiency of product issuance.

信贷资产证券化目前采取银保监会的备案制（2014 年以前为审批制）和人民银行核准制/注册制相结合的模式。其中，同质化程度较高的零售类资产可以采取在人民银行一次注册、在额度有效期内分期发行的模式，大大简化了发行程序，使得 RMBS、汽车贷款、信用卡等类型的证券化产品可以实现滚动发行。

With regard to credit asset securitisation, the regulatory authorities currently adopt a regulatory approach that combines different approval regimes. The CBIRC adopts the record-filing approach (before 2014, it adopted the evaluation and approval approach), whereas the PBOC adopts the approval/registration method. If the underlying assets are retail assets that have a relatively high degree of homogeneity then the issuance of the securities may proceed under the 'one-time registration and multi-stage issuance' model, whereby the securities need only be registered with the PBOC once before they can be issued in multiple stages, as long as the issuances are within the effective period and the quota approved at the time of registration. This regulatory regime could greatly simplify the issuance process and allow securitisation products arising out of RMBS, auto loan, credit card and other types of underlying assets to be issued on a rolling basis.

就交易所市场而言，需在交易所或报价系统挂牌交易的 ABS 产品需提前向交易所或报价系统申报材料并取得无异议函，发行成功后在基金业协会备案，不再需要证监会审批。并且，同质化较高的资产（如电商零售应收账款、汽车融资租赁债权、供应链应收账款等）也可以采取储架发行模式，在交易所核定的发行额度内滚动发行。

With regard to securitisation products on the securities exchange markets, application materials need to be filed with, and a letter of no objection received from, the exchange or the Quoting System before the ABS products can be listed for trading on the exchange or the Quoting System. After successful issuance, a record-filing regarding the securities issued needs to be made with the AMAC, but review and approval by the

CSRC are no longer needed. In this regard, issuances of securitisation products based on underlying asset pools that are in relative terms more homogeneous, such as account receivables of online retailers, debt claims on automobile finance leases and supply chain account receivables, could opt for shelf registration, which allows the securities to be issued within the quota approved by the exchange on a rolling basis.

就资产支持票据而言，发行前需在交易商协会完成注册，也可以采取一次注册、多期发行的模式。

With regard to ABNs, the notes shall be registered with the NAFMII before their issuance. The regulatory model of 'one-time registration and multi-stage issuance' is also available to ABNs.

6.2 执行制度的整体有效性

Effectiveness of Overall Enforcement Regime

中国的资产证券化法规体系（尤其信贷资产证券化和企业资产证券化）总体而言不断趋于完善。随着中国政府简政放权的改革的推进，银行间市场和交易所市场更多地由市场自律组织进行规则的制定和交易行为的监督，自 2014 年以来两大市场的发行审批/备案流程均得到显著的简化、发行效率得到显著的提升。两大市场的自律组织均加大了信息披露和中介机构规范力度，并通过细化各类基础资产的操作指南等方式给与市场参与机构更多的指导。然而，需要指出的是，中国的资产证券化市场目前仍存在过度规制的问题，监管部门或市场自律组织在审核具体项目时对发起机构主体和基础资产仍给予了过多的关注，可能延缓发行进度并降低交易的可预测性。此外，出于防范系统风险的考虑，银行间市场的信贷资产证券化采取比较固定的交易模式，对于交易创新（例如信用卡全账户证券化）采取极为谨慎的态度，这在一定程度上有利于中国资产证券化市场的长远、健康发展，但将会抑制部分市场主体的正常需求，我们仍然期待这个市场能够以稳健而审慎的态度尝试合理的创新。

In general, China's securitisation legal system (especially for credit asset securitisation and business asset securitisation) is improving gradually. With the advancement in the streamlining of administration, self-regulatory transactions in the Interbank Bond Market and exchange market are now given more authority to formulate rules and supervise the transactions. Since 2014, the approval and record-filing processes regarding the issuances in the two markets have been significantly simplified, and the issuance efficiency has been greatly improved. The self-regulatory organisations of the two markets have strengthened the requirements for information disclosure and the compliance of intermediaries, and provided more guidance for the organisations participating in the market through the refinements of the operational guidebooks for

transactions in various kinds of underlying assets. Nevertheless, it could be said that the problem of over-regulation in China's asset securitisation markets still exists, exemplified by the excessive examination of the originator and the underlying assets by the regulatory authorities or the market self-regulatory organisations when reviewing specific transactions, which could delay the issuance and reduce the predictability of the transactions. Additionally, with a view to the avoidance of systematic risks, credit asset securitisation on the Interbank Bond Market still adopts a relatively fixed transaction model, and the authorities still hold a very cautious attitude towards transaction innovation (eg, credit card account-level securitisation), which, to some extent, is beneficial to the long-term healthy development of China's securitisation market, but which could also inhibit some of the normal needs of market participants. We look forward to reasonable innovations in the market anchored in the attitudes of stability and prudence.

■ 7 各方的角色和责任

Roles and Responsibilities of the Parties

7.1 发行人

Issuers

在信贷资产证券化业务中，发行人为特殊目的信托（由特殊目的信托的受托人所代表）。在企业资产证券化业务中，发行人为资产支持专项计划（由专项计划的管理人所代表）。对于资产支持票据而言，需区分两种交易结构：一类是由发起机构直接将基础资产信托给受托人设立特定目的信托，并由特定目的信托（由受托人所代表）作为发行载体发行资产支持证券（该结构通常称为“信托型资产支持票据”）；一类是发起机构自己担任发行载体，发起机构以基础资产为资产支持票据的偿付提供抵质押担保（该结构通常称为“抵质押型资产支持票据”）。

In credit asset securitisation, the issuers are special purpose trusts (represented by the trustee of the special purpose trust). In business asset securitisation, the issuers are the asset-backed special schemes (represented by the scheme managers). For ABNs, it is necessary to distinguish between two transaction structures: in the first structure, the originator directly entrusts the underlying assets to the trustee to set up a special purpose trust, and the special purpose trust (represented by the trustee), acting as the issuing vehicle, issues the asset-backed securities (this structure is often referred to as 'trust-type ABN'); in the second structure, the originator itself acts as the issuing entity, and the originator provides the underlying assets as security for the repayment of the ABNs (this structure is usually referred to as 'pledge-type ABN').

就信贷资产证券化业务而言，发行人或发行载体管理机构应是银监会批准的具有特定目的信托受托机构资格的信托公司；就企业资产证券化业务而言，发行人应是证监会批准的具备客户资产管理业务资格的证券公司（或证券公司子公司）或基金管理公司子公司。就资产支持票据而言，如发行载体为特定目的信托，则作为发行载体管理机构的受托人应是银监会批准的具有特定目的信托受托机构资格的信托公司；如发行载体为发起机构，则根据现行规定，发起机构均为非金融企业，一般为公司法人。

With regard to credit asset securitisation, the issuer or the issuing vehicle manager shall be a trust company with the special purpose trust trustee qualification approved by the CBIRC; for business asset securitisation, the issuer shall be a securities company (or a subsidiary of a securities subsidiary company) or a subsidiary of a fund management company with the qualification for client asset management business approved by the CSRC. For ABNs, if the issuing vehicle is a special purpose trust, the trustee acting as

the issuing vehicle manager shall be a trust company with the specific purpose trust trustee qualification approved by the CBIRC; if the issuing vehicle is the originator, then according to current regulations the originator should be a non-financial enterprise, generally a corporation or company.

在信贷资产证券化、企业资产证券化业务，以及信托型资产支持票据业务中，发行人（发行载体管理机构）为受托人或管理人，其与投资者之间为信托法律关系或委托代理法律关系，因此其对投资者负有信义义务。其基本职责包括办理证券发行审批/备案、发行阶段的信息披露、持有和管理资产池、进行存续期信息披露、进行 SPV 财产的分配、必要时召集证券持有人大会、监督其他为 SPV 提供服务的机构，以及采取保护投资者利益的措施（包括但不限于对发起机构及为 SPV 提供服务的机构的违约行为追究责任）。但需要说明的是，发行人（发行载体管理机构）往往实际不具有对资产池进行专业化管理的足够能力，因此发行人（或发行载体管理机构）一般会聘请发起机构担任资产服务机构，提供资产池的日常管理、回收、处置等服务。而在质押型资产支持票据中，发行人是票据的债务人和抵押人/出质人，其主要义务是偿还资产支持票据本息、按照约定持有和管理基础资产并进行相关信息披露，发行文件中可能会指定主承销商代表票据持有人利益行使某些权利，比如召集票据持有人会议、代为持有和行使抵质押权利等。

In credit asset securitisation, business asset securitisation, and trust-type ABN business, the issuer (issuing vehicle manager) is the trustee or scheme manager, who stands in a trustee-settlor relationship or agent-principal relationship with the investors, and therefore owes fiduciary duties to investors. Their basic responsibilities include handling the approval and record-filing regarding the securities issuance, information disclosure during the issuance, holding and managing asset pools, information disclosure until the maturity of the product, distributing SPV assets, convening the security-holders meeting if necessary, supervising other agencies providing services to the SPV, and taking measures to protect the interests of investors (including but not limited to pursuing remedies for breach of contract against the originator or institutions providing services to the SPV). However, it should be noted that the issuer (issuing vehicle manager) often does not have sufficient capacity to manage the asset pool professionally. Therefore, the issuer (or the issuing vehicle manager) will generally retain the originator as the servicer to provide daily management, collection, disposal and other services concerning the asset pool. With regard to pledge-type ABNs, the issuer is the debtor on and mortgagor/pledger for the notes, and its main obligation is to repay the principal and interests of the ABNs, hold and manage the underlying assets in accordance with the agreement, and disclose relevant information. The lead underwriter may be designated to exercise certain rights on behalf of the noteholders, such as the right to convene the meeting of noteholders, to hold the pledged collateral and exercise the right of pledgee on behalf of the noteholders.

7.2 发起机构

Sponsors

在中国资产证券化相关规定中，发起机构一般系指资产证券化的原始权益人。根据相关规定，在信贷资产证券化中，发起机构是指通过设立特定目的信托转让信贷资产的金融机构；在资产支持票据中，发起机构是指为实现融资目的开展资产支持票据业务的非金融企业。在企业资产证券化业务中，相关监管规则没有规定“发起机构”的概念，而将向专项计划管理人转让基础资产的主体称为“原始权益人”，但习惯上一般将“发起机构”和“原始权益人”混用。例外情况是当基础资产并非直接由融资方转让给专项计划，而通过某些通道（比如保理公司、信托公司）进行转让时，“发起机构”应当指实质的融资方，而不是原始权益人。

In the relevant Chinese securitisation regulations, the sponsor is generally the originator of the securitisation. According to the relevant regulations, in credit asset securitisation, the sponsor is the financial institution that transfers the credit assets through the establishment of a special purpose trust; in ABNs, the sponsor is a non-financial enterprise engaging the ABN business for financing purposes. In business asset securitisation, the relevant regulations do not have the concept of 'sponsor', but the entity that transfers the underlying assets to the plan manager is referred to as an originator; in practice, the concepts 'sponsor' and 'originator' are often interchangeable. One exception is when the underlying assets are not directly transferred to the special plan by the fund-raising party, but through certain conduits (such as factoring companies or trust companies); the 'sponsor' should be the actual fund-raising party, rather than the originator of the underlying assets.

对于信贷资产证券化业务而言，只有银保监会批准设立的金融机构可以担任发起机构，包括商业银行、政策性银行、汽车金融公司、消费金融公司、金融租赁公司、金融资产管理公司等中资金融机构，以及外资法人银行。对于企业资产证券化而言，相关业务规定中并未对发起机构的主体类型进行限制，但市场上主要的发起机构（原始权益人）是各类非金融企业，如房地产开发商、物业管理公司、基础设施和公用事业单位、商业保理公司、此前由商务部主管的融资租赁公司、其他各类货物或服务的提供方等。对于资产支持票据而言，发起机构（原始权益人）只能是各类非金融企业，实际参与主体与企业资产证券化类似。

With regard to credit asset securitisation, only financial institutions approved by the CBIRC can act as originators. These include commercial banks, policy banks, automobile finance companies, consumer finance companies, financial leasing companies, financial asset management companies and other Chinese financial institutions, as well as foreign-funded incorporated banks. With regard to business asset

securitisation, the relevant regulations do not put restrictions on the entity type of the originator, but the majority of the sponsors (originators) in the market are non-financial enterprises, such as real estate developers, property management companies, infrastructure and utilities enterprises, commercial factoring companies, financial leasing companies previously supervised by the Ministry of Commerce, and various other providers of goods or services. With regard to ABNs, the sponsor (originator) can only be the various types of non-financial enterprises, and the types of participating entities in the market are similar to those in the business asset securitisation market.

发起机构的职责主要包括提供符合入池标准的基础资产，不得侵占、损害基础资产，对不合格基础资产进行赎回或置换，配合并支持发行载体和相关中介机构履行职责，及时向发行载体和相关中介机构提供相关披露的信息，并保证所提供的信息真实、准确、完整等。基础资产现金流的获得取决于发起机构持续经营的（主要指以未来应收账款进行证券化的情形），发起机构在项目存续期间还应维持正常的生产经营活动，为基础资产现金流的产生、支付提供合理的支持和必要的保障。

The responsibilities of a sponsor mainly include providing underlying assets that meet the eligibility criteria, not encroaching on or damaging the underlying assets, redeeming or replacing the ineligible underlying assets, co-ordinating and supporting the issuing vehicle and related intermediaries in performing their duties, and providing relevant disclosure information to the issuing vehicle and related intermediaries in a timely manner (ensuring that the information provided is true, accurate and complete). If the cash flow of the underlying assets depends on the continued operation of the sponsor (a scenario which mainly concerns the securitisation of future receivables), then the sponsor should also maintain normal production and operation throughout the life cycle of the securitisation, and provide reasonable support to and necessary protection for the generation and transfer of cash flow of the underlying assets.

7.3 承销机构和配售代理人

Underwriters and Placement Agents

承销机构/承销商或配售代理人是负责资产支持证券销售的机构，其一般职责包括进行资产支持证券的宣传、销售，以及承销团的组织；对于项目牵头承销商而言，其职责一般还包括撰写证券发行说明书以及其他发行文件、主持资产支持证券销售中的簿记建档或招标程序、归集证券募集资金、分配承销团员承销报酬，以及在项目准备过程中的交易结构设计、各参与方进度协调、向监管机关的材料报送等。中国资产证券化中的承销机构一般是中国境内符合一定注册资本、销售能力、销售渠道等条件的金融机构，主要是银行和证券公司。对于一些面对境外投资者的资产证券化而言，承销机构中还可能包括在中国注册的

外资银行。对于资产支持票据而言，在银行和证券公司之外，信托公司也可以担任资产支持票据的承销商。

An underwriting agency or a placement agent is the organisation responsible for the sale of the asset-backed securities. Its general duties include the promotion and sale of the asset-backed securities, as well as organisation of the underwriting syndicate; the duties of lead underwriters generally also include drafting the offering circulars and other issuance documents, presiding over the bookbuilding or bidding process for the sale of the asset-backed securities, collecting issuance proceeds, distributing underwriting fees among the members of the underwriting syndicate, design of the transaction structure during the preparation of the transaction, co-ordination of the progress of the project with other project participants, and filing with the regulatory authorities, etc. The underwriters of securitisation products in China are generally domestic financial institutions that meet certain requirements on registered capital, sales capacity, sales channels, etc, and are mainly banks and securities companies. The underwriters of some asset securitisation transactions targeting foreign investors may also include foreign-owned banks registered in China. Regarding ABNs, in addition to banks and securities firms, trust companies can also act as underwriters of the notes.

7.4 资产服务机构

Servicers

中国资产证券化中的资产服务机构一般即为资产的原始权益人或其关联公司，也有部分以不动产或其收益为现金流支持的资产证券化业务（例如 CMBS）中会委托专业的第三方物业服务机构作为资产服务机构。资产服务机构的一般工作职责包括收取资产现金流回收款并转付给特殊目的载体、管理资产池、保管基础资产、法律文件及相关记录、定期向特殊目的载体管理人提供服务报告，以及服务合同约定的其他职责。

Servicers are generally also the originators of the underlying assets, or their affiliates. Certain kinds of securitisation (such as CMBS) backed by real properties or incomes thereof may also use third-party professional property management institutions as servicers. The general responsibilities of the servicers include collecting the cash flow of the asset and transferring it to the SPV, managing the asset pool, safeguarding the underlying assets, including legal documents and related records thereof, providing regular service reports to the SPV manager, and other duties as stipulated in the servicing agreement.

7.5 投资人

Investors

资产支持证券投资人一般不主动参与特殊目的载体的管理，而是被动地收取资产支持证券的本金和收益，只有在某些可能影响投资人权利的情形下，投资人可能会参加资产支持证券持有人会议并进行表决。投资人的主要义务和责任包括：按照认购协议等约定缴付认购资金，遵守有关法律法规及交易文件中关于资产支持证券交易的规定，遵守关于权利行使的约定，保守商业秘密（尤其在私募项目中）等。目前中国资产证券化市场上的投资者一般包括银行、保险公司、证券公司、基金公司等金融机构、前述机构管理的资产管理产品、社保基金、公募基金、私募基金，以及其他符合合格投资者要求的非金融企业。

Investors in asset-backed securities generally do not actively participate in the management of the SPV, but passively collect the principal and returns on the asset-backed securities. Only in situations where the investors' rights might be affected may the investors participate in the security-holders' meeting and vote. The main obligations and responsibilities of the investors include paying the subscription price in accordance with the terms of the subscription agreement, complying with the relevant laws and regulations and the provisions on the trading of asset-backed securities in the transaction documents, complying with the provisions on the exercise of rights, and maintaining confidentiality regarding trade secrets (especially in privately placed deals), etc. At present, investors in China's securitisation market generally include financial institutions such as banks, insurance companies, securities companies, fund companies, asset management products managed by the aforementioned institutions, social security funds, public funds, private equity funds and other non-financial companies that meet the requirements for qualified investors.

7.6 受托人 Trustees

如上文第 7.1 发行人 部分所述，由于中国的资产证券化实践主要采取特殊目的信托和资产支持专项计划这两种发行载体，该等发行载体并非独立实体，而由受托人或计划管理人所代表，因此发行人与受托人往往是重合的，其实体类型和主要义务见第 7.1 发行人 部分关于发行人的介绍。只有在抵质押型资产支持票据业务中，发起机构本身即作为发行人，基础资产并未发生权属转移，而是抵押或质押给了票据持有人。在此情况下，出于办理抵押权或质权登记以及保护投资者权益的需要，一般会指定主承销商作为债权代理人，为票据持有人的利益行事，其职责一般包括：监督发行人对募集资金的使用，代为办理抵押权或质权登记并代为持有该等权利，监督基础资产的状况，监督发行人履约情况，必要时召集票据持有人大会对重要事项作出决议，采取维护债权人利益的行动（包括但不限于要求发行人追加担保，代表票据持有人对发行人采取财产保全措施、提起诉讼或申报破产债权），就发行人履约情况及基础资产状况向票据持有人进行信息披露等。

As mentioned in **7.1 Issuers**, above, Chinese securitisation practice mainly adopts two forms of issuing vehicles: special purpose trust and asset-backed special scheme. These are not independent legal entities but are represented by the trustees or plan manager. Therefore, the issuer often overlaps with the trustee. The entity type and main obligations of the trustees are described in part **7.1**. Only in the pledge-type ABN transactions will the originator itself act as the issuer, and the underlying assets are not transferred, but mortgaged or pledged to the noteholders. In such circumstances, for the purpose of completing mortgage or pledge registration and protecting the rights of the investors, the lead underwriter will generally be designated as the agent acting on behalf of the noteholders, whose duties generally include supervising the issuer's use of issuance proceeds, completing mortgage or pledge registration and holding the rights thereof on behalf of the investors, monitoring the underlying assets, supervising the contract performance by the issuer, convening the meeting of the noteholders when necessary to resolve important matters and take action to protect the interests of the creditors (including but not limited to requiring the issuer to provide additional security, taking property preservation measures against the issuer, filing lawsuits or filing bankruptcy petitions on behalf of the noteholders), and disclosing the information regarding the issuer's contract performance and the status of the underlying assets to the noteholders.

■ 8 合成证券化

Synthetic Securitisations

8.1 合成证券化

Synthetic Securitisation

根据中国人民银行、中国银行业监督管理委员会、财政部发布的《关于进一步扩大信贷资产证券化试点有关事项的通知》（银发[2012]127 号），扩大试点阶段禁止进行再证券化、合成证券化产品试点。实践中，监管部门会在审批或备案时对交易结构严格把关，力图交易结构简单明晰。在企业资产证券化及资产支持票据业务领域，虽无明文禁止性规定，但实际不允许开展再证券化和合成型证券化，资产证券化应以服务实体经济为目标。

According to the Notice of the People's Bank of China, China Banking Regulatory Commission and Ministry of Finance on Further Expanding the Pilot Programme on Credit Asset Securitisation (Yin Fa [2012] No 127), the piloting of re-securitisation and synthetic securitisation is not allowed within the Expanded Pilot Programme on Credit Asset Securitisation. In practice, the regulatory authorities will strictly control the transaction structure and make it simple and clear at the approval or record-filing stage of the transaction. In the fields of business asset securitisation and ABNs, although there is no explicit prohibition, re-securitisation and synthetic securitisation are not allowed in practice, which is in line with the goal of serving the productive economy.

■ 9 特定资产类型

Specific Asset Types

9.1 常见金融资产

Common Financial Assets

监管机构要求信贷资产证券化的基础资产必须为“信贷资产”，常见的信贷资产证券化基础资产包括：对公贷款、小微企业贷款、个人住房抵押贷款、住房公积金贷款、个人消费贷款、汽车抵押贷款、信用卡分期（包括账单分期、汽车分期）、金融租赁债权、不良贷款。

Regulatory authorities require that the underlying assets of credit asset securitisation must be so-called 'credit assets', which commonly include corporate loans, small and micro-enterprise loans, individual residential mortgage loans, residential provident fund loans, personal consumer loans, auto loans, credit card instalments (including statement instalments and automobile instalments), financial leasing debt claims of the financial institution and non-performing loans.

监管机构要求企业资产证券化的基础资产必须为符合法律法规规定，权属明确，可以产生独立、可预测的现金流且可特定化的财产权利或者财产，可以是单项财产权利或者财产，也可以是多项财产权利或者财产构成的资产组合。常见的企业资产证券化的基础资产包括：小额贷款、融资租赁债权、基础设施收费收益权、各类应收账款（如供应链应收账款、景区门票收入、影院票房收入、学校学费收入、购房尾款、物业租金、物业费等）、商业物业抵押贷款、融资融券债权、股票质押式回购债权、商业票据收益权等。值得一提的是，中国目前的 REITs 项目是依托于资产证券化的法律框架来操作的，因此 REITs 也是中国资产证券化的一块特殊领域。

Regulatory authorities require that the underlying assets of business asset securitisation must be property rights or financial assets in conformity with the laws and regulations, the ownership of which is clear and which are capable of generating independent and predictable cash flow. These can be a single property right or financial asset, or a portfolio of multiple rights or assets. Common underlying assets of business asset securitisation include petty loans, financial lease debt claims of non-financial institutions, rights of returns related to infrastructure, various kinds of receivables (such as supply chain receivables, ticket revenue of scenic areas, cinema box office revenue, school tuition receivables, residential final payment receivables, property rents, property management fees, etc), commercial mortgage loans, margin trade debt claims, stock pledge-style repo debt claims, right of returns on commercial papers, etc. In particular, REITs projects in China are currently operated within the legal framework

of securitisation, therefore REITs are also a special business field of securitisation in China.

监管机构要求资产支持票据的基础资产必须为符合法律法规规定，权属明确，能够产生可预测现金流的财产、财产权利或财产和财产权利的组合。资产支持票据的基础资产范围与企业资产证券化的基础资产相似，但未来应收账款以及不具有独立性的特定资产收益权能否作为信托财产，在法律上具有较大争议，对于该类基础资产而言，可能更适合采用质押型资产支持票据结构，而不适合采用信托结构。并且，一般认为即使采用信托结构，该类基础资产也无法实现与发起机构的风险隔离。

Regulatory authorities require that the underlying assets of ABNs must be assets, property rights, or a combination of the two, which are in conformity with laws and regulations, the ownership of which is clear and which are capable of generating independent and predictable cash flow. The scope of underlying assets of ABNs is similar to that of business asset securitisation. However, whether future receivables and rights to the income of certain assets that are not independent can be recognised as trust property is controversial under the law. For this kind of underlying assets, it may be more suitable to adopt the structure of pledge-type ABNs, without employing a trust structure. Moreover, it is generally believed that even if the trust structure is adopted, this kind of underlying assets may fail to achieve risk insulation from the originator.

9.2 常见结构

Common Structures

信贷资产证券化

Credit Asset Securitisation

信贷资产证券化的基本交易结构已在《信贷资产证券化试点管理办法》中作出明确规定，因此是比较固定的。信贷资产证券化的基本交易结构为：

The basic transaction structure of credit asset securitisation has been clearly stipulated in the Administrative Measures for the Securitisation of Credit Assets, and is therefore relatively fixed. The basic transaction structure of credit asset securitisation is as follows:

- 发起机构作为委托人将其合法所有的信贷资产（“基础资产”）作为信托财产委托给作为受托人的信托公司，设立特殊目的信托；
the originator, as the settlor, entrusts its legally owned credit assets (underlying assets) as trust property to the trust company as trustee, in order to establish an SPT;

- 受托人（作为发行人）向投资机构发行代表信托受益权的资产支持证券，并以信托财产所产生的现金流为限支付资产支持证券的本金、利息或收益；
the trustee (as issuer) issues asset-backed securities representing the beneficial rights of such a trust to the investors, and pays the principal, interest or income of securities from the cash flow generated by the trust property;
- 主承销商组建承销团承销资产支持证券；
the principal underwriter shall assemble an underwriter syndicate to underwrite the securities; and
- 受托人委托贷款服务机构（通常为发起机构）提供基础资产的日常回收、管理等服务；
the trustee engages a servicer (usually the originator) to provide daily collection and management of underlying assets, and
- 受托人委托资金保管机构提供信托财产所产生的回收款的资金保管服务；
the trustee engages a fund custodian to provide the fund custody service of the collections generated by the trust property;
- 受托人委托中央国债登记结算有限责任公司（或主管部门指定的其他机构）作为资产支持证券的登记托管机构和支付代理机构，负责对资产支持证券进行登记托管，并提供资产支持证券的代理本息兑付服务。
the trustee engages the China Central Depository & Clearing Co, Ltd or other institutions designated by regulatory authorities as securities depository and paying agent for the securities, to be responsible for the registration and depository of securities and provide agency services regarding the payment of the principal and interest of the securities.

对信贷资产证券化交易结构有重大影响的主要适用的法律法规包括：《中华人民共和国合同法》、《中华人民共和国信托法》、《信贷资产证券化试点管理办法》（中国人民银行、中国银行业监督管理委员会公告[2005]第7号）、《金融机构信贷资产证券化试点监督管理办法》（中国银行业监督管理委员会令2005年第3号）、《关于进一步规范信贷资产证券化发起机构风险自留行为的公告》（中国人民银行、中国银行业监督管理委员会公告[2013]21号）、《中国银行业监督管理委员会办公厅关于信贷资产证券化备案登记工作流程的通知》（银监办便函[2014]1092号）及《关于信贷资产支持证券发行管理有关事宜的公告》（中国人民银行公告[2015]第7号）。

The laws and regulations having material effects on the transaction structure of the credit asset securitisations include the Contract Law of the People's Republic of China, the Trust Law of the People's Republic of China, the Administrative Measures for the Securitisation of Credit Assets (Announcement of the PBOC and CBRC [2005] No 7), the Measures for the Supervision and Administration of the Pilot Scheme on Securitisation for Credit Assets of Financial Institutions (Order of CBRC [2005] No 3), the Announcement on Further Regulating the Risk Retention of Originator in Credit Asset Securitisation (Announcement of the PBOC and CBRC [2013] No 21), the Notice on the Workflow for the Record Registration of Credit Asset Securitisation (Yin Jian Ban Bian Han [2014] No 1092) and the Announcement on Issues concerning the Administration of the Issuance of Credit Asset Securities (Announcement of the PBOC [2015] No 7).

企业资产证券化

Business Asset Securitisation

企业资产证券化有两种常见的交易机构。第一种交易结构主要适用于各种既有债权和基础设施收费收益权，具体而言：

There are two kinds of common transaction structures for business asset securitisation. In the first, which is mainly applicable to various existing debt claims and infrastructure income rights:

- 认购人通过与计划管理人签订认购协议，将认购资金委托给计划管理人设立资产支持专项计划，认购人取得资产支持证券；
the subscribers sign subscription agreements with the scheme manager and make the subscription payments to the scheme manager to set up the asset-backed special scheme and obtain the securities;
- 计划管理人（代表专项计划，下同）与原始权益人签订基础资产买卖协议，将专项计划资金用于向原始权益人购买基础资产；
the scheme manager (henceforth representing the special scheme) purchases the underlying assets with the subscription fund from the originator by signing an asset purchasing agreement;
- 计划管理人与资产服务机构（通常为原始权益人）签订服务协议，委托资产服务机构负责基础资产的回收、催收以及违约资产处置等基础资产管理工作；
the scheme manager engages a servicer to be responsible for the recovery, collection and disposition of defaulted assets by signing a servicing agreement with the servicer (usually the originator);

- 计划管理人委托托管银行对以管理人名义开立的专项计划账户实行托管，委托监管银行对资产服务机构的收款账户进行监管；
the scheme manager engages a fund custodian bank to safeguard the special scheme account opened in the name of the scheme manager, and engages a fund supervisory bank to supervise the collection account of the servicer; and
- 计划管理人委托中国证券登记结算有限责任公司提供资产支持证券的登记托管和代理兑付服务。
the scheme manager engages China Securities Depository and Clearing Corporation Limited (CSDC) for the registration and depository of the securities and the agency services regarding the payments on the securities.

第二种常见的交易结构也称为双 SPV 结构，由两层特殊目的载体构成，主要适用于 CMBS 及未来应收账款证券化，具体而言：

In the second kind of transaction structure, which is also called a dual SPV structure, consists of two layers of SPVs, and is mainly suitable for CMBS and future receivables debt claims:

- 过桥资金方作为委托人设立资金信托，信托资金用于向融资企业发放信托贷款，过桥资金方指定自身为信托受益人，享有信托受益权；
an interim funding party, as the settlor, establishes a monetary trust to grant a trust loan to the party with financing needs, and designates itself as the trust beneficiary, thus obtaining the right to trust income;
- 认购人通过与计划管理人签订认购协议，将认购资金委托给计划管理人设立并资产支持专项计划，认购人取得资产支持证券；
the subscribers make the subscription payments to the scheme manager to set up an asset-backed special scheme and obtain the securities;
- 计划管理人（代表专项计划，下同）与过桥资金方（作为原始权益人）签订基础资产买卖协议，将专项计划资金用于向原始权益人购买信托受益权；
the scheme manager (henceforth representing the special scheme) signs an asset purchase agreement with the interim funding party (as the originator) and purchases the right to trust income from the originator with the special scheme fund;
- 计划管理人与资产服务机构（通常为融资方）签订服务协议，委托资产服务机构负责基础资产的回收和管理等工作；

the scheme manager engages a servicer to be responsible for the collection and management of underlying assets by signing a servicing agreement with the servicer (usually the fund-raising party);

- 计划管理人委托托管银行对以管理人名义开立的专项计划账户实行托管, 委托监管银行对资产服务机构的收款账户进行监管;

the scheme manager engages the fund custodian bank to safeguard the special scheme account opened in the name of the scheme manager, and engages a fund supervisory bank to supervise the collection account of the servicer; and

- 计划管理人委托中国证券登记结算有限责任公司提供资产支持证券的登记托管和代理兑付服务。

the scheme manager engages the CSDC for the registration and depository of securities and agency services regarding the payments on the securities.

对企业资产证券化交易结构有重大影响的法律法规主要包括:《中华人民共和国证券法》、《中华人民共和国证券投资基金法》、《证券公司及基金管理公司子公司资产证券化业务管理规定》(中国证券监督管理委员会公告[2014]49号)、中国证券投资基金业协会发布的《资产支持专项计划备案管理办法》及配套规则(中基协函[2014]459号)等。

The laws and regulations that have material effect on the transaction structure of business asset securitisations include the Security Law Of the People's Republic of China, the Securities Investment Fund Law of the People's Republic of China, the Administrative Provisions on Asset Securitisation of Companies and Subsidiaries of Fund Management Companies (Announcement of the CSRC [2014] No 49), the Measures for the Administration of the Record Filing of Asset-Backed Special Schemes and the accompanying rules published by the AMAC (Letter of the AMAC [2014] No 459).

资产支持票据

Asset-backed Notes

资产支持票据主要有两种交易结构:一类被称为信托型资产支持票据,具体交易结构为:

There are two main transaction structures for ABNs. In the first, called 'trust-type ABNs', the specific transaction structure is as follows:

- 发起机构直接将基础资产信托给信托公司（作为受托人和发行载体管理机构）设立特定目的信托；
the originator directly entrusts the underlying assets to a trust company (as trustee and issuing vehicle manager) to establish a SPT;
- 由特定目的信托（由受托人所代表）作为发行载体发行资产支持证券；
the SPT (represented by the trustee), as the issuing vehicle, issues the asset-backed securities;
- 受托人以信托财产产生的现金为限支付票据的本息；
the trustee pays the principal and interest of the notes with the cash flow generated from the trust property;
- 资产支持票据的发行由主承销商组建的承销团来完成；
the issuance of ABNs is conducted by an underwriting syndicate assembled by the principal underwriter;
- 受托人委托资产服务机构对基础资产的日常回收款等相关事宜进行管理和服务，委托资金保管机构提供资金保管服务；
the trustee engages a servicer to provide management and services of the daily collections of underlying assets, and engages a funds custodian to provide fund custody services;
- 资产支持票据将在中国银行间债券市场上市交易；
the ABNs will be offered and traded in the Interbank Bond Market;
- 银行间市场清算所股份有限公司（又称上海清算所）作为资产支持票据的登记托管机构，提供资产支持票据有关的登记托管和代理兑付服务。
Shanghai Clearing House, as the notes depository, provides the registration and depository services for the ABNs and agency service in relation to the payments on the notes.

另一类被称为“抵质押型资产支持票据”，具体交易结构为：

For the other structure, called 'pledge-type ABNs, the specific transaction structure is as follows:

- 发起机构自己担任发行载体向投资者发行资产支持票据，委托主承销商承销资产支持票据；

the originator acts as the issuing entity to issue ABNs to the investors and engages the principal underwriter to underwrite the notes;

- 发起机构以基础资产为资产支持票据的偿付提供抵质押担保;
the originator provides the underlying asset as pledge for the repayment of ABNs;
- 投资者委托债权代理人（通常由主承销商担任）代表投资者享有基础资产的抵/质押权，并监控基础资产现金流;
the investors authorise the creditor's agent (usually the principal underwriter) to hold the pledge rights on the underlying assets on behalf of the investors and to monitor the cash flow of the underlying assets;
- 发起机构在资金监管机构开立独立的资金监管账户，约定基础资产的现金流进入资金监管账户，优先用于支付资产支持票据收益；此外，如基础资产现金流不足时发起机构有义务以其他资金补足。
the originator establishes an independent fund supervisory account in the fund supervisory bank and agrees that the cash flow of the underlying assets is to be paid into this account and used first for the payment of interest of ABNs; additionally, if the cash flow of the underlying assets is insufficient, the originator shall be responsible to cover the deficiency with other funds.

对资产支持票据交易结构有重大影响的法律法规主要包括：《中华人民共和国信托法》、《银行间债券市场非金融企业债务融资工具管理办法》（中国人民银行令[2008]第1号）、《非金融企业资产支持票据指引》（中国银行间市场交易商协会公告[2012]14号）。

The laws and regulations that have material effect on the transaction structures of the ABNs include the Trust Law of the People's Republic of China, the Measures for Administration of Debt Financing Instruments Issued by Non-Financial Enterprises in the Interbank Bond Market (Order of PBOC [2008] No 1), and the Guidelines for Asset-Backed Notes Issued by Non-Financial Enterprises (Announcement of NAFMII [2017] No 27).

(以下无正文)



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